TIMING IS OF THE ESSENCE: REVIVING THE NEUTRAL LAW OF GENERAL APPLICABILITY STANDARD AND APPLYING IT TO RESTRICTIONS AGAINST RELIGIOUS FACE COVERINGS WORN WHILE TESTIFYING IN COURT

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INTRODUCTION

A subtle clash of civilizations is occurring in courts across Europe and in the United States. Conflicts have arisen between these legal systems, and the cultural and religious practices of Muslims, which are often at odds with the societal norms of Western countries. Public debate continues to rage regarding the extent to which countries must make accommodations for minority religious and cultural practices. The tension over these issues in Europe led German Chancellor Angela Merkel to state publicly that "the approach [to build] a multicultural [society] and to live side-by-side and to enjoy each other . . . has failed, utterly failed."[1] Additionally, French President, Nicholas Sarkozy, recently said that the full burka,[2] worn by some Muslim women, is "not welcome" in France.[3] France later banned the burka, and face coverings in general, from all public places.[4] In the United States following the attacks of September 11, 2001, difficulties regarding religious accommodations have been prevalent in the airport security con-

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[1] *Merkel Says German Multicultural Society Has Failed*, BBC NEWS (Oct. 17, 2010, 3:51 AM), http://www.bbc.co.uk/news/world-europe-11559451 (alterations in original) (quoting German Chancellor Angela Merkel).

[2] The burka covers the entire face and body, including a complete veil with only a mesh screen to see through. *In Graphics: Muslim Veils*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/pop_ups/05/europe_muslim_veils/html/2.stm (last visited July 6, 2011) [hereinafter *Muslim Veils*]; *see also* Martin Asser, *Why Muslim Women Wear the Veil*, BBC NEWS (Oct. 5, 2006, 8:01 PM), http://news.bbc.co.uk/2/hi/middle_east/5411320.stm (explaining that the niqab consists of a body-covering robe and a full veil covering the face with only a slit for the eyes).

[3] *Sarkozy Says Burka 'Not Welcome'*, BBC NEWS (Jan. 14, 2010, 11:02 AM), http://news.bbc.co.uk/2/hi/8458831.stm (internal quotation marks omitted).

[4] *French Veil Ban Clears Last Legal Hurdle*, BBC NEWS (Oct. 7, 2010, 12:42 PM), http://www.bbc.co.uk/news/world-europe-11496459.

text and in public accommodations.[5] Even as recently as 2008, a Georgia court held a woman in contempt of court, and briefly jailed her, for refusing to remove her headscarf.[6] One 2006 incident in Michigan raises critical questions about how the U.S. legal system will handle an increase in conflicts between minority religious practices and traditional legal customs.

One of the key tenets of the U.S. legal system is an individual's right to the free exercise of religion as protected by the First Amendment of the U.S. Constitution.[7] This Comment analyzes current free exercise jurisprudence in order to provide a framework for how conflicts between cultural and religious practices can be resolved. An excellent example of this topic's relevancy is a conflict that emerged between a state court judge and a veil-wearing Muslim woman in Michigan.[8]

Ginnah Muhammad, a Muslim woman wearing a niqab,[9] a full veil covering her entire face except for the eyes, brought a small claims case in Michigan before Judge Paul Paruk.[10] When Muhammad took the stand to testify, the judge asked her to remove her veil.[11] She told him that she could not take it off in front of a man, as doing so would violate her religion.[12] Due to her refusal, the Judge dismissed Muhammad's case.[13] Muhammad filed a civil rights claim in the federal court for the Eastern District of Michigan, but the district court judge declined to exercise jurisdiction over the claim for declaratory relief.[14] Initially, Muhammad appealed that decision, but for unknown reasons, she dropped her appeal prior to oral arguments, leaving the case unresolved.[15] Following Muhammad's case, the Michigan Supreme Court[16] altered Michigan's rules of evidence in 2009,

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5 Amany R. Hacking, *A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America*, 54 ST. LOUIS U. L.J. 917, 922 (2010).

6 *U.S. Judge Jails Muslim Woman Over Head Scarf*, MSNBC.COM (Dec. 17, 2008, 2:48 PM), http://www.msnbc.msn.com/id/28278572/.

7 U.S. CONST. amend. I.

8 *See* Transcript of Record, Muhammad v. Enterprise Rent-A-Car, No. 06-41896-GC (Mich. Dist. Ct. Oct. 11, 2006) [hereinafter Transcript].

9 *Muslim Veils*, *supra* note 2 (explaining that the niqab is closely related to the burka, but differs in that the burka has a screen covering the face, whereas the niqab has an open slit leaving the eyes exposed).

10 Transcript, *supra* note 8, at 1, 3.

11 *Id.* at 3-5.

12 *Id.* at 4, 6.

13 *Id.* at 5-6.

14 Muhammad v. Paruk, 553 F. Supp. 2d 893, 901 (E.D. Mich. 2008).

15 Adam Schwartzbaum, Comment, *The* Niqab *in the Courtroom: Protecting Free Exercise of Religion in a Post-*Smith *World*, 159 U. PA. L. REV. 1533, 1535 n.17 (2011) (explaining the procedural history of the case and the timeline of events).

16 The Michigan Constitution vests judicial rulemaking authority in the State Supreme Court. MICH. CONST. art. VI, § 5.

essentially affirming Judge Paruk's decision and granting general discretion over the appearance of witnesses to state court judges.[17]

A proper analysis of these issues requires an examination of the Supreme Court's free exercise jurisprudence, which underwent a significant shift in 1990 with *Employment Division v. Smith*.[18] Despite precedent requiring that strict scrutiny be applied to laws burdening the free exercise of religion,[19] the *Smith* Court held that laws shown to be neutral and generally applicable do not require strict scrutiny review; instead, such laws trigger rational basis review.[20] This Comment argues that a proper application of *Smith*, as clarified in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[21] protects free exercise rights when courts recognize the substance of the neutrality and general applicability requirements of *Smith*. This Comment applies free exercise law to restrictions on Islamic veils[22] worn by witnesses testifying in court under the following three legal scenarios: (1) a judge's discretionary restriction on a face covering without the support of any written law, like in Muhammad's original case; (2) a face-covering restriction under the authority of Michigan Rule of Evidence ("MRE") 611(b); and (3) a face-covering restriction in the context of a criminal trial.

Part I of this Comment provides background on the Islamic practice of veiling and its conflicts with the legal system. Part II gives an overview of Free Exercise Clause jurisprudence and demonstrates the need for a revival of the *Church of Lukumi* framework. A similar discussion of relevant Confrontation Clause case law follows in Part III. Part IV proposes identifying and applying a fifth, timing prong that underlies the Supreme Court's analysis in *Church of Lukumi*. Finally, Part V applies this framework and concludes that (1) discretionary government actions that burden religious exercise, but are not based on written laws, cannot be considered neutral laws of general applicability; and (2) MRE 611(b) is not a neutral law of general applicability; but (3) the Confrontation Clause of the Sixth Amendment is neutral and generally applicable, and Muslim women should not receive an exception to the Confrontation Clause's face-to-face requirement. Thus, strict scrutiny should apply to veil restrictions in civil cases, and rational basis review should apply in criminal cases.

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17 *See* MICH. R. EVID. 611(b).

18 494 U.S. 872 (1990).

19 *See* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) (considering whether the eligibility provisions of the South Carolina statute enforced a compelling state interest).

20 *See Smith*, 494 U.S. at 879.

21 508 U.S. 520 (1993).

22 This Comment uses the Islamic veil as the prototype for examining the free exercise issue. Notably, this analysis would also apply to other cases where individuals attempted to wear veils on religious grounds.

I. ISLAMIC VEILING AND U.S. LAW

To understand the conflict between the veiling practice of some Muslim women and the U.S. legal system, one must understand why some Muslims wear veils and how similar conflicts have played out worldwide. This Part, first, provides background on Muslim veiling practices. It then examines the cultural and legal conflicts that can arise between Muslim practices and Western legal customs, focusing on Ginnah Muhammad's conflict with the Michigan court system.

