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## A Nurse's Face: The Burqa in the Hospital

Lucas Newbill

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## A NURSE'S FACE: THE BURQA IN THE HOSPITAL

LUCAS NEWBILL \*

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### I. INTRODUCTION

Ninety-nine percent of Americans breathe their first breaths in a hospital,<sup>1</sup> while twenty-nine percent live the last days of their lives there.<sup>2</sup> The Supreme Court highlighted in a labor rights case the premise that “[h]ospitals carry on a public function of the utmost seriousness and importance[,]” and “give rise to unique considerations that do not apply in

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\* I thank my family, Ruthann Robson, and Hilary Klein.

1. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TRENDS IN OUT-OF-HOSPITAL BIRTHS IN THE UNITED STATES, 1990–2012, 1 (2012), <http://www.cdc.gov/nchs/products/databriefs/db144.htm>.

2. See Margaret Jean Hall et al., *Trends in inpatient hospital deaths: National Hospital Discharge Survey, 2000–2010*, NATIONAL CENTER FOR HEALTH STATISTICS DATA BRIEF, no. 118, at 1 (2013), <http://www.cdc.gov/nchs/data/databriefs/db118.pdf> (715,000 inpatient hospital deaths in 2010 out of 2.5 million).

the industrial settings . . . .”<sup>3</sup> A cornerstone of caring for hospital patients is the physician-patient relationship, which has been identified as deserving of special protection under the law;<sup>4</sup> and “the importance of physician dress on the patient-physician relationship can be traced back to Hippocrates, who stated that the physician ‘must be clean in person, well dressed, and anointed with sweet-smelling unguents . . . .’”<sup>5</sup> Not only is a patient’s trust and confidence significantly associated with professional dress, but so is a patient’s willingness to adhere to prescribed therapy, and to share social, sexual, and psychological problems.<sup>6</sup>

The principle of *hijab* in the religion of Islam refers to the covering of a woman’s head and body out of modesty.<sup>7</sup> The chapter of the Qur’an pertaining to hijab is the *Surat an-Nur* (Q 24:30–31), where it is written that a woman’s modesty requires “believing women [to] lower their gaze and guard their modesty and that they should not display their beauty and ornaments . . . .”<sup>8</sup> The most common form of hijab is a cloth covering of the head and neck,<sup>9</sup> and is popularly recognized as a “headscarf” by courts and the Equal Employment Opportunity Commission (“EEOC”).<sup>10</sup> While the four main schools of Islamic jurisprudence do not believe that a veil covering a woman’s face is required, some scholars interpret the Qur’an to require such covering,<sup>11</sup> and in some countries interpreting the Qur’an very strictly, such as Saudi Arabia, it is a punishable offense for a woman to appear in public without a veil covering her face.<sup>12</sup> Such covering may come in the form of a *burqa* or a *niqab*.<sup>13</sup> The *niqab* is a face veil that allows for the eyes to remain uncovered; while the *burqa*, also spelled *burka*, completely covers the face, allowing for sight through a mesh screen.<sup>14</sup>

3. *Beth Israel Hosp. v. NLRB.*, 437 U.S. 483, 508 (1978) (quoting *NLRB v. Beth Israel Hosp.*, 554 F.2d 477, 481 (1st Cir. 1977), *aff’d*, 437 U.S. 483 (1978)).

4. *See Jaffee v. Redmond*, 518 U.S. 1 (1996) (psychotherapist-patient privilege).

5. Shakaib U. Rehman et al., *What to Wear Today? Effect of Doctor’s Attire on the Trust and Confidence of Patients*, 118 AM. J. MED., 1279, 1280 (2005) (quoting 2 HIPPOCRATES 311–12 (Harvard University Press 1923)).

6. *Id.* at 1283–84.

7. Kendra Sarna, *Hijab*, in *ENCYCLOPEDIA OF GLOBAL RELIGION*, 515, 515 (Mark Juergensmeyer & Wade Clark Roof ed., 2012); Mary Ali, *Why Do Muslim Women Cover Their Head?*, INST. OF ISLAMIC INFO. & EDUC., <http://www.iiie.net/index.php?q=node/37> (last visited Oct. 30, 2016).

8. SARNA, *supra* note 8; ALI, *supra* note 8.

9. *What’s the Difference Between a Hijab, Niqab and Burka?*, BBC NEWSROUND (June 18, 2015), <http://www.bbc.co.uk/newsround/24118241>; *see also* Sarna, *supra* note 8.

10. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1111 (10th Cir. 2013), *rev’d and remanded*, —, U.S. —, 135 S. Ct. 2028 (2015).

11. Cassandra M. Vogel, Note, *An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools*, 78 BROOK. L. REV. 741, 748 (2013).

12. *Id.* at 747.

13. *What’s the Difference Between a Hijab, Niqab and Burka?*, *supra* note 10.

14. *Id.*

The workplace environment can be hostile—and sometimes downright horrific—for Muslim women who practice hijab. Muslim women employees filing discrimination claims allege that they have been told to “take the ‘rag’ off [their] head”;<sup>15</sup> that they have been called “evil” compared to other “good Christian” coworkers;<sup>16</sup> that their daughters have been forbidden from waiting for them in the lobby of their workplace, while other children were allowed to come into the office and wait for their mother.<sup>17</sup> One woman alleged that her shift leader *forcibly removed her headscarf in front of male co-workers*.<sup>18</sup>

In 2009, the Egyptian Ministry of Health banned nurses from wearing niqab in the hospital.<sup>19</sup> The Washington Post reported in 2011 that a Muslim nurse at Columbia Hospital for Women in Washington, D.C. had been hired after wearing a veil to her job interview, but was later told that it was interfering with her ability to relate to patients.<sup>20</sup>

Can a hospital in the U.S. legally prevent a nurse from wearing a burqa? This Article explores the scientific and cultural origins of the notion that face-to-face communication is important, and how it may impact patient care. The Article then examines how nurses at city hospitals in states with religious freedom laws may be afforded the greatest protection while their counterparts at federal facilities may be unable to rely on similar federal laws—or even civil rights actions—because of a 1976 Supreme Court decision by Justice Potter Stewart, wherein Justice John Paul Stevens joined by Justice William Brennan articulated a compelling dissent. Finally, the Article examines how the captive nature of the hospital may trigger Establishment Clause concerns and impact the First Amendment rights of the patient.

## II. THE FACE OF HUMANS AND PRIMATES

The idea that a woman should cover her head is not unique to the Qur'an. In the Holy Bible, Paul wrote to the Corinthians that a woman's long hair is

15. Ahmed v. Astoria Bank, No. 14-CV-4595, 2016 WL 1254638, at \*3 (E.D.N.Y. Mar. 31, 2016).

16. Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty., 804 F.3d 826, 830 (7th Cir. 2015).

17. *Id.*

18. Elhassan v. Proctor & Gamble Mfg. Co., No. 1:12CV1039, 2014 WL 1281231, at \*1 (M.D.N.C. Mar. 27, 2014).

19. Valentina Colombo, *Europe: Behind the Burqa Debate*, GATESTONE INSTITUTE (Mar. 12, 2010, 5:00 AM), <http://www.gatestoneinstitute.org/1104/behind-the-burqa-debate-in-europe>.

20. Steve Hendrix, *The Few U.S. Muslim Women Who Choose Full Veil Face Mix of Harassment, Sympathy*, WASH. POST (Apr. 13, 2011), [https://www.washingtonpost.com/local/the-few-us-muslim-women-who-choose-full-veil-face-mix-of-harassment-sympathy/2011/04/13/AFLrwzYD\\_story.html](https://www.washingtonpost.com/local/the-few-us-muslim-women-who-choose-full-veil-face-mix-of-harassment-sympathy/2011/04/13/AFLrwzYD_story.html). As a side note, the Columbia Hospital for Women is now a luxury condominium called “The Columbia.”; See *The Columbia*, LIFE AT THE TOP, <http://www.lifeatthetop.com/condo/thecolumbia> (last visited Oct. 30, 2016).

given to her as a covering—and asked whether it is proper for a woman to pray without her head covered.<sup>21</sup> Paul also wrote in 1 Corinthians, “[f]or now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.”<sup>22</sup> Religious scholars have interpreted this phrase to signify that by seeing someone face-to-face you are able to achieve the highest possible understanding; a “complete mutuality of knowledge.”<sup>23</sup> One legal scholar in his analysis of a proposed ban on the face veil for public employees in Quebec pointed to this verse as a possible genealogical theory for the notion that face-to-face communication is important.<sup>24</sup>

Scientific studies indicate a more innate explanation for the importance of the face in past and modern societies. Evidence exists that the human brain is uniquely designed to recognize faces, which requires a highly efficient process enabling us to identify minute deviations from the similar configuration of two eyes above a nose and a mouth,<sup>25</sup> while only a fraction of the population is unable to recognize such patterns.<sup>26</sup> This specialized form of recognition depends on specific areas of the brain that are activated by face-like patterns.<sup>27</sup> Damage to the most prominent face-specialized area of the brain, known as the *fusiform gyrus*, which undergoes stronger responses to faces than to any other stimuli, can lead to the inability to recognize individual faces.<sup>28</sup> Another hypothesis is that the face is a complex stimuli—but not necessarily a special one—and that the face-specialized areas of the brain only *become specialized* through repeated exposure and study.<sup>29</sup> Regardless of whether facial recognition is a natural function or an expertise developed through repetition, humans show a preference for facial

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21. 1 Corinthians 11:13–15.

22. 1 Corinthians 13:12.

23. Robert Leckey, *Face to Face*, 3 ONATI SOCIO-LEGAL SERIES 1184, 1190 (2013), (first citing Anthony C. Thiselton, *FIRST CORINTHIANS: A SHORTER EXEGETICAL AND PASTORAL COMMENTARY* 232 (2006); and then quoting Charles Kingsley Barret, *A COMMENTARY OF THE FIRST EPISTLE TO THE CORINTHIANS* 307 (1968)).