A. *Practice of Veiling*

The Holy Qur'an, the sacred text for Muslims, states: "Tell the faithful women to lower their gaze and guard their private parts and not display their beauty except what is apparent of it, and to extend their scarf to cover their bosom."[23] This verse is often cited as support for the practice, which varies worldwide, of Muslim women wearing head coverings or veils.[24] One of the most common garments is the hijab, a scarf covering the hair and neck but leaving the face visible.[25] A less common practice, and the focus of this Comment, is the niqab,[26] which consists of completely covering the body with a robe and a veil covering the whole face except for the eyes.[27] Veiling practices vary in different parts of the world,[28] as do opinions on what the Qur'an actually requires women to wear.[29] The concept of veiling also comes from an interpretation of the *Hadith*, a collection of the recorded sayings and actions of the prophet Muhammad.[30] Some Muslims argue that the hijab is the only thing required by Islam, and that a veil is a cultural

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23 Asser, *supra* note 2 (quoting the QUR'AN 24:31 (English trans.)) (internal quotation marks omitted).

24 *Id.* This Section relies on a very concise and easy-to-read summary of the practice of veiling put together by BBC News. *See id.* The theology and scholarly debate regarding the practice of veiling is far more complex than the brief description provided in this Comment. For a more extensive discussion of the topic, see Aliah Abdo, Comment, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 446 (2008).

25 Asser, *supra* note 2.

26 *Id.* The niqab is closely related to the burka, which is more common in certain countries like Afghanistan; the primary difference is that the niqab leaves an opening for the eyes, whereas the burka has a full screen covering the face. *Muslim Veils*, *supra* note 2.

27 Asser, *supra* note 2.

28 Abdo, *supra* note 24, at 446 (discussing the diversity of practices of hijab among Muslims worldwide).

29 Asser, *supra* note 2.

30 Abdo, *supra* note 24, at 448.

choice, while others believe that a full veil is religiously mandated.[31] The distinction between whether a practice is required by a religion or an option is relevant because it may have legal ramifications, particularly for Muslims living in Western countries.[32] This Comment focuses only on face-covering veils, like the niqab and burka, and the conflict between veiling and the U.S. legal system.

B. *Conflicts Between the Veil and the U.S. Legal System*

The growth of the Muslim population in the United States[33] and new policies following the September 11, 2001 terrorist attacks have led to a number of conflicts between U.S. law and the religious practices of some Muslims. These conflicts include incidents of racial profiling, prisoners' being denied the ability to practice their religion, and restrictions on Muslim women's dress in courtrooms and public places.[34]

In Ginnah Muhammad's case, the judge told her "[y]ou can either take [the veil] off and you can give me the testimony . . . but if, in fact, you do not wish to . . . I have to dismiss your case."[35] He also stated that he understood the veil as a "custom thing" and not a "religious thing."[36] Additionally, he emphasized that he needed to see Muhammad's face to determine whether she was telling the truth.[37] Nevertheless, she refused to remove her veil and had her case dismissed.[38] Following this incident, Muhammad filed a civil rights claim in federal court, claiming that Judge Paruk violated her free exercise rights.[39] Federal District Judge John Feikens chose not to exercise jurisdiction over the claim for declaratory relief.[40] He issued an opinion explaining, among other things, that the tension caused by evaluating the neutrality and general applicability of the day-to-day practices of a state court judge would be too great to exercise jurisdiction.[41] Muhammad appealed her case to the U.S. Court of Appeals for the Sixth Circuit, but she

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31 *See, e.g.*, Transcript, *supra* note 8, at 4-5 (noting Judge Paruk's statement that Muslim women told him that a hijab is religiously required, but that a full veil is optional; Ms. Muhammad, a Muslim woman, argues that the full veil is religiously required).

32 Schwartzbaum, *supra* note 15, at 1536 n.18 (observing that the U.S. Constitution protects religious practice but not religious custom).

33 Roaa M. Al-Heeti, *Why Nursing Homes Will Not Work: Caring for the Needs of the Aging Muslim American Population*, 15 ELDER L.J. 205, 207-08 (2007) (noting that there are now approximately six million Muslims in the United States, and the population continues to grow).

34 Hacking, *supra* note 5, at 922, 924.

35 Transcript, *supra* note 8, at 5-6.

36 *Id.* at 5 (internal quotation marks omitted).

37 *Id.* at 3-4.

38 *Id.* at 6.

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

40 *Id.* at 901.

41 *Id.* at 900.

dropped the case prior to oral argument, leaving the First Amendment question unanswered.[42]

Following the dismissal of Muhammad's case and the publicity that accompanied it, the Michigan Supreme Court approved an amendment to its rules of evidence in 2009 that affirmed Judge Paruk's actions. Michigan Rule of Evidence 611(b) now states:

> (b) *Appearance of Parties and Witnesses.* The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.[43]

The court voted five to two to approve this amendment and issued several opinions, including two concurrences and a dissent.[44] The dissent wanted a religious exception to be included in the language of MRE 611(b), but did not argue that the Free Exercise Clause of the First Amendment required such an exception.[45] Muhammad's case in Michigan appears to be the first documented case regarding veils and testimony, and MRE 611(b) is the first major response to the problem. This Comment examines the unanswered question regarding the level of protection provided by the Free Exercise Clause for witnesses who want to wear religious face coverings in court.

II. FREE EXERCISE JURISPRUDENCE

The religion clauses of the First Amendment of the U.S. Constitution state that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[46] Differing interpretations of this provision have led to a complex body of law.[47] The complexity mainly arises from difficult decisions regarding when the Constitution[48] requires a religious exemption for conduct otherwise restricted by law.[49]

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42 Schwartzbaum, *supra* note 15, at 1535 n.17 (detailing the mysterious dropping of the case).

43 MICH. R. EVID. 611(b) (emphasis added).

44 Order Adopting Amendment of Rule 611 of Michigan Rules of Evidence, ADM File No. 2007-13 (Mich. Aug. 25, 2009), *available at* http://www.courts.michigan.gov/SUPREMECOURT/RESOURCES/ADMINISTRATIVE/2007-13-08-25-09-Order.pdf.

45 *Id.* at 10, 14 (Kelly, J., concurring in part and dissenting in part).

46 U.S. CONST. amend. I.

47 *See* Schwartzbaum, *supra* note 15, at 1543-54 (discussing where rational basis and strict scrutiny apply, and the varying ways which different courts in the United States apply the hybrid-rights standard).

48 The Supreme Court incorporated the First Amendment's religion clauses through the Fourteenth Amendment, thus making those clauses to apply to the states. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

49 *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 874 (1990) (deciding whether religious use of a controlled substance could receive an exemption under the Free Exercise Clause).

The turning point in the Supreme Court's free exercise jurisprudence came in the 1990 *Smith* decision.[50] To understand free exercise jurisprudence as it exists today, one must first consider *Smith* and how it shifted free exercise law away from previous holdings.[51] Additionally, one must understand the Court's application of *Smith* in *Church of Lukumi* and Congress's response to *Smith* via the 1993 Religious Freedom Restoration Act ("RFRA").[52]

A. Employment Division v. Smith*: A Shift in Free Exercise Jurisprudence*

An examination of free exercise law begins first with *Reynolds v. United States*.[53] In *Reynolds*, a plaintiff challenged a criminal law forbidding polygamy on grounds that his religion compelled the practice.[54] The Court ruled that laws may not interfere with an individual's beliefs or opinions, but can interfere with his actions.[55] Allowing an individual to invoke religious exemptions to neutral laws, the Court said, would "permit every citizen to become a law unto himself."[56] *Reynolds*, decided in 1878, remained the Court's primary free exercise decision for nearly a century.

In 1963, the Supreme Court decided *Sherbert v. Verner*.[57] In that case, Ms. Adell Sherbert, a member of the Seventh-Day Adventist Church, lost her job because she refused to work on Saturday, her faith's Sabbath day.[58] Her efforts to obtain new employment were unsuccessful due to her inability to work Saturdays.[59] Ms. Sherbert applied for unemployment compensation under a South Carolina law that made an individual ineligible if she failed, "without good cause," to accept suitable work.[60] The state denied her the compensation.[61] Although *Reynolds* held that religious conviction does not shield actions from government regulation, the *Sherbert* Court distinguished *Reynolds* and its progeny as limited to protecting "public safety, peace or order."[62] The Court read *Reynolds* narrowly and found that an un-

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50 *Id.* at 876-90.

51 *Id.*

52 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-46 (1993); *see also* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

53 98 U.S. 145 (1878).