24. *Id.*

25. David Leopold & Gillian Rhodes, *A Comparative View of Face Perception*, 124 J. COMP. PSYCHOL. 233, 234 (2010).

26. See Alison M. Harris & Geoffrey K. Aguirre, *Prosopagnosia*, 17 CURRENT BIOLOGY R7, R7 (Jan. 9, 2007) (People suffering from prosopagnosia, also known as face-blindness, are unable to recognize the faces of other individuals, sometimes even those of family members.); see *id.* at R7–R8 (Prosopagnosia may be acquired through brain injury, but it may also be congenital or developmental.); see also Nicholas Bakalar, *Just Another Face in the Crowd, Indistinguishable Even if It's Your Own*, N.Y. TIMES, July 18, 2006, at F5 (Recent research indicates that around 2.47% of the population may suffer from prosopagnosia.).

27. LEOPOLD, *supra* note 27, at 234.

28. *Id.*

29. Brady I. Phelps, *Prosopagnosia*, in *ENCYCLOPEDIA OF CHILD BEHAVIOR & DEVELOPMENT*, 1166, 1667 (Sam Goldstein & Jack A. Naglieri eds., 2011).

stimuli.<sup>30</sup> Infants as young as 4 months of age naturally prefer facial stimuli over other forms.<sup>31</sup> Newborn infants are able to distinguish facial patterns and form a preference for their mother's face within days of birth.<sup>32</sup>

As with facial recognition, human and non-human primates are also highly developed for communication through facial expressions.<sup>33</sup> Parts of the human brain are uniquely stimulated by the facial expressions and eye gaze of others, which can directly influence the observer's own emotional state.<sup>34</sup> The interaction between humans through their eyes is an important feature of social interaction, and is abnormal in psychiatric conditions.<sup>35</sup> Eyes provide insight into attentiveness, engagement, intent, and focus of interest.<sup>36</sup> The musculature on the face of primates is highly elaborate, allowing for communication of a wider array of thoughts and emotions through facial expression than other mammals, which rely less on vision and more on olfaction and audition for social communication.<sup>37</sup> An expansion of primate face mobility during primate evolution may reflect an increased importance of "visual social exchange."<sup>38</sup> There is also evidence that facial expressions transcend cultures. In studies of people from 21 different countries,<sup>39</sup> the majority in *every* country agreed on the recognition of happiness, sadness, and disgust; while for surprise there was agreement by the majority in 20 out of the 21 countries, for fear in 19 out of 21, and for anger in 18 out of 21.<sup>40</sup> The same expressions were shown to people in the South Fore community of Papua New Guinea, a population living in complete isolation—a community that had never seen a photograph, magazine, film or television, and similar results were achieved.<sup>41</sup>

In the practice of law, there is explicit recognition of the importance of being able to read visual cues on a person's face. The Confrontation Clause of the Sixth Amendment dictates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

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30. Mark Pennick, *Facial Recognition*, in *ENCYCLOPEDIA OF CHILD BEHAVIOR & DEVELOPMENT*, 634, 634 (Sam Goldstein & Jack A. Naglieri eds., 2011).

31. *Id.*

32. LEOPOLD, *supra* note 27, at 234.

33. *Id.* at 235.

34. *Id.* at 234.

35. *Id.*

36. *Id.*

37. *Id.* at 236, 239.

38. *Id.* at 236.

39. Paul Ekman, *Facial Expressions*, in *HANDBOOK OF COGNITION AND EMOTION*, 301, 305 (Tim Dalgleish & Mick J. Power eds., 1999) ("Africa (this included subjects from more than one country in Africa, and is the only group who were not tested in their own languages but in English), Argentina, Brazil, Chile, China, England, Estonia, Ethiopia, France, Germany, Greece, Italy, Japan, Kirghizistan, Malaysia, Scotland, Sweden, Indonesia (Sumatra), Switzerland, Turkey and the USA.").

40. *Id.*

41. *Id.* at 308.

him[,]"<sup>42</sup> and in the words of Supreme Court Justice John Marshall Harlan, "[s]imply as a matter of English the clause may be read to confer nothing more than a right to meet *face to face* all those who appear and give evidence at trial."<sup>43</sup> The reasoning behind the clause was not only to allow for personal cross-examination of the witness, but also to "[compel] him to stand *face to face* with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."<sup>44</sup>

The definition of the word "face" in the Oxford English Dictionary occupies six pages, of which only a small part is dedicated to the physical aspect of "[t]he front part of the head, from the forehead to the chin[,]" and the rest on the importance of the face in society, like the significance and history of the phrases "to have two faces[,]" meaning to be guilty of duplicity; "to look (a person, etc.) in the face[,]" meaning to "meet with a steady gaze that implies courage, confidence, or (sometimes) defiance;" and "face to face[,]" meaning to confront.<sup>45</sup> The importance of the visual aspects of one's face in knowing and communicating with that person is at least anecdotally demonstrated by the success of the widely popular *social* media website Facebook.

### III. THE HOSPITAL'S OBLIGATION TO REASONABLY ACCOMMODATE THE NURSE'S RELIGIOUS PRACTICE

Title VII of the Civil Rights Act of 1964<sup>46</sup> makes it unlawful for "[a]n employer [to] take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to *reasonably accommodate* that observance or practice without *undue hardship*."<sup>47</sup>

If there are any reasonable accommodations, it is important that the hospital thoroughly explore them along with the nurse.<sup>48</sup> In *E.E.O.C. v. Reads, Inc.*, a private company providing counselors to schools refused to hire an applicant because she wore a headscarf for fear that the company would be in violation of state law prohibiting teachers from wearing religious garb in

42. U.S. CONST. amend. VI.

43. *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) (emphasis added).

44. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (emphasis added).

45. 5 OXFORD ENGLISH DICTIONARY 641 (2d ed. 1989).

46. 42 U.S.C. § 2000(e)(j) (2012).

47. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034, 192 L. Ed. 2d 35 (2015) (J. Alito, concurring) (emphasis added).

48. *E.E.O.C. v. Reads, Inc.*, 759 F. Supp. 1150, 1161 (E.D. Pa. 1991) (attributing liability to employer that neglected to examine whether headcoverings with a fashionable appearance would have been suitable to employer's primary school client operating under state law preventing employees from wearing religious garb).

school.<sup>49</sup> In attributing liability to the company, the court highlighted its failure to investigate compromises, including proposals that were submitted by the applicant herself as to how she may be able to fashionably wear her headscarf in a manner that did not make her faith apparent.<sup>50</sup> “To the contrary, [the company] rejected [the applicant’s] accommodation without knowing whether the [proposed alternative] headcoverings would be perceived as religious[.]” and thereby in violation of Title VII.<sup>51</sup> The company neither consulted legal counsel nor submitted the employee’s application to the school district to see if a solution could be found.<sup>52</sup>

“[T]o avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when any reasonable accommodation is provided, the statutory inquiry ends.”<sup>53</sup> The National Health Service (NHS) in the United Kingdom, the country’s nationalized healthcare and hospital system, has indicated that preventing an employee from wearing clothing which covers the face while facing patients and allowing for such wear while on break or eating lunch would be a reasonable accommodation.<sup>54</sup> In the United States there is a split among the Circuit Courts as to whether an accommodation must completely eliminate the conflict between work and religion in order to be reasonable.<sup>55</sup> In the Fourth and Eighth Circuits an accommodation need not totally eliminate the conflict in order to be reasonable, in contrast with the Second, Seventh and Ninth Circuits.<sup>56</sup> The Second Circuit Court of Appeals applied the requirement of complete elimination of conflict when it held that a shift change allowing for an employee who believes he must abstain from work on Sunday to attend church while requiring him to work on Sunday is not a reasonable accommodation.<sup>57</sup> For employees who believe that the Qur’an requires them to cover their body and face outside of the home, the British remedy would certainly fail to alleviate the conflict and would thus be unreasonable in any court requiring complete alleviation.<sup>58</sup>

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49. *Id.* at 1152-53, 1155.

50. *Id.* at 1161.

51. *Id.*

52. *Id.* at 1160-61.

53. *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (relying on *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986)).

54. NAT’L HEALTH SERV., *WEARING FACE VEILS IN THE WORKPLACE*, (Sept. 9, 2013), <http://nhsemployers.org/your-workforce/plan/building-a-diverse-workforce/need-to-know/wearing-face-veils-in-the-workplace>.

55. *See* 1 Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 3:5 (2016).

56. *See id.*

57. *Baker v. The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006).

58. *See id.* (an accommodation is not a reasonable one if it does not “eliminate the conflict between the employment requirement and the religious practice.”); *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1013 (D. Ariz. 2006) (allowing employee to cover her hair during Ramadan while



## IV. THE UNDUE HARDSHIP DEFENSE

The hospital may argue that allowing a nurse to be fully veiled while interacting with patients would cause an “undue hardship.” An accommodation causes “undue hardship” if it results in “more than a *de minimis* cost” to the employer.<sup>59</sup> “The [EEOC] will determine what constitutes ‘more than a *de minimis* cost’ with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.”<sup>60</sup> The Third Circuit takes the position that the undue hardship test presents a low burden for the defendant.<sup>61</sup> While it may be the case that the harm need only be greater than *de minimis*, proving such burden requires supporting facts.<sup>62</sup> “[A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine.”<sup>63</sup> “An employer must present evidence of actual undue hardship and may not rely on speculation or ‘hypothetical hardship.’”<sup>64</sup> “The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case.”<sup>65</sup>

Because by statute the undue hardship must be “‘on the conduct of the employer’s business,’” and the main objective of industry in general is profit, the majority of case precedent classifies hardship in economic terms—but courts may also consider noneconomic hardship.<sup>66</sup> In *Lewis v. New York City Transit Auth.*, the defendant Transit Authority asserted that to exempt a Muslim employee from wearing a Transit Authority cap “would have

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not serving customers but still requiring employee to serve customers fails to accommodate the religious conflict and thus is not reasonable).

59. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); accord EEOC COMPLIANCE MANUAL, (2008), 29 C.F.R. § 1605.2 (1995)).

60. 29 C.F.R. § 1605.2 (1995).

61. *E.E.O.C. v. GEO Grp., Inc.*, 616 F.3d 265, 273 (3d Cir. 2010) (“[T]he Supreme Court’s decision in [*Hardison*, 432 U.S. 63] strongly suggests that the undue hardship test is not a difficult threshold to pass.”).

62. *GEO*, 616 F.3d at 265.

63. *Gordon v. MCI Telecommunications Corp.*, 791 F. Supp. 431, 435 (S.D.N.Y. 1992) (quoting *Draper v. U. S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975), cert. denied, 108 S. Ct. 1293 (1988)) (citation omitted).

64. *Id.* at 436 (quoting *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481(10th Cir. 1989) *aff’d and remanded*, 107 S. Ct. 367 (1986)).

65. *Toledo*, 892 F.2d at 1492 (emphasis in original); see, e.g., *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011) *rev’d on other grounds and remanded*, 731 F.3d 1106 (10th Cir. 2013) *rev’d on other grounds and remanded*, 135 S. Ct. 2028 (2015) (expert opinion that it would be damaging to the very important “in-store experience” and brand image, which is the core driver of sales, to permit an employee to wear a headscarf in conflict with Abercrombie’s policy is insufficient to demonstrate undue hardship without accompanying data analysis).

66. *E.E.O.C. v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) (quoting 42 U.S.C. § 2000(e)(j) (“Cost cannot always be measured in terms of dollars.”)).

caused it to lose control of its public image—an undue hardship.”<sup>67</sup> In considering the alleged hardship, the court stated that it could not conclude as a matter of law that a religious accommodation would have had anything more than a *de minimis* effect on the Transit Authority’s public image without supporting factual evidence,<sup>68</sup> and evidence that the defendant provided exceptions unrelated to religious exercise undercut the undue hardship argument.<sup>69</sup> Likewise, evidence that the policy preventing religious exercise is not effectively enforced cuts against the defense.<sup>70</sup>

The threat of criminal action, fines, and expulsion from a profession can constitute an undue hardship.<sup>71</sup> In *United States v. Board of Education for the School District of Philadelphia*, Ms. Reardon was a substitute teacher who after embracing her devotion to the religion of Islam began teaching with a headscarf.<sup>72</sup> On three separate occasions she was told that she could not teach in her religious clothing, provided an opportunity to go home and change, to which she refused and was not allowed to teach.<sup>73</sup> In addressing discrimination claims against the School Board, the Third Circuit reasoned that the Supreme Court recognized that undue burden may be noneconomic when it held that forced deviation from a seniority system established through a collective-bargaining agreement—in order to accommodate an employee’s observance of the Sabbath—can constitute an undue burden.<sup>74</sup> The Third Circuit determined that the School Board would have faced an undue hardship by accommodating Ms. Reardon because it would have forced the Board to violate Pennsylvania’s Garb Statute<sup>75</sup> (the history of which will be revisited later in this Article), which prohibited teachers from wearing religious garb in school and imposed enforcement by administra-

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67. *Lewis v. New York City Transit Auth.*, 12 F. Supp. 3d 418, 445 (E.D.N.Y. 2014).

68. *Id.* at 445-46 (“[T]he Transit Authority has not adduced any evidence supporting its contention that permitting Lewis to wear her [headscarf] without a cap on top of it and without affixing a logo to her forehead would have been anything more than a *de minimis* imposition on the Transit Authority’s headwear policy.”).

69. *Id.* at 445 (“The Transit Authority does not dispute that it permitted other bus drivers to deviate from its headgear policy without compromising its public image. For example, after the September 11, 2001 terrorist attacks, bus drivers were permitted to wear FDNY hats in solidarity with the fire department.”).

70. *Id.* (“[A] survey conducted by the DOJ found over 300 violations of the headwear policy in just 11 hours in 2005.”).

71. *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 890-91 (3d Cir. 1990).

72. *Sch. Dist. of Philadelphia*, 911 F.2d at 884.

73. *Id.* at 884-85.

74. *Id.* at 887 (relying on *Hardison*, 432 U.S. at 78-83); *Id.* at 84 (The Supreme Court in *Hardison* went on to hypothesize the costs, and defined undue hardship to be anything more than *de minimis*.).

75. Act of June 27, 1895, No. 282, 1895 Pa. Laws 395 (West 1992) (codified as amended at 24 Pa. Stat. § 11-1112).

tors, carrying the weight of a misdemeanor charge, fines, and discharge from employment.<sup>76</sup>

Civil rights law “does not require that safety be subordinated to the religious beliefs of an employee.”<sup>77</sup> “A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison.”<sup>78</sup> When safety is the purported undue hardship within the prison context, the Third Circuit Court of Appeals has accepted employer testimony standing alone.<sup>79</sup> In the case of potential physical harm to employees or inmates, the Court did not require factual findings supporting the danger, but allowed the policy to “stand on the testimony of [the employer].”<sup>80</sup> It is important to keep in mind the prison context in which this deference was awarded. The Court analogized the prison context to the police context and thereby relied heavily upon a prior police uniform case, *Webb v. City of Philadelphia*.<sup>81</sup> In *Webb*,<sup>82</sup> the court analogized the police uniform to the military uniform, and relied on the Supreme Court case *Goldman v. Weinberger*, which held that the Air Force’s uniform enforcement of its dress code was not an unconstitutional burden on an officer’s free exercise of his religion.<sup>83</sup> Even if a court were to apply the Third Circuit’s liberal view of what is required to prove a safety risk, it may be a stretch to apply the same amount of deference to a hospital as courts have historically given to prisons and the military.<sup>84</sup>

#### A. *Mitigating The Spread of Infectious Disease*

Scientific evidence that a burqa would present a higher risk of the spread of disease and bacteria would go a long way towards demonstrating undue hardship.<sup>85</sup> Existing studies indicating the importance of routinely changing a nurse’s protective gown and mask may be of use. Under the General Duty Clause of Occupational Safety and Health Administration (“OSHA”)—

76. *Sch. Dist. of Philadelphia*, 911 F.2d at 890-91.

77. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975).

78. *GEO*, 616 F.3d at 273 (within the prison context, headscarves may be used to injure an employee, smuggle in contraband, and as a means to avoid identification on surveillance video).

79. *Id.* at 270.

80. *Id.* at 274 (“[A] prison should not have to wait for a [headscarf] to actually be used in an unsafe or risky manner, risking harm to employees or inmates, before this foreseeable risk is considered in determining undue hardship.”) (alteration in original).

81. *Id.* at 273 (“[*Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009)] is relevant to this case by analogy, as some security and uniformity interests held by the police force are also implicated in the prison context.”).

82. *Webb*, 562 F.3d at 260-62.

83. *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (Yamaka as religious garb).

84. See *GEO*, 616 F.3d at 265; see also *Webb*, 562 F.3d at 256.

85. This Article does not delve into the scientific complexities of the spread of common infections due to improper hygiene, but only briefly addresses the issue.

gloves, a gown, and a mask—are required for any potential infectious disease exposure.<sup>86</sup> Following potential exposure, the outside front and sleeves of the gown, outside of the mask, and outside of the gloves are considered “contaminated.”<sup>87</sup> Procedure for removal of protective gear is detailed and specialized to ensure the patient does not touch a contaminated area.<sup>88</sup> Factual demonstration that the procedure could not be replicated for a loose-fitting burqa would be useful to proving undue hardship. However, such risk may be avoided by fitting the protective gear for wear over the burqa. Furthermore, such risk may not be an issue outside the operating room or potentially infectious area—potentially creating a reasonable accommodation by restricting the nurse’s activity to outside such areas.<sup>89</sup>

### B. Identification

A burqa is unlike the more commonly presented headscarf in that it completely prevents visual identification, which may present a safety risk in the hospital setting. “[I]f an individual’s religious headgear is or can be worn in a manner that does not inhibit visual identification of the employee, and if temporary removal may be accomplished for security screens and to address smuggling concerns without undue hardship, the individual can be accommodated.”<sup>90</sup> The EEOC’s guidelines imply the question: must an employer accommodate religious clothing that does not allow for visual identification of the employee? Further, what is the answer to this question when presented in an environment in which employees are required to wear their photo I.D. in a forward facing fashion at all times in order to preserve safety and prevent crime?<sup>91</sup> The ability to identify employees is particularly important for a hospital charged with caring for and managing access to incapacitated persons and unaccompanied children.

Identification at the onset of the nurse’s shift may be accomplished relatively easily and at little to no cost. While the Transportation Security Administration (T.S.A.) does not publicize its policy for the identification of a

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86. CTR FOR DISEASE CONTROL, GUIDANCE FOR THE SELECTION AND USE OF PERSONAL PROTECTIVE EQUIPMENT (PPE) IN HEALTHCARE SETTINGS, <http://www.cdc.gov/HAI/pdfs/ppe/PPEslides6-29-04.pdf> (last visited July 7, 2015).

87. *Id.*

88. *Id.*

89. See Kathy Dix, *Apparel in the Hospital What to Wear, Where?* (2005) <http://www.infectioncontroltoday.com/articles/2005/03/apparel-in-the-hospital-what-to-wear-where.aspx>

90. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES, Example 18 Head Coverings that Pose Security Concerns, [http://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm#\\_ftnref16](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm#_ftnref16) (last visited April 27, 2016).