54 *Id.* at 161-62.

55 *Id.* at 166.

56 *Id.* at 166-67.

57 374 U.S. 398 (1963).

58 *Id.* at 399.

59 *Id.*

60 *Id.* at 400-01 (internal quotation marks omitted).

61 *See id.* at 401.

62 *Id.* at 403.

employment-compensation law did not fall under that scope.[63] Reasoning that the law burdened Ms. Sherbert's free exercise rights, the Court held that the State must demonstrate a "compelling state interest" to justify any laws burdening an individual's free exercise of religion, and that South Carolina had failed to do so.[64]

In 1990, after *Sherbert* had been the default approach for years,[65] the Court in *Smith* significantly shifted its interpretation of the Free Exercise Clause.[66] In that case, two men were fired from their jobs for ingesting peyote, an illegal drug.[67] They used peyote for sacramental purposes as part of a Native American church to which they belonged.[68] The men were denied unemployment compensation because they were fired for "misconduct."[69] The Oregon Supreme Court, applying *Sherbert*, determined that denial of unemployment compensation placed a burden on the free exercise of religion.[70] Relying primarily on *Reynolds*, the Supreme Court reversed and held that an individual's free exercise right does not excuse him from complying with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[71]

Justice Antonin Scalia wrote the decision for the five-justice majority.[72] The other four Justices concurred in parts one and two of an opinion written by Justice Sandra Day O'Connor, but criticized the majority opinion as one that "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[73]

The majority reached its conclusion by reading *Sherbert* narrowly, distinguishing other cases as hybrid situations,[74] and relying on *Reynolds*.[75] The *Smith* majority read *Sherbert* narrowly by finding that the Court only

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63 *Sherbert*, 374 U.S. at 403.

64 *Id.* at 403, 408 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (internal quotation marks omitted).

65 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (granting a religious exemption to mandatory schooling laws for the Amish).

66 Emp't Div. v. Smith, 494 U.S. 872, 876-90 (1990).

67 *Id.* at 874.

68 *Id.*

69 *Id.* (internal quotation marks omitted).

70 *Id.* at 875 (explaining that the Oregon Supreme Court cited *Sherbert* to rule for the plaintiffs).

71 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (internal quotation marks omitted).

72 *Smith*, 494 U.S. at 874.

73 *Id.* at 891 (O'Connor, J., concurring). Justice Blackmun, joined by Justices Brennan and Marshall, wrote a dissenting opinion as well. *Id.* at 907 (Blackmun, J., dissenting).

74 *Id.* at 882 (majority opinion); *see also* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (combining free exercise rights of students and rights of parents to direct the education of their children).

75 *Smith*, 494 U.S. at 879.

used the compelling state interest test three times since *Sherbert* to strike down a government action and each time it dealt with unemployment-compensation statutes.[76] The Court articulated its narrow reasoning as follows: "[t]he statutory conditions [in *Sherbert* and [similar cases]] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions."[77] In other words, the unemployment laws challenged in previous cases allowed government officials to make case-by-case or individualized exemptions based on a subjective "good cause" standard.[78] Therefore, the Court read *Sherbert* as limited to cases where the law being challenged had created a "mechanism for individualized exemptions."[79] This portion of the *Smith* decision is often known by courts and scholars as the *Sherbert* exception, where the compelling-state-interest test would apply.[80]

In *Smith*, the Court acknowledged using the compelling-state-interest test in other free exercise situations, but it distinguished those cases as "hybrid situation[s]"[81] where free exercise rights were violated in combination with some other constitutional right.[82] The opinion did not give much guidance on how to identify these hybrid situations in future cases.[83]

To support its "neutral and generally applicable" standard in *Smith*, the Court cited *Reynolds* as standing for the principle that while government may not interfere with "mere religious belief," individual "conduct" can be restrained even if the conduct is based on religion.[84] Although the Court had not frequently cited *Reynolds* in the years leading up to *Smith*, the majority referred to precedent that demonstrated implicit approval of *Reynolds*.[85] Ultimately, the Court used *Reynolds* to show support for the new *Smith* standard on the ground that an alternative holding would allow "every citizen to become a law unto himself."[86] By not mandating religious accommodations on free exercise grounds, the Court gave deference and authority to

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76 *Id.* at 883.

77 *Id.* at 884 (first alteration in original) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (internal quotation marks omitted).

78 *Id.*

79 *Id.* (quoting *Bowen*, 476 U.S. at 708) (internal quotation marks omitted).

80 Schwartzbaum, *supra* note 15, at 1558-59.

81 *Smith*, 494 U.S. at 881-82.

82 *Id.*

83 Though some have tried to develop the hybrid concept, the Court has yet to apply it substantively. *See, e.g.*, Schwartzbaum, *supra* note 15, at 1554.

84 *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)) (internal quotation marks omitted).

85 *Id.* at 879-80.

86 *Id.* at 879 (quoting *Reynolds*, 98 U.S. at 167) (internal quotation marks omitted).

the democratic branch of government, meaning the legislatures, to provide such accommodations if they so desire.[87]

Ultimately, *Smith* held that the lesser, rational basis standard of review may be applied to laws that incidentally burden religious exercise if the following conditions are met: (1) the law is neutral and generally applicable; (2) the law has no mechanism for individualized exemptions (the *Sherbert* exception); and (3) the law is a not a "hybrid situation."[88] Regardless of one's opinion regarding the outcome in *Smith*, it certainly has complicated free exercise law. Furthermore, the *Smith* majority failed to provide a sufficient framework for lower courts to use when applying this standard.[89]

B. *The* Smith *Standard Applied and Clarified in* Church of Lukumi

The Court returned to the issue three years later in the 1993 *Church of Lukumi* case, where it expanded on the *Smith* standard, giving it more substance.[90] In *Church of Lukumi*, a church of the Santeri faith, which uses animal sacrifice as part of its rituals, sought permits to build a place of worship in Hialeah, Florida.[91] Aware of the Santeri practice, the Hialeah City Council passed ordinances forbidding the slaughter of animals for "sacrifice" or "ritual."[92] The ordinances included a specific exemption for establishments licensed to slaughter for food purposes, though it failed to provide criteria for case-by-case individualized exemptions.[93] Therefore, the *Sherbert* exception described in *Smith* did not apply.[94] The church challenged the ordinance as a violation of the Free Exercise Clause.[95] Applying *Smith*, the Court held that the ordinances passed by the city did not constitute neutral laws of general applicability.[96] To reach this conclusion, the Court developed substance for the neutrality and general applicability requirements.[97] Although the Court did not format its analysis in multiple parts, this Comment adopts one author's effort of extracting the Court's analysis and formatting it into a four-part test.[98]

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87 *See id.* at 878-80.

88 *See id.* at 879-84.

89 *See* discussion *infra* Part II.B.

90 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-40, 542-45 (1993).

91 *Id.* at 524-26.

92 *Id.* at 527-28 (internal quotation marks omitted).

93 *Id.*

94 *See id.*; Schwartzbaum, *supra* note 15, at 1558-59.

95 *Church of Lukumi*, 508 U.S. at 528.

96 *Id.* at 546.

97 *Id.* at 533-40, 42-45.

98 *See* Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1075-76 (2000).