91. NewYork-Presbyterian, *Crime Prevention at New York-Presbyterian*, NYP.ORG, <http://www.nyp.org/about-us/safety/security/crime-prevention> (last visited Apr. 27, 2016).

passenger whose face is fully veiled, its policy on determining whether there is a detectable threat underneath a head covering may be a useful indication. “If an alarm cannot be resolved through a pat-down, you may ask to remove the head covering in a private screening area.”<sup>92</sup> Since the Qur’an is not interpreted to require a Muslim woman to cover herself when in the exclusive company of other women and young children, the removal of a Muslim woman’s burqa by a female colleague within the confines of a private room would not violate her religious tenets.<sup>93</sup>

Accommodation during the nurse’s shift may be more problematic. According to a New York Times article on religion in the workplace, in order to accommodate a female Muslim employee, I.B.M. had two badges created: the first containing a picture of her fully veiled for general use around the office; and the second identification card containing a photo of her face uncovered that she carried in her purse and would only be required to show when asked by a female security officer.<sup>94</sup> While the monetary cost of requiring a female hospital employee to take an accommodated nurse to the ladies room for identification may be minimal, such a procedure performed in the middle of a shift may interfere with the timely care of patients. And even if such accommodations are sufficient to provide for the identification of the nurse by the employer, they are inadequate for providing *the patient* with the ability to visually identify his or her caregiver.

#### V. BEYOND UNDUE HARDSHIP—THE PRIMARY FUNCTION OF THE HOSPITAL

“A religious choir singing in a hospital chapel may well be desirable but if that interferes with patient care, it cannot be allowed.”<sup>95</sup>

– Supreme Court Justice Warren Burger

There are two defenses to religious discrimination other than demonstrating undue hardship: *business necessity*<sup>96</sup> and *bona fide occupational qualification*.<sup>97</sup>

92. Transp. Sec. Admin., *Frequently Asked Questions*, TSA.GOV, <https://www.tsa.gov/travel/frequently-asked-questions> (last visited Aug. 15, 2015).

93. Aliah Abdo, *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, 449 (2008).

94. Kelley Holland, *When Religious Needs Test Company Policy*, N.Y. TIMES (Feb. 25, 2007), [http://www.nytimes.com/2007/02/25/business/yourmoney/25mgmt.html?\\_r=0](http://www.nytimes.com/2007/02/25/business/yourmoney/25mgmt.html?_r=0).

95. N.L.R.B. v. Baptist Hosp., Inc., 442 U.S. 773, 791 (1979) (Burger, C.J., concurring).

96. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2016).

97. 42 U.S.C. § 2000e-2(e) (2016).

Within the hospital setting, the safe care of patients is of the highest order. In a case upholding a hospital's ban on union solicitation in patient areas, Chief Justice Burger wrote:

The central 'business' of a hospital is, not a business in the sense that term is generally used in industrial contexts. The hospital's only purpose is the care and treatment of its patients . . . . Whatever doubts there may be as to the adverse effects on patients should be resolved in favor of their protection. I would not elevate the [labor] interests of . . . employees, whose highest duty is to patients, to a higher plane than that of the patients.<sup>98</sup>

If one is to accept the empirical evidence that it is important to see someone's face in order to communicate and establish a relationship, then it is hard to imagine a place where these abilities are more important and the consequences of failure to perform such functions greater than in the hospital. The Third Circuit has determined that the ability of a patient to communicate problems with medical staff may justify outright gender based discriminatory hiring practices in the hospital setting.<sup>99</sup> For the hearing impaired, communication with a fully veiled nurse may inhibit communication. According to a report by the Center for Disease Control and Prevention ("CDC"), approximately 15% of American adults aged 18 and over report some trouble hearing.<sup>100</sup> Nearly 25% of those aged 65 to 74 and 50% of those who are 75 and older have a disabling hearing loss.<sup>101</sup> According to the CDC, 24.87% of persons aged 65-74 ended up in the hospital in 2010, while the figure was 39.83% for persons aged 75-84, and 56.68% for persons aged 85 and over.<sup>102</sup> Based on data from United States Census Bureau in 2010, persons aged 65-74 made up 7.03% of the population, 75-84 made up 4.23%, and 85 and over made up 1.78%.<sup>103</sup> We can extrapolate from this data that at least 4.44% of hospital patients have a hearing impairment that qualifies as a disability (this number does *not* include persons under the age of 65). This means that for roughly one out of every twenty patients a nurse

98. *Baptist*, 442 U.S. at 793 (Burger, C.J., concurring) (upholding hospital's ban on union solicitation in corridors and sitting rooms on patient floors, rather than exclusively within immediate patient care areas).

99. See *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996) ("A [gender] balanced staff is . . . necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser.").

100. U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY HEALTH STATISTICS FOR U.S. ADULTS: NATIONAL HEALTH INTERVIEW SURVEY, 2012 10D NO. 260, 5 (Feb. 2014) [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_260.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_260.pdf).

101. National Institute on Deafness and Other Communication Disorders, *Quick Statistics About Hearing*, NIH, <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing#5> (Last updated June 17, 2016).

102. See U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2014, 299 (2015), <http://www.cdc.gov/nchs/data/hus/14.pdf#089>.

103. See U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, 4 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

in a burqa serves would present significant difficulty in terms of communication,<sup>104</sup> not to mention potential problems faced by 15% of the population with a less severe hearing disorder.

#### A. *The Business Necessity Defense*

The Supreme Court in 1971 articulated the “business necessity” defense to a claim of unintentional discrimination, i.e. an act that is neutral on its face but has a discriminatory impact, known as “disparate impact.”<sup>105</sup> The defense was later explicitly included as an exception under Title VII by Congress in 1991.<sup>106</sup> If an employer’s discriminatory policy has an actual impact on job performance, i.e. an employment requirement that is related to the job, and there is no less discriminatory alternative method, then it may be justified.<sup>107</sup> Such impact cannot be abstract or tangential.<sup>108</sup> The Supreme Court invalidated job requirements consisting of an aptitude test and a high school diploma—qualifications the Company claimed would improve the overall quality of the work force, but which also had a discriminatory impact against black applicants—relying on the fact that employees hired before the imposed requirement performed satisfactorily and received promotions.<sup>109</sup> Many courts have used the language “necessary to the safe and efficient operation of the business[,]”<sup>110</sup> while the Supreme Court has indicated that “job-relatedness” and “necessary to the safe and efficient operation of the business” are two sides of the same coin.<sup>111</sup>

104. *Rice v. Schuyler Cty. Civil Serv. Comm’n*, 183 A.D.2d 974, 975-76 (N.Y. App. Div. 3d Dept 1992) (“[P]ersons with a hearing loss like petitioner’s can learn to compensate by using visual and contextual cues, [however], as attested to by respondents’ audiologist, . . . such hearing loss increases the probability that petitioner will have difficulty understanding when those cues are removed.”).

105. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

106. *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009); 42 U.S.C. § 2000e-2(k)(1) (2016).

107. 42 U.S.C. § 2000e-2(k)(1); see Merrick T. Rossein, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:35 (Rel. 15 2010) (“[C]ourts have upheld employment practices that disproportionately exclude minorities if that practice is related to skills that result in better job performance.”).

108. See 42 U.S.C. § 2000e-2(k)(1).

109. *Duke Power Co.*, 401 U.S. at 427, 431.

110. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 249 (10<sup>th</sup> Cir. 1970); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971); *Waters v. Wisconsin Steel Works of Int’l Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974); *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972); *Watkins v. Scott Paper*, 530 F.2d 1159, 1171 n. 15 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S. Ct. 163, 50 L.Ed.2d 139 (1976).

111. *Williams v. Colorado Springs, Colo., Sch. Dist. No. 11*, 641 F.2d 835, 840 n.2 (10th Cir. 1981) (“The job-relatedness and the safety and efficiency standards are simply different sides of the same coin . . . . The Supreme Court has, in fact, indicated that the two terms are interchangeable. In *Albemarle Paper Co. v. Moody*, the Court stated that if the employer shows that ‘its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship.”’” 422 U.S. 405, 425 [] (1975) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1823, 36 L.Ed.2d 668 (1973) (emphasis added)); see also *Dothard v.*

While the business necessity defense centers on job performance, courts have also looked to other circumstances impacting the purpose of the business.<sup>112</sup> Mr. Manjit Singh Bhatia, a machinist at Chevron, filed discrimination charges against the company when it refused to allow him to maintain his position without shaving his face.<sup>113</sup> Mr. Bhatia, as a Sikh, refused to shave his facial hair, which prevented him from achieving an air-tight seal when wearing a respirator.<sup>114</sup> Since the duties of a machinist involved potential exposure to toxic gases, all machinists were required to abide by the no-facial-hair policy instituted in order to comply with the directions of state occupational safety regulators.<sup>115</sup> The court found that allowing Mr. Bhatia to continue to operate as a machinist would either open the company to liability for failing to comply with safety regulations, or if they allowed him to avoid duties that required the use of a respirator, would place too great a burden on scheduling and on his co-workers for taking on a greater share of potentially hazardous work.<sup>116</sup>

A patient's comfort has been deemed a business necessity in the hospital setting.<sup>117</sup> An employee who was instructed to speak only in English when in the vicinity of patients sued New York Presbyterian Hospital for discrimination.<sup>118</sup> Jose Pacheco, who did not dispute the facts put forward by the hospital, worked in a unit of the Hospital's Patient Financial Services Department on the first floor of the hospital.<sup>119</sup> Mr. Pacheco's supervisors had received several complaints from patients who felt that Mr. Pacheco was speaking about them in Spanish and laughing at them with his co-workers.<sup>120</sup> When analyzing the plaintiff's discrimination claim, the court accepted the hospital's business necessity to ensure that patients felt comfortable that they were not being talked about or ridiculed surreptitiously by hospital personnel.<sup>121</sup> It is likely that a patient's comfort is even more im-

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Rawlinson, 433 U.S. 321, 331 & n.14 (1977) (the Court stated in reference to the job-relatedness standard that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.").