A majority of the Court joined an opinion written by Justice Anthony Kennedy.[99] The Court's approach is best broken down into two parts examining the law's neutrality and two parts examining its general applicability.[100] The Court admitted that "neutrality" and "general applicability" are "interrelated," but it apparently maintained them separately for clarity's sake.[101] The Court's approach proceeded to answer four questions: (1) Is the law facially neutral based on its text?; (2) Does the operation of the law demonstrate that the law has a discriminatory object?; (3) Is the law designed to serve a general or specific purpose?; and (4) Does the law, in effect, only impact one religion for its conduct?[102]

In applying the Free Exercise Clause to the city ordinance, the Court began with neutrality. First, it acknowledged that the legislature should receive deference on the question of facial neutrality, and that most laws will satisfy the test.[103] Even though the ordinances used the religious words "ritual" and "sacrifice," the Court held the law facially neutral because those words have secular meanings as well.[104] Second, the Court concluded under the second neutrality prong that the law's operation demonstrated a discriminatory purpose.[105] As evidence, the Court cited one of the ordinances that outlined the community's *particular* objections to the Santeri religious practice.[106] The Court found that the ordinances, as structured, were remote from the stated general object.[107]

The general applicability determination turned first on whether the law had a specific or general purpose.[108] The Court focused its analysis on the under-inclusive nature of the law's structure.[109] The Court inferred that the law's numerous secular exceptions demonstrated its actual purpose of restricting Santeri religious practices, as opposed to its stated purpose of pro-

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99 *Church of Lukumi*, 508 U.S. at 523. One part of Justice Kennedy's analysis, not joined by a majority of the Court, considers the legislative history of statements made by members of the legislative body to determine whether the legislature intended to discriminate against a particular religion. *Id.* at 540-42 (opinion of Kennedy, J.). Justice Scalia's concurring opinion took issue with Justice Kennedy's suggestion that the Court should look to the legislature's motive to determine if it passed a statute with discriminatory intent. *Id.* at 558 (Scalia, J., concurring). Justice Scalia argued that determining a singular motive of a legislative body made up of individuals is nearly impossible and the Court should instead focus on the law's effect. *Id.* Other than this contention, Justice Scalia and Chief Justice Rehnquist joined with the rest of Justice Kennedy's test. *Id.*

100 *See* Kaplan, *supra* note 98, at 1076.

101 *See Church of Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) (internal quotation marks omitted).

102 *See* Kaplan, *supra* note 98, at 1077-79.

103 *See Church of Lukumi*, 508 U.S. at 533-34 (majority opinion).

104 *Id.* (internal quotation marks omitted).

105 *See id.* at 534.

106 *Id.* at 535-36.

107 *Id.* at 535.

108 *Id.* at 544-45.

109 *Church of Lukumi*, 508 U.S. at 544-45.

moting health.[110] This inference led the Court to conclude in part four of its analysis that the ordinances almost only impacted a particular religious practice.[111] The Court noted that the Santeri were nearly the only individuals the rules affected, so the ordinances were not generally applicable.[112]

Justice Kennedy argued for a fifth prong, but a majority of the Court did not join this portion of the opinion.[113] The additional part of Justice Kennedy's test proposed using "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body."[114] After making this point, however, Justice Kennedy focused primarily on statements made by particular legislators.[115] In his concurring opinion, Justice Scalia wrote, "I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers* . . . ."[116] Except for Justice Scalia's objection, a majority of the Court agreed to the previously mentioned four units of analysis.[117]

The approach in *Church of Lukumi*, broken down into four parts, gives significant meaning to the "neutral law of general applicability" test first outlined in *Smith*.[118] This test provides a crucial threshold that a law must overcome in order to trigger a lower standard of review for free exercise challenges. *Church of Lukumi*, however, did not garner much attention because Congress's passage of RFRA almost immediately made it inapplicable.

C. *The Religious Freedom Restoration Act of 1993*

Though some thought the Court headed in the right direction with *Smith*,[119] the decision generally received negative reactions.[120] Judges and

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110 *Id.*

111 *Id.* at 543.

112 *Id.* at 545.

113 *See id.* at 540-42 (opinion of Kennedy, J.).

114 *Id.*

115 *Church of Lukumi*, 508 U.S at 541.

116 *Id.* at 558 (Scalia, J., concurring).

117 *Id.*

118 *See* discussion *supra* Part II.A.

119 *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991) (defending the idea of moving away from requiring states to prove a compelling state interest for restrictions but still calling the full opinion in *Smith* indefensible).

120 *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (identifying the immediate negative reaction to *Smith*); *see also* James J. Musial, *Free Exercise in the 90s: In the Wake of* Employment Div., Dep't of Human Resources v.

legal scholars were not the only ones upset; the decision sparked enough controversy for Congress to act.[121] In 1993, Congress adopted RFRA, which became law shortly after the Court handed down *Church of Lukumi*.[122] This legislation reinstated the *Sherbert* test, rendering *Smith*, and by extension, *Church of Lukumi*, largely irrelevant.[123] RFRA directly applied the *Sherbert* standard to all state and federal laws.[124]

The law remained in effect until 1997, when the Court decided *City of Boerne v. Flores*,[125] where the constitutionality of RFRA, as it applied to the states, was at issue.[126] In *Flores*, a local zoning board denied a Catholic archbishop a permit to build a church.[127] The archbishop challenged the decision under RFRA.[128] The Court held that Congress exceeded its power under Section 5 of the Fourteenth Amendment when it passed RFRA and made it applicable to the states.[129] Therefore, the Court struck down RFRA as it applied to the states, but it left the portion applying to federal government action in place.[130]

Following *Flores*, both *Smith* and *Church of Lukumi* apply to a significant number of cases. RFRA still applies to federal laws and federal government actions that burden religious exercise.[131] Following the Supreme Court ruling in *Flores*, some state legislatures have passed statewide RFRA laws.[132] Although *Smith's* reach is more limited following RFRA and *Flores*, it still applies to all state laws that: (1) do not create mechanisms for individualized exemptions, (2) do not present hybrid situations, and (3) are passed in states lacking statewide RFRA laws.[133]

However, because Congress, shortly after the *Church of Lukumi* decision, passed RFRA to overturn *Smith*, and RFRA remained in full effect until 1997, both *Smith* and *Church of Lukumi*, therefore, were dormant for

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Smith, 4 TEMP. POL. & CIV. RTS. L. REV. 15, 41-51 (1994) (surveying the numerous critiques of *Smith* levied by scholars around the country).

121 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

122 *See id.* § 2000bb(b).

123 *Id.*

124 *See id.* §§ 2000bb-2(1) to bb-3(a).

125 521 U.S. 507 (1997).

126 *Id.* at 511.

127 *Id.* at 511-12.

128 *Id.* at 512.

129 *Id.* at 532-33.

130 *See id.*

131 *See Flores*, 521 U.S. at 532-34.

132 Schwartzbaum, *supra* note 15, at 1546 n.95 (listing states that have passed statewide versions of RFRA).

133 *See* Emp't Div. v. Smith, 494 U.S. 872, 878-88 (1990).

four years.[134] Due to this history, the lower courts and scholars never truly embraced the Supreme Court's clarification of *Smith* in *Church of Lukumi*.

D. *The History of Post-*Smith *Free Exercise and the Need for Reviving* Church of Lukumi

Handed down only three years prior to RFRA, *Smith* lacked sufficient time to develop in the lower courts.[135] Many commentators, though, considered the *Smith* test weak, as they often assumed laws to be neutral and generally applicable without considering the substance of the test.[136] Absent RFRA, *Church of Lukumi* might have altered these views about the effectiveness of *Smith*, because it provided a fairly rigorous standard for determining whether a law is actually neutral and generally applicable.[137] Due to RFRA, however, *Church of Lukumi* sat dormant while opinions of the *Smith* test were given time to solidify.[138]

One of the main criticisms of *Smith* was that the decision's shift away from the compelling state interest test lacked the support of precedent.[139] How courts ought to apply the *Smith* test also remained an open question, as the opinion failed to include guidance for determining neutrality and general applicability.[140] The Court provided a workable framework in *Church of Lukumi*, but RFRA hindered its development, as did the subsequent patchwork of free exercise law.[141] Not until 1997, when the Court partially revived *Smith* in *Flores*, did lower courts have the opportunity to apply

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134 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

135 *See id.*; *Smith*, 494 U.S. at 874-76.

136 *See, e.g.*, Claire McCusker, Comment, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 391-92 (2007) (failing to analyze neutrality and general applicability under the *Lukumi* framework and assuming the Michigan judge's actions complied with neutrality and general applicability requirements); Brian M. Murray, Note, *Confronting Religion: Veiled Muslim Witnesses and the Confrontation Clause*, 85 NOTRE DAME L. REV. 1727, 1738 (2010) (focusing on the Confrontation Clause as a neutral, generally applicable law, but not subjecting it to an intensive analysis); Schwartzbaum, *supra* note 15, at 1554 (focusing on the hybrid situation exception from *Smith* and assuming MRE 611(b) is neutral and generally applicable); Aaron J. Williams, Comment, *The Veiled Truth: Can the Credibility of Testimony Given by a Niqab-Wearing Witness be Judged Without the Assistance of Facial Expressions?*, 85 U. DET. MERCY L. REV. 273, 273-74 (2008) (focusing on demeanor evidence and not considering neutrality or general applicability of a judge's actions).

137 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-40, 42-45 (1993).

138 *See supra* Part II.C.

139 *See, e.g.*, McConnell, *supra* note 120, at 1129.

140 *See Smith*, 494 U.S. at 879-80 (providing examples of neutral and generally applicable laws but not explaining the standard).

141 *See* discussion *supra* Part II.C.

Church of Lukumi.[142] By this time, however, seven years had passed since *Smith*, and RFRA had demonstrated a clear congressional preference for the compelling state interest test.[143] Due to the stunted development of *Church of Lukumi*, it is now in need of a revival. Free exercise is not dead under *Smith* when the framework of *Church of Lukumi* is properly applied. A faithful application of the *Church of Lukumi* rationale will lead courts to discover that fewer laws are actually neutral and generally applicable than commentators originally thought.

III. CONFRONTATION CLAUSE JURISPRUDENCE AND EXCEPTIONS TO THE FACE-TO-FACE REQUIREMENT

Analysis of the Free Exercise Clause of the First Amendment requires a different approach when it conflicts with another constitutional provision, like the Confrontation Clause of the Sixth Amendment, which gives a criminal defendant the right "to be confronted with the witnesses against him."[144] There are many facets to the Confrontation Clause, but two significant Supreme Court cases[145] are particularly relevant to the issue of disguised or shielded witnesses: *Coy v. Iowa*[146] and *Maryland v. Craig*.[147] First, this Part explains the state of the law following *Coy* and *Craig*. Second, it provides a brief discussion of the role of demeanor evidence in the courtroom.

A. *The Confrontation Clause Cases*

In *Coy*, a criminal defendant was accused of committing lascivious acts with a child.[148] The issue presented to the Court involved whether or not allowing the child to avoid eye contact with the defendant by testifying behind a screen violated the defendant's Sixth Amendment rights.[149] The Court found that the word "confrontation" means that a person has the right

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142 A West KeyCite check of *Church of Lukumi* shows that it did not receive any in-depth treatment by lower courts prior to the passage of RFRA.

143 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

144 U.S. CONST. amend. VI.

145 Marc C. McAllister, *The Disguised Witness and* Crawford's *Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 482-88 (2010).

146 487 U.S. 1012 (1988).

147 497 U.S. 836 (1990).

148 *Coy*, 487 U.S. at 1014.

149 *Id.*

to meet his or her accuser face-to-face.[150] It reasoned that past exceptions to the Confrontation Clause were granted based on rights inferred from the text, whereas in this case the issue dealt squarely with the "irreducible literal meaning of the Clause" requiring a face-to-face meeting.[151] The *Coy* Court held that shielding the complaining witness from the defendant violated the defendant's rights.[152] The majority also noted that the defense failed to provide an individualized finding that the particular witness needed special protection.[153] The Court stated that any possible exception would only be granted if "necessary to further an important public policy," but left that issue for another day.[154]

In *Craig*, the Court considered whether a child who accused a defendant of sexual abuse could testify outside of the courtroom via one-way closed circuit television.[155] Justice O'Connor, writing for the majority, took the *Coy* Court up on its suggestion to decide exceptions at a later date.[156] Justice O'Connor relied on the "important public policy" language and the lack of "individualized findings" language in *Coy* to justify granting an exception in *Craig*.[157] The *Craig* Court required that any procedure allowing less than face-to-face in person testimony must pass a two-part test.[158] The first part requires the demonstration of an important public policy purpose for granting the exception, and the second mandates that the testimony's reliability be "otherwise assured."[159]

The Court held that the protection of an accusing child qualified as a significant public policy if individualized findings demonstrated that the particular child needed such protection.[160] Maryland law required, and the trial court in *Craig* found, that the individual child needed special protection.[161] The Court also had to consider the reliability of testimony given via one-way, closed-circuit television.[162]

To demonstrate whether the reliability of testimony is preserved, the Court held that three out of the following four "elements of confrontation" must be met: (1) the opportunity to examine the witness in person, (2) opportunity for cross-examination, (3) testimony under oath, and (4) opportu-

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150 *Id.* at 1020-21.

151 *Id.* at 1021.

152 *Id.* at 1020-21.

153 *Id.* at 1021.

154 *Coy*, 487 U.S. at 1021.

155 Maryland v. Craig, 497 U.S. 836, 840-43 (1990).

156 *Id.* at 844.

157 *Id.* at 845, 857 (internal quotation marks omitted).

158 *Id.* at 845-46.

159 McAllister, *supra* note 145, at 499 (quoting *Craig*, 497 U.S. at 850) (internal quotation marks omitted).

160 *Craig*, 497 U.S. at 855.

161 *Id.*

162 *Id.* at 851.

nity to assess witness demeanor.[163] The procedure in *Craig* satisfied the reliability test because it only lacked "a personal examination."[164] The judge, the jury, and the defendant's attorney conducting cross-examination viewed the witness's demeanor and the child testified under oath.[165] Therefore, the process satisfied Justice O'Connor's test, and the Court granted an exception to the Confrontation Clause's face-to-face requirement.

While *Coy* sets the baseline for the requirement of a face-to-face meeting, *Craig* actually controls and sets the standard for whether or not a court will grant an exception to that requirement. Notably, the Court has focused on somewhat different implications of the Confrontation Clause in recent years.[166] However, the test set forth in *Craig* remains applicable to requests for exceptions to the face-to-face requirement of the Confrontation Clause.

B. *Demeanor Evidence in Court*

Demeanor evidence, the outward behavior of a witness, functions as an underlying premise for the Confrontation Clause.[167] Demeanor plays a role both in allowing the jury to judge witness credibility and in allowing counsel to make an effective cross-examination.[168] The Court has clearly articulated the idea that witness demeanor is an important part of the protections of the Confrontation Clause,[169] which only applies to criminal prosecutions, but the status of demeanor evidence in civil cases is less clear.[170]

The Constitution lacks a clear basis for requiring the viewing of demeanor evidence in civil cases. However, as one law professor has observed, "[L]ive trial testimony would hardly be insecure if it had no place in the Constitution. Purely as a political matter, American lawyers and nonlawyers alike would not tolerate any major curtailment of an institution so deeply embedded in our legal tradition."[171] Nevertheless, research has increasingly shown that transcripts, rather than live testimony, allow fact finders to do a better job of executing their truth-telling function.[172] While

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163 McAllister, *supra* note 145, at 499 (quoting *Craig*, 497 U.S. at 846) (internal quotation marks omitted).

164 *Craig*, 497 U.S. at 845 (internal quotation marks omitted).

165 *Id.* at 851.

166 *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 42-60 (2004) (focusing entirely on physical presence in the courtroom and on the opposing counsel's ability to complete a full cross-examination).

167 Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1077 (1991).

168 McAllister, *supra* note 145, at 502-06.

169 *Craig*, 497 U.S. at 845-46.

170 *See* Wellborn, *supra* note 167, at 1091.

171 *Id.* at 1091-92.

172 *Id.* at 1091; *see also* Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1159 (1993) ("[T]he long-standing confidence in the principle of demeanor evidence is unfounded . . . .").

demeanor evidence has a clear constitutional place in criminal prosecutions, where the Confrontation Clause applies, the science calling the value of demeanor evidence into question provides a reason to reconsider its place in the civil setting.

Although the importance of demeanor evidence is considered part of the U.S. legal tradition, the lack of a constitutional requirement in civil proceedings, along with scientific evidence questioning its value, could lead to significant changes. First, the scientific evidence may cause judges and lawyers eventually to abandon, or at least weaken, the strong preference for demeanor evidence. The frequency with which courts use demeanor evidence, however, makes a voluntary shift unlikely.[173] Second, and more importantly, when constitutional rights are burdened by a preference for demeanor evidence in a civil setting, those rights will likely outweigh that preference.

IV. TIMING AS THE FIFTH PRONG IN THE *CHURCH OF LUKUMI* FRAMEWORK

This Part proposes identifying and emphasizing a fifth prong to add to the *Church of Lukumi* framework. This additional prong is derived from a theme underlying the other four prongs: legislative timing. Focusing on an objective timeline allows courts to determine more effectively whether a law's object is to restrict a particular religious practice.