112. See Merrick T. Rossein, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:35 (Rel. 15 2010).

113. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984).

114. *Id.*

115. *Id.*

116. *Id.* at 1384.

117. *Pacheco v. New York Presbyterian Hosp.*, 593 F. Supp. 2d 599, 621 (S.D.N.Y. 2009) (patient comfort in knowing that hospital staff were not discussing their condition surreptitiously or ridiculing them was a justifiable business necessity in employing requiring patients to speak only in English around patients).

118. *Id.* at 606.

119. *Id.* at 604-05.

120. *Id.* at 606.

121. *Id.* at 621.



portant after being admitted to the hospital than at the billing station, where Mr. Pacheco worked.<sup>122</sup>

The Fourth Circuit has confronted a discrimination claim by a nurse who was fired because her overly conservative dress made patients feel uncomfortable.<sup>123</sup> Lori Kennedy, a nursing assistant at St. Catherine's Nursing Center, a religious facility maintained in accordance with Catholic principles and where prayers were read over the intercom, was fired for wearing overly modest garb that included a long dress and a head cover.<sup>124</sup> Her supervisor told her that her mode of dress was making residents and their family members feel uncomfortable.<sup>125</sup> The court however did not reach the question of whether the impact of the plaintiff's clothing on patients' comfort interfered with the business necessity of nursing or constituted an undue hardship, and instead dismissed her claims as exempt from discrimination laws under the religious organization exemption to Title VII,<sup>126</sup> which precludes claims of religious discrimination against a religious organization like St. Joseph's.<sup>127</sup>

While the EEOC specifically rejects customer preference as a defense to discrimination,<sup>128</sup> it would be improper to conflate the comfort of a hospital patient with mere preference. Even if a court was to accept this characterization, "it is not the law that customer preference is an insufficient justification as a matter of law."<sup>129</sup> In applying a business necessity standard to the retail food setting, where "store hygiene and an appearance of cleanliness is an important aspect of customer preference[.]" the employer may institute a "no beard" policy without repercussion.<sup>130</sup> Customer preference in these situations is often expressed in terms of an undue hardship on the employer.<sup>131</sup> In the hospital setting, patients may be in a state of distress—whether it be because of extreme physical or mental pain, or fear of ailment or even death. Adding unnecessarily to a patient's discomfort is not about

122. *Id.* at 605.

123. *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 191 (4th Cir. 2011).

124. *Id.* at 190.

125. *Id.* at 190-91.

126. 42 U.S.C. § 2000e-1(a) (2016).

127. *Kennedy*, 657 F.3d at 196.

128. 29 C.F.R. § 1604.2 (2014) (bona fide occupational qualification).

129. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) (exemption of employee, and member of the Church of Body Modification, to company policy prohibiting the wear of jewelry on the face would create an undue burden because it would adversely affect the employer's public image).

130. *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35, 43 (E.D. Va. 1976) *aff'd*, 579 F.2d 43 (4th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S. Ct. 1267, 59 L.Ed.2d 486 (1978).

131. See *Cloutier*, 390 F.3d at 126; *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 599 (S.D.N.Y. 2001), *aff'd sub nom.*, 31 F. App'x 740 (2d Cir. 2002); *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35, 43 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978).

the impact on a hospital's bottom line if a "customer" unplugs her respirator, disconnects the I.V., and chooses to march across town to the hospital's nearest competitor. Helping a child suffering from leukemia to feel as comfortable as possible is so far ahead in importance to a grocery shopper's concern over her butcher's scruffy appearance that it is outlandish to include the two in the same sentence. For those breathing their last breaths in the hospital, the function of end-of-life care is to alleviate distressing symptoms of the patient, also termed "comfort care."<sup>132</sup>

The business necessity exception is not applicable to a claim of intentional discrimination.<sup>133</sup> A claim of intentional discrimination may be brought for a failure to accommodate a headscarf by a company with a "no-headwear" policy.<sup>134</sup> Thus it follows that a nurse may bring a claim of intentional discrimination for a failure to accommodate a burqa, even if the hospital's action appears to be neutral.<sup>135</sup> Given the extensive use of masks in hospitals, it appears likely that even the most employer-friendly of jurisdictions may deem a restriction on the wear of a burqa as a form of intentional discrimination.<sup>136</sup> Further, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on *why* the employer discriminates, but rather on the explicit terms of the discrimination."<sup>137</sup> In the likely case that a hospital faces a claim of intentional discrimination, the hospital will need to rely on the *bona fide occupational qualification* defense.

#### B. The Bona Fide Occupational Qualification Defense

Similar to a business necessity, although harder to demonstrate,<sup>138</sup> and considerably more narrow,<sup>139</sup> a *bona fide occupational qualification* (BFOQ) is a valid defense against a claim of *intentional* discrimination,

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132. Craig D. Blinderman, M.D., & J. Andrew Billings, M.D., *Comfort Care for Patients Dying in the Hospital*, 373 NEW ENG. J. MED. 2549, 2549 (2015).

133. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 197-98 (1991).

134. *Abercrombie*, 135 S. Ct. at 2034.

135. *See id.*

136. *Id.* at 2039 (Thomas, J., dissenting) ("If an employer declines to accommodate a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof [of intentional discrimination].").

137. *Johnson Controls*, 499 U.S. at 199 (discussing the concern of lead exposure to female employees that may result in birth defects) (emphasis added).

138. *Id.* at 198.

139. *Id.* at 201.

also known as “disparate treatment.”<sup>140</sup> The statutory exception written into Title VII “limits the situations in which discrimination is permissible to ‘certain instances’ where . . . discrimination is ‘reasonably necessary’ to the ‘normal operation’ of the ‘particular’ business.”<sup>141</sup> “[I]n order to qualify as a BFOQ, a job qualification must relate to the ‘essence,’ [] or to the ‘central mission of the employer’s business[.]’”<sup>142</sup> In *Johnson Controls*, the Supreme Court determined that a battery manufacturer’s concern over birth defects caused upon the children of female employees did not relate to the essence of the business because elevated lead levels in her blood did not impact her “ability to perform [] safely and efficiently . . . those aspects of [her job] that [fell] within the ‘essence’ of the [battery manufacturer’s] business.”<sup>143</sup>

The safety of third parties which are “indispensable to the particular business at issue” may, on the other hand, create a valid BFOQ, e.g. inmates to prisons and passengers to airline carriers.<sup>144</sup> Within the context of age discrimination, the Supreme Court has embraced a two-part enquiry known as the *Tamiami* standard for establishing a BFOQ, which allows for an escalation of job qualifications proportionate to “the likelihood of harm and the probable severity of that harm” inherent in the essence of the business; so long as the “employer could establish that it ‘had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved[.]’” or that it would be “‘impossible or highly impractical’ to deal with the older employees on an individualized basis.”<sup>145</sup> It does not require any stretch of imagination or language<sup>146</sup> to state that the job of a hospital is the safe care for its patients.<sup>147</sup> And while a hospital “must have a ‘basis in fact’ for its belief that [discrimination is necessary to] perform the job in question[,] appraisals need not be based on objective, empirical evidence, and common sense and deference to

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140. *Healey*, 78 F.3d at 131 (citing *Johnson Controls*, 499 U.S. at 202-03) (discussing sex as a BFOQ in the hospital setting).

141. *Johnson Controls*, 499 U.S. at 201.

142. *Id.* at 203.

143. *Id.* at 206-07.

144. *Id.* at 203.

145. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412-17 (1985) (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 235-36, (5th Cir. 1976)).

146. See *Johnson Controls*, 499 U.S. at 207 (“It is word play to say that ‘the job’ at Johnson [Controls] is to make batteries without risk to fetuses in the same way ‘the job’ at Western Air Lines is to fly planes without crashing.”).

147. *N.L.R.B.*, 442 U.S. at 793 (Burger, J., concurring) (“The central ‘business’ of a hospital is not a business in the sense that term is generally used in industrial contexts—[its] only purpose is the care and treatment of its patients[.]”).

experts in the field may be used.”<sup>148</sup> The BFOQ defense has been recognized as valid within the religious discrimination context;<sup>149</sup> valid in support of job qualifications that do not directly discriminate on the basis of religion, but on some aspect of that religion;<sup>150</sup> and within the context of privacy, courts have accepted a hospital’s contentions regarding a bona fide occupational qualification without supporting factual findings.<sup>151</sup> Lastly and to the point, the ability of a patient to communicate problems with medical staff may give rise to a BFOQ in the hospital.<sup>152</sup>

While there does not yet appear to be any quantified studies of the specific effects of a nurse wearing a burqa upon patient care as it relates to the relationship between the patient and medical staff, one physician in Sudan, where women practice medicine wearing a burqa, has articulated that in his opinion there are “profound adverse effects on interaction with their patients.”<sup>153</sup> Evidence that the human brain is uniquely designed to recognize faces;<sup>154</sup> humans preference for facial stimuli;<sup>155</sup> the natural social interaction between humans through their eyes;<sup>156</sup> demonstrated by the highly elaborate musculature on the face of primates allowing for communication of a wider array of thoughts and emotions than other mammals;<sup>157</sup> and evidence that facial expressions transcend cultures;<sup>158</sup> all point to the im-

148. *Healey*, 78 F.3d at 132 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)) (relying on expert testimony, not statistical evidence, to determine BFOQ defense and explaining that gender discrimination is necessary to adequately serve sexual abuse victim patients in the hospital setting); *Torres v. Wis. Dep’t Health and Social Servs.*, 859 F.2d 1523, 1531–32 (7th Cir. 1988) (discussing when establishing a BFOQ defense, defendants need not produce objective evidence, but rather employer’s action should be evaluated on basis of totality of circumstances as contained in the record).