Due to the stunted development of the *Church of Lukumi* framework following its temporary hiatus after RFRA and before *Flores*, *Church of Lukumi* is in need of a revival and further examination.[174] To address this need, this Comment proposes identifying and adding a fifth element to the *Church of Lukumi* framework. The proposed prong would ask whether the context and timing surrounding a law's passage indicate that the law targeted a particular religious practice. The majority in *Church of Lukumi* implicitly used this type of analysis throughout its opinion, including the parts of the opinion joined by Justice Scalia.[175] This underlying theme is best seen through the way the majority characterizes particular facts.[176] For example, the Court stated that "[t]he prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987."[177] De-

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173 *See* Wellborn, *supra* note 167, at 1091-92.

174 *See* discussion *supra* Part II.D.

175 *Church of Lukumi*, 508 U.S. at 557-59 (Scalia, J., concurring) (joining in the entire majority opinion except for Section 2 of Part II-A).

176 *See id.* at 526 (majority opinion).

177 *Id.*

monstrating the relevance of timing, a majority of the Court also stated that "Ordinance 87-72[178] was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church."[179] This underlying reliance on legislative timing is implied throughout the opinion,[180] and this Comment proposes elevating it and bringing it to the foreground. It is true that many laws are passed in direct response to specific incidents. However, this Comment's proposal for the consideration of legislative timing is limited to the free exercise context.[181]

This proposal is not the same as the portion of Justice Kennedy's opinion that failed to garner the support of a majority on the Court.[182] Justice Scalia's disagreement with Justice Kennedy's approach does not foreclose the proposed fifth prong.[183] This Comment recommends that courts recognize the already existing fifth part of the analysis and focus on it to inform their application of the *Church of Lukumi* framework. The proposal aids in the analysis of a law's object, but it does not search for a legislative body's intent. While Justice Kennedy suggested using context and legislative history to determine legislative motive,[184] this Comment recommends that courts instead use context and timing to identify the law's object. Because a focus on context and timing underlies the portions of the analysis joined by Justice Scalia,[185] this proposal merely emphasizes an analysis already endorsed by the Court.

This fifth prong would focus entirely on any objectively discernable factual incidents occurring in the community and the timing of those events in relation to the passage of the law. It would require courts to reconstruct an objective timeline of the social and political context surrounding the passage of a law as evidence of whether, in effect, the law burdens only one religion. The proposed element does not—and may not—include an analysis of legislative history in the sense of using the statements of individual legislators to determine the intent of the entire body. The intended focus is limited to what the timing and context surrounding a law's passage might convey about that law's objective. Courts must be aware that this prong may not always be dispositive. The question really becomes: does timing, coupled with the other factors, indicate that the legislation is targeted at a particular religion? Adopting this fifth factor will aid courts in understand-

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178 *Id.* at 540 (considering multiple ordinances as one package; Ordinances 87-71 and 87-72 constituted two major parts of that package).

179 *Id.*

180 *Id.* at 534-36.

181 This Comment does not propose expanding this form of analysis beyond this subject matter.

182 *Church of Lukumi*, 508 U.S. at 540-42 (opinion of Kennedy, J.).

183 *Id.* at 558 (Scalia, J., concurring).

184 *Id.* at 540 (opinion of Kennedy, J.).

185 *Id.* at 540 (majority opinion).

ing the purpose of a law, particularly one passed in response to a particular incident.

For example, in *Church of Lukumi*, the Court could have considered the date public information became available regarding the Church's desire to hold religious services in the town, the date of any newspaper publications indicating public outrage over particular religious practices, the date the legislative body convened, and the date of the legislation's passage. This information could provide evidence that legislative action took place as a direct response to a public outcry. There is no bright line regarding how far back a court ought to look when considering contextual events. However, a reasonably direct relation must exist between the timeline of relevant events and the beginning of deliberations on a particular law. Because the legislative process can be lengthy, this Comment recommends using the beginning of deliberations that led to passage as a frame of reference for considering the relationship between a law's passage and relevant events in the community.

The timing prong would be less likely to implicate older laws than newer laws, which respond to modern developments. This is not to say that an old law that now burdens religious exercise is always neutral and generally applicable. Such a law would fail the general applicability test if modern circumstances caused it to apply only to a particular type of religious conduct.[186] Additionally, arbitrary enforcement of an old law that would otherwise be neutral and generally applicable might cause its invalidation under *Church of Lukumi*.[187] However, like traditional regulation of drug use at issue in *Smith*,[188] an old law passed without contemplation or awareness of a potential religious conflict that develops later is more likely to satisfy the neutrality and general applicability requirements. Laws like the ordinances in *Church of Lukumi* that are passed in reaction to particular conflicts with religion are far more likely to fail the neutral and general applicability tests, despite a state's attempts to make such laws appear lawful.[189]

The timing prong would also recognize the difference between older laws as applied to new religion and newer laws applied to old religion. If one wishes to start practicing a religion in a country or state that already has laws proscribing the type of conduct the religion requires, it will be far more difficult to challenge those laws than if a legislature passed them following the introduction and spread of the religion in the jurisdiction.

In sum, the proposal in this Comment has two major pieces. First, it promotes the extraction of a multipart test from the Court's opinion in

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186 For example, even if MRE 611(b) had been in existence prior to Judge Paruk's dismissal of Ginnah Muhammad's case, it would still not survive the *Church of Lukumi* test because the religious practices of Muslim women would still be "almost the only conduct subject to" the rule. *Id.* at 535-36.

187 *Id.* at 533-40, 542-45.

188 Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

189 *See Church of Lukumi*, 508 U.S. at 533-40, 542-45.

Church of Lukumi to make it easier for lower courts to apply.[190] Second, it identifies the underlying theme of legislative timing in the *Church of Lukumi* opinion, upon which a majority of the Court agreed. It then emphasizes to lower courts this underlying theme's importance by adding it to the test. The result is a framework made up of five interrelated parts derived from *Church of Lukumi*, some of which will be more important than others depending on the factual circumstances in a particular case.

V. APPLYING THE *CHURCH OF LUKUMI* FRAMEWORK TO RESTRICTIONS ON RELIGIOUS FACE COVERINGS IN COURT

This Part applies the *Church of Lukumi* framework, with a focus on the proposed fifth prong, to three different types of restrictions on religious veiling. First, the test is applied to Ginnah Muhammad's original case where a judge forbade her from wearing a veil solely based on his own discretion and unsupported by a written law. Second, this Part applies the proposed framework to the same scenario if it were to occur after the adoption of MRE 611(b). Finally, this Part considers the proposed test's application to veil restrictions occurring in the context of a criminal prosecution, where the Confrontation Clause of the Sixth Amendment applies.

A. *Judicial Discretion Alone: Veil Restrictions Prior to MRE 611(b)*

Prior to the passage of MRE 611(b), Judge Paul Paruk prevented Ginnah Muhammad from wearing a veil while she testified in small claims court.[191] In refusing to exercise jurisdiction over Muhammad's federal civil rights claim, District Court Judge John Feikens first noted that *Smith* applied to the case and also that "[u]nder this standard, if Paruk has a valid, neutral and generally applicable policy of requiring witnesses to keep their faces visible while giving testimony, that policy would not violate Muhammad's right to free exercise of her religion."[192] However, Judge Feikens went on to say that applying the *Smith* test would require an examination of how Judge Paruk runs his courtroom on a day-to-day basis.[193] Such a task would prove an extremely difficult undertaking for a reviewing court and would cause significant tension between federal and state courts.[194] Accordingly, Judge Feikens declined to exercise jurisdiction.

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190 *See id.*; *see also* Kaplan, *supra* note 98, at 1076.

191 Transcript, *supra* note 8, at 5-6.

192 Muhammad v. Paruk, 553 F. Supp. 2d 893, 900 (E.D. Mich. 2008).

193 *Id.*

194 *Id.*

How a higher court would go about examining an unwritten local policy for neutrality and general applicability remains unclear. An unwritten local policy likely does not constitute a "law" as understood in *Smith* and *Church of Lukumi*. Based on the transcript of the exchange between Judge Paruk and Muhammad, the judge never referenced any type of written policy or local rule to support his decision.[195] Furthermore, following Judge Paruk's decision, the Michigan Supreme Court felt the need to amend the Michigan Rules of Evidence to grant judges the authority to exercise reasonable control over the appearance of witnesses.[196] The addition of the new rule implies that Judge Paruk's action lacked the clear support of any existing law.[197]

In addition, the Court's focus on legislative action in *Smith* lends support to the idea that the word "law" implies written action by a lawmaking body with a legitimate source of authority.[198] For example, the Court wrote, "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[199] In this case, Michigan, in its constitution, granted the State Supreme Court legislative authority to make rules governing the practices and procedures in the state court system, but at the time of Ms. Muhammad's case, no such law existed.[200] When a state action that burdens the free exercise of religion is not based on any written law, the application of the *Smith* test becomes extremely difficult and perhaps impossible.[201]

Most free exercise cases, both before and after *Smith*, analyzed free exercise conflicts with statutes, rules, ordinances, and other types of written laws.[202] Reading *Smith* in light of *Church of Lukumi* demonstrates that in order to avoid strict scrutiny, a court must examine a case to determine whether a neutral, generally applicable *law* exists for the lower standard of *Smith* to be triggered.[203] *Church of Lukumi* focuses on neutrality and general applicability, but the entire framework assumes an examination of a *written* law.[204] As Judge Feikens articulated, determining whether Judge Paruk had a consistently neutral and generally applicable policy would be an intrusive

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195 *See* Transcript, *supra* note 8.

196 *See* MICH. R. EVID. 611(b).

197 *See id.*

198 *See* Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

199 *Id.* at 890.

200 *See* MICH. CONST. art. VI, § 5 (granting the State Supreme Court rulemaking authority).

201 *Cf. Smith*, 494 U.S. at 874-82 (applying the neutrality and general applicability test to a *written* Oregon law).

202 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525-28 (1993) (reviewing city council ordinance); *Smith*, 494 U.S. at 874 (reviewing state drug laws); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (reviewing compulsory school attendance law); Sherbert v. Verner, 374 U.S. 398, 399-401 (1963) (reviewing an unemployment compensation law).

203 *See Smith*, 494 U.S. at 878-79.

204 *See Church of Lukumi*, 508 U.S. at 533-40, 542-45.

and laborious endeavor.[205] The Court meant for *Smith* to apply to written laws because the other cases discussed in the opinion deal with statutes and the framework developed by the Court in *Church of Lukumi* cannot be applied to judicial, discretionary actions.[206] The lesser standard set forth by *Smith* is only triggered if neutrality and general applicability are satisfied. If there is no written law, then the standard cannot be triggered. Therefore, strict scrutiny should remain the default and should apply to discretionary judicial actions not based on any written law.

B. *Responding to Conflicts with Religion: Is MRE 611(b) a Neutral Law of General Applicability?*

It is unclear how Muhammad's case might play out if the same incident occurred after the passage of MRE 611(b).[207] This Section applies the proposed framework, derived from *Church of Lukumi*, to MRE 611(b) and considers whether it is neutral and generally applicable.[208] As noted above, the Court recognized in *Church of Lukumi* that the neutrality and general applicability concepts are at least "interrelated."[209]

First, courts must determine whether the law is facially neutral.[210] *Church of Lukumi* demonstrated that this standard is deferential to the state.[211] In *Church of Lukumi*, the Court found that the use of the words "sacrifice" and "ritual" implied a lack of neutrality when combined with the statutorily constructed secular exemptions, like those for food production.[212] The Court, however, held that because "sacrifice" and "ritual" are words commonly used with a secular meaning, the law qualified as facially neutral.[213] MRE 611(b) does not reference Islam in its text.[214] It merely gives judges the general authority to "exercise reasonable control over the appearance of parties and witnesses."[215] Furthermore, MRE 611(b) does not carve out any secular exemptions like the ordinances in *Church of Lukumi*.[216] MRE 611(b) is substantially more neutral on its face than the ordin-

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205 Muhammad v. Paruk, 553 F. Supp. 2d 893, 900 (E.D. Mich. 2008).

206 *See Smith*, 494 U.S. at 878-82.

207 *See* MICH. R. EVID. 611(b) ("The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.").

208 *See supra* Part II.B.

209 *Church of Lukumi*, 508 U.S. at 531.

210 *Id.* at 533.

211 *Id.* at 533-35.

212 *Id.* at 534 (internal quotation marks omitted).

213 *Id.* (internal quotation marks omitted).

214 *See* MICH. R. EVID. 611(b).

215 *Id.*

216 *See id.*; *see also Church of Lukumi*, 508 U.S. at 536.

ances in *Church of Lukumi* that were themselves found to be facially neutral.[217] Therefore, MRE 611(b) satisfies the facial neutrality requirement.

The second portion of the neutrality analysis focuses on whether or not the law has a discriminatory object.[218] The use of the words "sacrifice" and "ritual" in the *Church of Lukumi* case were not enough to demonstrate a lack of facial neutrality, but the Court reasoned that their use served as evidence of a discriminatory object.[219] To determine whether a discriminatory object existed, the Court considered the "construction, design, and enforcement" of the law.[220] MRE 611(b) uses neutral language and grants no exceptions.[221] Evidence is lacking regarding the enforcement of MRE 611(b) when it comes to other potential cases similar to Ginnah Muhammad's, and there are several possible explanations.

First, the Muhammad case and the passage of MRE 611(b) may have created a chilling effect, causing individuals wearing religious veils to avoid testifying. Second, and more likely, parties and witnesses at the lowest levels of court proceedings may not be able to afford counsel, or the size of a claim might not justify hiring counsel. In these situations, where dockets are overloaded and cases move quickly, discretionary judicial actions can discriminate against an individual's religious practices unnoticed. Without counsel as a guide, an individual may be unable to seek relief, and legitimate claims likely go unreported.[222] Whatever the reasons, without discernible evidence of discriminatory enforcement, MRE 611(b) must be considered neutral.

The general applicability analysis begins by asking whether the particular law's purpose is general or specific.[223] While the ordinances in *Church of Lukumi* stated general public purposes, a majority of the justices found a more specific purpose upon close reading.[224] The Court determined the ordinances at issue were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."[225] The Court reasoned that the secular exceptions in the ordinances were "no less likely to constitute animal cruelty or to pose a threat to public health than similar acts committed for purposes of religious worship."[226]

Unlike the *Church of Lukumi* ordinances, MRE 611(b) does not carve out any exceptions based on its text.[227] Although the rule appears to allow

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217 *See Church of Lukumi*, 508 U.S. at 534.

218 *Id.*

219 *Id.* at 533-34 (internal quotation marks omitted).

220 Kaplan, *supra* note 98, at 1077.

221 MICH. R. EVID. 611(b).

222 Potential remedies for these difficulties are beyond the scope of this Comment.

223 Kaplan, *supra* note 98, at 1078.

224 *See id.*

225 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

226 Kaplan, *supra* note 98, at 1078.

227 *See* MICH. R. EVID. 611(b).

for a subjective determination of what constitutes "reasonable control," there is no evidence of secular exceptions being granted in practice.[228] Therefore, under *Church of Lukumi*, the plain text of MRE 611(b) indicates that it was designed for a general purpose.[229]

The fourth prong of *Church of Lukumi* requires courts to determine whether the law "almost . . . only" impacts a particular religious practice.[230] In *Church of Lukumi*, the Court found that "almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members."[231] The construction of the law, the practical impact on the public, and the context of its passage supported the Court's conclusion.[232] MRE 611(b) is not applicable to the general public because, in effect, it only restricts the religious exercise of Muslim women who wear a veil.

An analysis of the timing prong supports this conclusion. The objective timeline of Ginnah Muhammad's case includes a number of relevant events. The case garnered significant attention in the media and among interest groups.[233] Muhammad then sued in federal court, where the judge declined to exercise jurisdiction.[234] She then appealed, but she dropped the appeal before it was heard.[235] All of this was not resolved until the middle of 2009.[236] Shortly thereafter, the Michigan Supreme Court adopted the amendment to MRE 611, adding subsection (b) to give judges the authority to exercise reasonable control over the appearance of witnesses.[237]

The sequence of events in Ginnah Muhammad's case is analogous to the timeline in *Church of Lukumi*. Both situations demonstrate a government reaction to a particular incident shortly after its occurrence and a result where "almost the only conduct" proscribed is that of the particular religious group involved in the previous incident.[238] As in *Church of Lukumi*, nothing had been done to regulate this issue prior to the highly publi-

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228 One could argue that the *Sherbert* exception applies to cases like these, but this Comment focuses on the substantive meaning of the neutral and general applicability standard.