149. *See e.g.*, *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351 (7th Cir. 1986) (explaining although the university was not a religious organization exempt from Title VII, the court held that having some Jesuit presence in the philosophy department, including in teaching roles related to applied ethics, philosophy of law, and logic, was a BFOQ since university was founded by Jesuits, Jesuit “presence” was important to the successful operation of the university, and the educational experience would be different without a Jesuit presence); *see also* *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983) (being Muslim where an employer hired pilots to fly into countries where only Muslims were allowed to enter is a valid BFOQ), *aff’d*, 746 F.2d 810 (5th Cir. 1984).

150. *E.E.O.C. v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981) (explaining cleanliness is a bona fide occupational qualification for a manager of a restaurant).

151. *See* *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1193 (ED Ark. 1981) (“The Court finds merit in defendant’s contention that the majority of women patients [in the obstetrics and gynecological department] will object to intimate contact with a member of the opposite sex.”).

152. *See Healey*, 78 F.3d at 133 (“A [gender] balanced staff is [] necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser.”).

153. *Awad Mohamed Ahmed, Ninja Turtles at Sudan Hospitals and Medical Schools*, 4 SUDANESE JOURNAL OF PUBLIC HEALTH 360, 364 (2009).

154. *LEOPOLD, supra* note 27, at 234.

155. *PENNICK, supra* note 32, at 634.

156. *LEOPOLD, supra* note 27, at 234.

157. *Id.* at 236, 239.

158. *See EKMAN, supra* note 40, at 305-08.

portance of the face in social interaction. If a court is prepared to accept this empirical evidence as relevant, if five percent of hospital patients have a debilitating hearing disorder, and if communication<sup>159</sup> and comfort<sup>160</sup> are important in the hospital setting, then a court may accept a hospital's qualification that a nurse's face not be covered because it relates to the central mission of the hospital, i.e., the safe care of patients. And *even if* a court does not accept this mass of tangential evidence as being on point, the court may rely on common sense and deference to experts in the field so long as the employer has a "basis in fact."<sup>161</sup>

## VI. THE FIRST AMENDMENT AND RELIGIOUS FREEDOM RESTORATION ACTS

A public hospital differs from a private one in that as a state actor, the Constitution proscribes it from violating the rights of others, including its employees.<sup>162</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*,"<sup>163</sup> and this proscription applies not only to the federal government but also city and state organizations.<sup>164</sup> The Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act."<sup>165</sup> "The first is absolute but, in the nature of things, the second cannot be."<sup>166</sup> Therefore, "[c]onduct remains subject to regulation for the protection of society."<sup>167</sup> Historically, any challenge to government action on the basis of a free exercise violation triggered the strictest of scrutiny, i.e., the least amount of deference to the government's purported reasoning.<sup>168</sup> Challenged conduct could only be validated by a compelling interest that was narrowly tailored to effectuate that interest.<sup>169</sup> The Supreme Court has described compelling interests as those "of the highest order,"<sup>170</sup> to be con-

159. See *Healey*, 78 F.3d at 133.

160. See *Backus*, 510 F. Supp. at 1191 (explaining that court accepted that female patients would not be comfortable with male nurse in obstetrics and gynecology department); *Pacheco*, 593 F. Supp. 2d at 599 (discussing hospital staff using foreign language to ridicule patients in surreptitious manner).

161. *Healey*, 78 F.3d at 132 (citing *Dothard*, 433 U.S. at 335) (relying on expert testimony, not statistical evidence, to determine BFOQ defense); *Torres*, 859 F.2d at 1531–32 (discussing when establishing a BFOQ defense, defendants need not produce objective evidence, but rather employer's action should be evaluated on basis of totality of circumstances as contained in the record).

162. See *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 566 (1974).

163. U.S. CONST. amend. I (emphasis added).

164. See *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the states via the Fourteenth Amendment).

165. *Id.* at 303.

166. *Id.* at 303–04.

167. *Id.* at 304.

168. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

169. *Id.*

170. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

trusted with the most deferential form of scrutiny—requiring only a “rational basis” as justification.<sup>171</sup> The U.S. Supreme Court retreated from this approach in *Employment Div., Dept. of Human Resources of Ore. v. Smith*,<sup>172</sup> and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>173</sup> The Supreme Court in *Lukumi* cited *Smith* for the proposition that while laws targeting religious conduct remain subject to strict scrutiny, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”<sup>174</sup> The Supreme Court in *Smith* held that Oregon’s criminal drug laws were neutral and of general applicability, and thus the laws’ impingement on the sacramental ingestion of peyote by members of the Native American Church need not be justified by a compelling governmental interest.<sup>175</sup> While *Smith* and *Lukumi* do not explicitly mention the term “rational basis,” lower courts have interpreted them as imposing the most deferential form of review on neutral laws of general applicability.<sup>176</sup> Under rational basis review, “legislation is presumed to be valid . . . [and] will be upheld ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the [burden imposed].’”<sup>177</sup>

In response to the weakening of judicial scrutiny with respect to neutral, generally applicable laws under *Smith* and *Lukumi*, Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993 – the same year *Lukumi* was decided.<sup>178</sup> The purpose of RFRA was to restore the compelling interest test that preceded *Smith* and *Lukumi*, “as set forth in *Sherbert v. Verner*”<sup>179</sup> and *Wisconsin v. Yoder*”<sup>180</sup> and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”<sup>181</sup> Although Congress intended RFRA to apply to the states as well as the federal government, the Supreme Court later held that this was an unconstitutional exercise of Congress’ powers in

171. *Lyng v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 375 (1988).

172. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

173. *Lukumi*, 508 U.S. at 520.

174. *Id.* at 531 (citing *Smith*, 494 U.S. 872 (1990)).

175. *Smith*, 494 U.S. at 877-82.

176. *See, e.g., Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 212 (2d Cir. 2012).

177. *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep’t of Health & Mental Hygiene*, No. 12 CIV. 7590 NRB, 2013 WL 126399, at \*32 (S.D.N.Y. Jan. 10, 2013), *vacated and remanded*, 763 F.3d 183 (2d Cir. 2014) (internal citations omitted).

178. *See* 42 U.S.C. § 2000bb-1 (2016).

179. *Sherbert*, 374 U.S. at 398.

180. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

181. 42 U.S.C. § 2000bb (2016).

*City of Boerne*<sup>182</sup> and invalidated application of the law to the states.<sup>183</sup> Following *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),<sup>184</sup> which was enacted under Congress's Commerce and Spending Clause powers.<sup>185</sup> RLUIPA removed States from the definition of "government" in RFRA,<sup>186</sup> while at the same time included States and local government in the application of RLUIPA, which applied only to land use regulation and burdens on prisoner.<sup>187</sup> The scope of application was limited to "a program or activity that receives Federal financial assistance"; "the substantial burden affects, or removal of that substantial burden would affect, [interstate commerce]"; or land use regulation.<sup>188</sup> Presently, challenges to governmental action under RFRA remain subject to strict scrutiny even if the law does not target religion,<sup>189</sup> while challenges under the U.S. Constitution to governmental action that is neutral and generally applicable, aside from that which is related to land use and prisoner's rights, remain subject to the most deferential form of review under *Smith* and *Lukumi*.<sup>190</sup>

#### A. *The Free Exercise Rights of the Nurse*

A dress policy requiring the use of an employee uniform is a neutral law of general applicability.<sup>191</sup> A public hospital may rely on a uniform dress attire policy in order to receive lesser scrutiny by the courts. "[A] uniform requirement fosters discipline, promotes uniformity, encourages esprit de corps, and increases readiness and having standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission."<sup>192</sup> "While [the uniform requirement] is doubtless of most importance in a law enforcement context, there is no reason to believe

182. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

183. *Id.*

184. The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, §§ 7-8, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. § 2000cc et seq. (2012)).

185. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).

186. The Religious Land Use and Institutionalized Persons Act (RLUIPA), §§ 7-8.

187. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) ("Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; § 3 relates to religious exercise by institutionalized persons, § 2000cc-1.").

188. 42 U.S.C. §§ 2000cc (2016).

189. See, e.g., *Burwell*, 134 S. Ct. at 2751.

190. See 42 U.S.C. §§ 2000cc, cc-1.

191. See, e.g., *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 761 (E.D.N.Y. 1998) *aff'd*, 189 F.3d 461 (2d Cir. 1999) (policy of Transit Authority requiring its car inspectors to wear TA-provided hard hat which prevented employee from wearing turban at all times required by Sikh religion is a neutral and generally applicable law).

192. *Commc'ns Workers of Am. v. Ector Cnty. Hosp. Dist.*, 467 F.3d 427, 439 (5th Cir. 2006) (internal citations omitted) (hospital setting).

it is not of real significance in most of the many non-law enforcement contexts, both governmental and civilian, where uniforms are appropriately required.”<sup>193</sup> In order to preserve rational basis scrutiny, a defendant hospital would need to enforce its policy uniformly and without exception.<sup>194</sup>

A public hospital that does not impose a uniform on its nursing staff but wishes to prohibit a nurse from wearing a burqa in patient care areas may trigger the highest of judicial scrutiny. “[I]nvidiously discriminatory ordinances targeting a religious practice of a particular religion are subject to strict scrutiny.”<sup>195</sup> The defendant City of Hialeah in *Lukumi*—against a background of legislative history indicating hostility towards the practice of Santeria—imposed a ban on animal sacrifice that contained so many exceptions as to cause the ban to apply exclusively to the religious ceremony.<sup>196</sup> “The *Lukumi* opinion [] declared the ‘principle’ that ‘government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.’”<sup>197</sup> Distinguishing *Lukumi* from regulation prohibiting the performance of religious services on public school grounds, the Second Circuit held that such prohibition was not in violation of the Free Exercise Clause because (i) the regulations did not intend to nor did they suppress a religious ritual of a particular religion; (ii) there was no demonstrable “animus,” i.e., hostility; and (iii) the government interest was avoidance of Establishment Clause concerns.<sup>198</sup>

*Lukumi*’s invocation of presumptive unconstitutionality and strict scrutiny cannot reasonably be understood to apply to rules that focus on religious practices in the interest of observing the concerns of the Establishment Clause. The constitutionality of such rules must be assessed neutrally on all the facts and not under strict scrutiny.<sup>199</sup>

A hospital enforced ban on the covering of a nurse’s face while at the same time requiring surgical masks appears to single out Muslim women for the practice of a religious ritual, i.e., the complete covering of a woman’s face in public. The hospital may distinguish the mask by its limited use – unless of course that use is not limited. The Department of Health for the State of New York adopted a regulation in 2013 requiring unvaccinated hospital personnel—including doctors and nurses—to wear during influen-

193. *Id.* at 440.

194. *See* *Litzman v. New York City Police Dep’t*, 2013 WL 6049066, at \*3 (S.D.N.Y. Nov. 15, 2013) (relying on *Lukumi*, 508 U.S. at 534) (policy limiting facial hair growth was not uniformly enforced and contained exceptions, and thus strict scrutiny was applied).

195. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 190 (2d Cir. 2014) cert. denied, 135 S. Ct. 1730 (2015) (citing *Lukumi*, 508 U.S. at 534).

196. *Lukumi*, 508 U.S. at 525-26.

197. *Bronx Household*, 750 F.3d at 192 (quoting *Lukumi*, 508 U.S. at 543).

198. *Id.* at 191-95.

199. *Id.* at 195.



za season a surgical or procedural mask at all times when in areas where patients or residents may be present.<sup>200</sup> The regulations were amended in 2014 to narrow slightly the applicability of the mask-wearing requirement from an area where patients “may be present” to where they are “typically present[;]” and to include exceptions for personnel providing speech therapy or working with a patient who reads lips.<sup>201</sup> In a challenge to the regulations brought by the hospital worker’s union and four nurses, the Court dismissed the complaint, determining that the State correctly adopted the regulations bearing in mind the risk to patient health presented by the spread of influenza in health care facilities.<sup>202</sup> A hospital requiring a nurse to wear a surgical mask when interacting with patients, while prohibiting her from wearing a burqa, may have difficulty in selling the argument that the prohibition does not invidiously target the nurse’s religion. An exception when handling patients that read lips indicates that it is important for a nurse to be able to remove her mask when dealing with patients who have difficulty hearing, which may be a rational basis for disallowing a burqa or niqab, but if the court determines that such action targets the burqa *because it is a burqa*, the city hospital will be required to climb a much steeper mountain than the plains of rational basis.<sup>203</sup>

In States that have passed their own religious freedom restoration acts, any act “substantially burden[ing]” religion can only be legally valid if it is in furtherance of a “compelling governmental interest[.]” and the act is the “least restrictive means of furthering that compelling governmental interest.”<sup>204</sup> Within the context of religious freedom restoration laws, there is a split among the Circuits as to whether religious exercise is “substantially burdened” when it is not compelled or prohibited by the religion.<sup>205</sup> Given

200. N.Y. Comp. Codes R. & Regs. Tit. 10 § 2.59 (2016).

201. *Spence v. Shah*, 2016 NY slip op. 01386, 136 A.D.3d 1242, 1244 (App. Div.)

202. *Id.* at 1246.

203. See *Lukumi*, 508 U.S. at 520; see also *Smith*, 494 U.S. at 872.

204. See 2015 Ark. Act 975, 2015 Ark. S.B. 975.

205. See *Mack v. O’Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *cert. granted, judgment vacated*, 522 U.S. 801, 118 S. Ct. 36, 139 L. Ed. 2d 5 (1997), and *vacated*, 151 F.3d 1033 (7th Cir. 1998) (“The Fourth, Ninth, and Eleventh Circuits define “substantial burden” as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). see also *Goodall v. Goodall* v. Stafford County School Board, 60 F.3d 168, 172–73 (4th Cir.1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir.1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir.1995) (per curiam). The Eighth and Tenth Circuits use a broader definition—action that forces religious adherents “to refrain from religiously motivated conduct,” *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir.1994), or that “significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person’s] individual beliefs,” *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir.1995), imposes a substantial burden on the exercise of the individual’s religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is “essential” or “fundamental,” *Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489, 491–92 (6th Cir.1995)).

some religious scholars interpret the Qur'an to *require* a woman to cover her face and body in public,<sup>206</sup> and First Amendment jurisprudence that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect[.]"<sup>207</sup> if a Muslim woman working in a city or State hospital demonstrates adherence to this commandment, she will likely receive protection under her State's RFRA even if her State lies within a Federal Circuit that requires religious compulsion or prohibition—meaning in states with their own RFRA, any restriction on the wear of a burqa, intentional or otherwise, would likely trigger the strictest of scrutiny.<sup>208</sup>

As for a nurse at a federal hospital, like the V.A., although any challenge to a federal entity's action under the (federal) RFRA remains subject to strict scrutiny,<sup>209</sup> she would not be able to rely on RFRA—or even civil rights claims—as a remedy for employment discrimination.<sup>210</sup> It was not until 1972 that Congress extended Title VII's protection to federal employees by way of the Equal Employment Opportunity Act of 1972, which added the corresponding § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16.<sup>211</sup> By 1976, the Supreme Court in an opinion delivered by Justice Potter Stewart held that a federal employee's exclusive remedy for discrimination was through Title VII.<sup>212</sup> Clarence Brown—a black employee of the General Services Administration who had been passed over for two promotion opportunities—alleged racial discrimination, but since he missed the 30 day window for filing a civil action under Title VII, he was barred from bringing an action not only under Title VII, but also under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.<sup>213</sup> "[Since] Congress simply failed explicitly to describe § 717 [of Title VII]'s position in the constellation of antidiscrimination law[.]" Justice Stewart wrote that "[the Court] must, therefore, infer congressional intent in less obvious ways."<sup>214</sup> Justice Stewart went on to infer that Congress intended to create in 1972 an "exclu-

206. Cassandra M. Vogel, *An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools*, 78 BROOK. L. REV. 741, 748 (2013).

207. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) (challenging First Amendment).

208. Cf. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 56 (Fla. Dist. Ct. App. 2006) (based on expert testimony, it is consistent with Islamic law that a woman unveil for medical needs and photo ID cards for police identification, and thus in such situations, the complainant is "merely inconvenienced" as opposed to "substantially burdened").

209. See, e.g., *Burwell*, 134 S. Ct. at 2751.

210. See *Francis v. Mineta*, 505 F.3d 266, 271-72 (3d Cir. 2007); *Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011).

211. *Brown v. General Services Administration*, 425 U.S. 820, 824-25 (1976); *Francis*, 505 F.3d at 271-72.

212. *Brown*, 425 U.S. at 824-25.

213. *Id.* at 822-24.

214. *Id.* at 825.

sive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination[.]” based on the “understanding of Congress[.]” “that federal employees who were treated discriminatorily had no effective judicial remedy.”<sup>215</sup> He went on to support the decision with the canon of statutory interpretation that resolves tension between specific statutes and general statutes in favor of specific statutes;<sup>216</sup> and the practical effect that allowing Mr. Brown to sue the government under § 1981 would allow the plaintiff to circumvent Title VII’s procedural requirements for federal employees.<sup>217</sup> Justice Thurgood Marshall took no part in the *Brown* decision—while Justice John Paul Stevens joined by Justice William Brennan dissented. Justice Stevens pointed out “Congress intended federal employees to have the same rights available to remedy racial discrimination as employees in the private sector,” and that since it is well settled that victims of discrimination in the private sector are not limited to Title VII,<sup>218</sup> “federal employees should enjoy parallel rights.”<sup>219</sup> Moreover, “the General Subcommittee on Labor of the House Committee on Education and Labor *rejected an amendment which would have explicitly provided that § 717 [of Title VII] would be the exclusive remedy for federal employees.*”<sup>220</sup> Courts have since held that federal employees cannot bring an action under 42 U.S.C. § 1983 for a violation of their Constitutional rights for actions that could instead be brought under Title VII.<sup>221</sup>

The Third Circuit Court of Appeals in 2007, relying on *Brown* and legislative history put forth by the government defendants, held that a T.S.A. employee could not rely on RFRA to redress the allegations that the T.S.A. ordered him to cut his dreadlocks, and that when he refused, he was ordered to sign a separation agreement terminating his employment.<sup>222</sup> The defendants had put forward as evidence of legislative intent a “Senate Report on RFRA, which in a section titled ‘Other Areas of Laws Are Unaffected,’ noted that ‘[a]lthough the purpose of this act is only to overturn the Supreme Court’s decision in *Smith*, concerns have been raised that the act could have unintended consequences and unsettle other areas of law.’”<sup>223</sup> The Report goes on to state that “[n]othing in this act shall be construed as

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215. *Id.* at 828-29.

216. *See id.* at 834-35.

217. *See id.* at 833.

218. *Id.* at 836; *see also* *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

219. *Brown*, 425 U.S. at 836 (Stevens, J., dissenting).

220. *Id.* at 838 (emphasis added).

221. *See* *Ratliff v. City of Milwaukee*, 608 F. Supp. 1109 (E.D. Wis. 1985), *aff’d* 795 F.2d 612 (7th Cir. 1986).

222. *Francis*, 505 F.3d at 268, 272.

223. Brief for Appellees at \*16-17, *Francis*, 505 F.3d 266 (3d Cir. 2007) No. 06-1293, 2006 WL 6222589 (quoting S. Rep. No. 103-111, at 12, 1993 U.S.C.C.A.N. 1892, 1902).

affecting religious accommodation under Title VII of the Civil Rights Act [of 1964].”<sup>224</sup> Whether Congress meant that RFRA should not undermine Title VII’s ability to redress employment discrimination or that Title VII should limit RFRA to non-federal employees—the Third Circuit answered in the latter.<sup>225</sup>

*B. The Free Exercise rights of the patient and the Establishment Clause*

While the EEOC specifically rejects customer preference as a defense to discrimination,<sup>226</sup> a patient’s fundamental rights may justify such discrimination. In *Healey v. Southwood Psychiatric Hosp.*, the Third Circuit held that a balanced staff including both males and females on all shifts is necessary to treat sexually abused adolescents and ensure patients’ privacy, i.e. the hospital may discriminate based on sex to ensure this fundamental right.<sup>227</sup> In *Backus v. Baptist Medical Center*, an Arkansas Eastern District Court held that the essence of an obstetrics nurse’s business is to provide sensitive care for patient’s intimate and private concerns, and thus the hospital’s requirement that labor and delivery nurses in the obstetrics and gynecology department be female was a bona fide occupational qualification for the job.<sup>228</sup> Footnote four of the opinion in *Johnson Controls* made clear that “sex could [] constitute a [] bona fide occupational qualification when privacy interests are implicated.”<sup>229</sup>

A city hospital must respect the fundamental right of a patient to freely exercise religion.<sup>230</sup> While the Establishment Clause of the First Amendment prohibits a city hospital from endorsing a religion,<sup>231</sup> prohibition of *non-proselytizing* services of a hospital employee chaplain would interfere with a confined patient’s rights to practice his freely chosen religion, and thereby violate the Free Exercise Clause of the First Amendment.<sup>232</sup> A state

224. Brief for Appellees, *supra* note 226, at 11.

225. See *Francis*, 505 F.3d at 272.

226. 29 C.F.R. § 1604.2 (bona fide occupational qualification).

227. *Healey*, 78 F.3d at 132.

228. *Backus*, 510 F.Supp. at 1191, *vacated as moot*, 671 F.2d 1100 (8<sup>th</sup> Cir. 1982).

229. *Johnson Controls*, 499 U.S. at 206 n.4 (citing *Backus*, 510 F. Supp. at 1191).

230. See *Carter v. Broadlawns Med. Ctr.*, amended 667 F. Supp. 1269 (S.D. Iowa), *aff’d* and modified in part 672 F. Supp. 1149 (S.D. Iowa 1987).

231. See *Doe v. Small*, 934 F.2d 743, 746 (7<sup>th</sup> Cir.), *reh’g granted and opinion vacated*, 947 F.2d 256 (7<sup>th</sup> Cir. 1991), and on *reh’g*, 964 F.2d 611 (7<sup>th</sup> Cir. 1992) (the core of the Establishment Clause is prohibition of state endorsement of religion).

232. *Carter*, 667 F. Supp. at 1280 (relying on *Katcoff v. Marsh*, 755 F.2d 223 (2<sup>d</sup> Cir. 1985)) (providing chaplaincy services to armed forces does not generally violate the Establishment Clause); *Wilder v. Sugarman*, 385 F. Supp. 1013, 1026 (S.D.N.Y. 1974) (“Where a state, as the administrator of . . . hospitals needed to protect and preserve public health and safety, has been forced to assume control over and responsibility for . . . patients entitled to practice their respective religions, ‘reasonable oppor-

paid chaplain must refrain from “proselytizing upon a captive audience of patients” and the hospital must “ensure that those patients who do not wish to entertain a chaplain’s ministry need not be exposed to it.”<sup>233</sup>

The question that needs addressing for public hospitals is whether a burqa—when worn by a nurse in the hospital—amounts to proselytizing. The Supreme Court will readily find secular purpose in religious principles in order to avoid invalidating state action that seems to endorse a particular religion, even if those principles are expressed directly as text from the Bible.<sup>234</sup> However, the court will strongly consider the coercive effect of the act at issue.<sup>235</sup> Daily repetition of exposure to the Ten Commandments within the school setting is sufficient to run astray of the Constitution while a monument of the Ten Commandments on state grounds is “far more passive.”<sup>236</sup> Determination of whether the government violates the Constitution’s proscription of the establishment of a religion “demands sensitivity to any ‘coercive pressure’ imposed upon the relevant community on account of the challenged policy.”<sup>237</sup> In a free speech case brought by a hospital workers’ union against a hospital’s “non-adornment” policy prohibiting the employees from wearing buttons, the Fifth Circuit held that the policy did not violate the First Amendment, noting that “the Hospital’s patients—and their families—are in the nature of a captive, and essentially involuntary, audience with respect to whatever message is conveyed by buttons on the uniforms of on-duty Hospital employees.”<sup>238</sup> Relying on an Eighth Circuit Court of Appeals case in the prison context, a District Court in Iowa likened patients to prisoners when it determined that “to forcefully expose patients to religious doctrine” would violate not only the Establishment

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tunities must be afforded . . . to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments without fear of penalty.”) (relying on *Cruz v. Beto*, 405 U.S. 319, 322 n. 2 (1972) (reasonable opportunities to exercise religion must be provided to prisoners)).

233. *Carter*, 667 F. Supp. at 1282 (quoting *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986)).

234. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (display of Ten Commandments monument had historical purpose).

235. *Id.* at 693 (Thomas, J., concurring in judgment) (“[O]ur task would be far simpler if we returned to the original meaning of the word ‘establishment’ than it is under the various approaches this Court now uses. The Framers understood an establishment ‘necessarily [to] involve actual legal coercion.’”).

236. *Id.* at 691 (“The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone v. Graham*, 449 U.S. 39 (1980), where the text confronted elementary school students every day.”).

237. *Sumnum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002) (relying on *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001)).

238. *Comm’n Workers*, 467 F.3d at 441 (“It is reasonable for the Hospital to conclude that its service to patients and their families is enhanced by their not being involuntarily subjected to having messages on matters of public concern indiscriminately conveyed to them . . . by on duty Hospital employees.”).

Clause of the First Amendment, but also contravene the Free Exercise rights of the patient given the captive nature of their stay at the hospital.<sup>239</sup>

In perhaps the most coercive environment—primary school—the Pennsylvania Supreme Court in 1894 had the opportunity to address the influence of a nun's habit.<sup>240</sup> The majority determined that it was valid for the nun to wear her religious garb while teaching, even though it “conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer.”<sup>241</sup> The majority opinion focused on the hostility towards Catholics apparent by the legal action itself, noting “there never was a time when ministers of Protestant sects were not frequently selected as teachers[,] [s]ome of [whom] wore in the school room, where children of Catholic parents were pupils, a distinctively clerical garb.” “In the 60 years of existence of our present school system, this is the first time this court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a school room in a dress peculiar to a religious organization of a Christian church.”<sup>242</sup> The dissent felt otherwise:

[Catholic nuns] have renounced the world, their own domestic relations, and their family names. They have also renounced their property, their right to their own earnings, and the direction of their own lives, and bound themselves by solemn vows to the work of the church, and to obedience to their ecclesiastical superiors. They have ceased to be civilians or secular persons. They have become ecclesiastical persons, known by religious names, and devoted to religious work. Among other methods by which their separation from the world is emphasized, and their renunciation of self and subjection to the church is proclaimed, is the adoption of a distinctly religious dress. This is strikingly unlike the dress of their sex, whether Catholic or Protestant. Its use at all times and in all places is obligatory. They are forbidden to modify it. Wherever they go, this garb proclaims their church, their order, and their separation from the secular world, as plainly as a herald could do if they were constantly attended by such a person.<sup>243</sup>

How can a court distinguish the message of one religious garb from that of another? If a chaplain can wear his distinctively clerical garb in the hospital, spreading the word of God to those who want to hear it, why can't a

239. See *Carter*, 667 F. Supp. at 1282 (relying on *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980) (exposure performed by volunteers given access to the prison)).

240. *Hysong v. Sch. Dist. of Gallitzin Borough*, 30 A. 482 (Pa. Sup. Ct. 1894).

241. *Id.* at 484.

242. *Id.*

243. *Id.* at 485. In response to *Hysong*, the Pennsylvania legislature immediately enacted the anti-garb statute that would be used nearly one hundred years later to excuse the Board of Education's failure to accommodate a teacher's headscarf *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, *supra*, a case discussed earlier in this Article.

nurse wear a burqa while remaining silent about her religion and caring for patients? Is it that the nurse is more like a school teacher and the patient a pupil—such that the message is different because it is unavoidable and constant—and therefore coercive? Even so, does that rise to the level of proselytizing?

## VII. CONCLUSION

There is no need to cite authority for the proposition that the hospital carries out one of the most—if not the foremost—function in society. People who enter the hospital often do so in the final days, or the first days, or the weakest days of their lives. Hospitals care for us and our loved ones when we are at our most vulnerable. Facial cues and recognition are important to communication and a patient's well-being, which provides an understanding of why a hospital may not want its nurses adorning a burqa and the potential defenses to a related discrimination suit. But then there are surgical masks. They may be distinguished, effectively or not, from a burqa in that they are necessary to accomplish the ultimate objective of patient care—to be used sparingly. But when they are required at all times, how can a municipal hospital's restrictions on similar religious garb withstand the strict scrutiny of religious freedom laws? Where this all leaves a nurse in a burqa depends on whether she may avail herself of state religious freedom laws.