229 This Comment is forced to make a number of conclusions in favor of neutrality due to a lack of evidence. When these cases are actually litigated, the courts will have the benefit of discovery, which will allow for more effective evidence gathering. The purpose of detailing the analysis here, despite the lack of evidence, is to provide a guide for the lower courts.

230 *Church of Lukumi*, 508 U.S. at 535.

231 *Id.*

232 *Id.* at 533-40, 542-45.

233 *See* Martha Neil, *Courtroom Judge Has Power to Ban Muslim Veil, Top Michigan Court Decides*, ABA JOURNAL (June 17, 2009, 2:04 PM), http://www.abajournal.com/news/article/courtroom_judge_has_power_to_ban_muslim_veil_top._mich._court_decides/ (mentioning that the American Civil Liberties Union represented Muhammad).

234 Muhammad v. Paruk, 553 F. Supp. 2d 893, 900 (E.D. Mich. 2008).

235 *See* Schwartzbaum, *supra* note 15, at 1535 n.17 (explaining that very close to the date of oral arguments, Muhammad's lawyer dropped the case).

236 *Id.*

237 *See* MICH. R. EVID. 611(b).

238 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

cized dismissal of Muhammad's case. The events surrounding the adoption of MRE 611(b) strengthen the conclusion that the law fails the general applicability test.[239]

The Michigan Supreme Court enacted MRE 611(b) in response to a Muslim woman attempting to wear a veil while testifying in court. The only other Michigan case that directly involved any type of face covering had nothing to do with religion. In *People v. Sammons*,[240] a trial court allowed a man to testify while wearing a full mask, but the court of appeals reversed on Confrontation Clause grounds.[241] Interestingly, the trial court initially allowed veiled testimony in that case, which was overturned later only because it violated the constitutional rights of a criminal defendant.[242] Also notable is the fact that Michigan did not amend its rules of evidence following *Sammons*. Even though the case was criminal, it likely caused the rule writers to consider whether a similar incident could happen in a civil case, yet they did not amend the rules of evidence. Although Michigan's inaction following *Sammons* is not dispositive, it supports the proposition that MRE 611(b) passed in response to Muhammad's case and concern over similar future cases. Finally, the fact that there is only one other case on record in over twenty years supports the argument that MRE 611(b) "almost only" impacts Muslim veiling practices.

The history and context surrounding Muhammad's case support a finding that MRE 611(b) almost only impacted Muslim women and was specifically aimed at restricting Muslim women from wearing veils in court. Therefore, because the law's object was discriminatory, MRE 611(b) is not a neutral law of general applicability, and strict scrutiny should apply to any burdens the law imposes on the free exercise of religion.

C. *Applying* Church of Lukumi *to Veil Restrictions Under the Confrontation Clause*

Whether veils should be allowed during testimony in the context of a criminal prosecution requires a somewhat different analysis because the Sixth Amendment's Confrontation Clause applies.[243] The Confrontation

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239 Although the timing prong primarily aided the analysis of general applicability in this case, in other similar scenarios it may also aid the neutrality analysis.

240 478 N.W.2d 901 (Mich. Ct. App. 1991).

241 *Id.* at 909.

242 *Id.*

243 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). Several authors have written on the Confrontation Clause issues raised by a veil-wearing witness, but have tended to focus primarily on Confrontation Clause jurisprudence and not free exercise jurisprudence. *See, e.g.*, Steven R. Houchin, Comment, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?*, 36 PEPP. L. REV. 823, 868-74 (2009) (using Confrontation

Clause only applies to criminal prosecutions and is inapplicable in civil cases like Ms. Muhammad's.[244] The need for a different analysis comes from the difference in the source of authority for demanding demeanor evidence. When analyzing MRE 611(b), the conflict is between the constitutional right of free exercise and a recently adopted evidentiary rule. However, in a criminal context, a defendant has the individual, substantive constitutional right to view demeanor evidence with limited exceptions.[245] Because the Confrontation Clause has its own substantive jurisprudence, a court must examine how the Confrontation Clause and the Free Exercise Clause interact to reach a proper result.

1. The *Church of Lukumi* Framework in the Confrontation Clause Context

The neutrality analysis is far simpler when examining the Confrontation Clause instead of MRE 611(b). In *Church of Lukumi*, the ordinance in question used the religious words "ritual" and "sacrifice," but because those words also had a commonly used secular meaning, the Court considered the law facially neutral.[246] The Confrontation Clause has no text that implicates anything religious and is far more neutral than the ordinance in *Church of Lukumi*.[247] The Clause has been applied to a number of situations including, but not limited to, the exclusion of out-of-court statements, the right to cross-examine a witness, and the right to meet one's accuser face-to-face.[248] It has been applied widely to all types of people for various reasons since its adoption in 1791.[249] Nothing about its design, construction, or enforcement implicates any intent to discriminate against or target religion.[250]

The general applicability analysis in criminal cases mirrors the neutrality analysis and is perhaps even more straightforward. It is apparent that the Confrontation Clause was designed for the general purpose of protecting a criminal defendant's right to fair trial.[251] Unlike the ordinances in *Church of*

Clause jurisprudence as the main framework of analysis and only mentioning free exercise very briefly); Murray, *supra* note 136, at 1738-40 (briefly mentioning that the Confrontation Clause is neutral and generally applicable, then analyzing at length under Confrontation Clause jurisprudence).

244 *See* U.S. CONST. amend. VI.

245 *See infra* Part VI.C.2.

246 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-34 (1993) (internal quotation marks omitted).

247 *See* U.S. CONST. amend. VI.

248 Coy v. Iowa, 487 U.S. 1012, 1020-21 (1988).

249 *See id.* (examining various Confrontation Clause cases to demonstrate the scope of the amendment).

250 Murray, *supra* note 136, at 1738 (stating that the Confrontation Clause is a neutral law of general applicability).

251 *See id.* at 1730.

Lukumi, the design, construction, and enforcement of the amendment did not indicate any covert, specific purpose of religious discrimination.[252] Additionally, the Clause's operation demonstrates that it has applied broadly to everyone for numerous secular reasons and has not solely burdened religious conduct.[253] Therefore, the Confrontation Clause is generally applicable.

The relatively straightforward analysis above, compared with the previous analysis of MRE 611(b), highlights the relevance of timing and how older laws are more likely to be neutral and generally applicable than newer laws. Both the Confrontation Clause and MRE 611(b) seem to authorize judges to require women to remove a veil prior to testifying in court, and neither carves out any textual exceptions.[254] The difference between the two is timing. The *Church of Lukumi* framework for applying *Smith* focuses on the object of the law, and that focus cannot avoid the relevant context of when the legislature passed the law and when the religious exercise became an issue.[255] For example, how could the States adopting the Confrontation Clause in 1791 have done so with the object of discriminating against the religious exercise of Muslim women when very few, if any, lived within the new nation's borders? It seems unlikely that they could have done so. In other words, the Founders adopted the Confrontation Clause without contemplation of the specific religious conflict developing today, whereas laws like MRE 611(b) are passed within the context of modern religious and cultural conflicts.

Here the timing prong strongly supports the simple application of *Church of Lukumi* and a finding that the Confrontation Clause is a neutral law of general applicability. In a criminal prosecution, then, courts would only need a rational basis for enforcing a requirement that Muslim women remove veils in order to testify. The importance of demeanor evidence, particularly in a criminal prosecution where the liberty of a defendant is at stake, would likely satisfy the rational basis test. Therefore, under free exercise jurisprudence, Muslim women can be prevented from testifying in criminal court while wearing veils. This analysis only provides a foundation, however, because under Confrontation Clause jurisprudence, Muslim women might be entitled to an exception to the Confrontation Clause's face-to-face requirement.[256]

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252 *See* Kaplan, *supra* note 98, at 1077 (observing that courts must examine the construction, design, and enforcement of a law to determine whether its actual covert purpose is religious discrimination).

253 *See id.* at 1079 ("Is the law constructed so that in its actual operation it targets only religious conduct or singles out a particular religion?").

254 *See* U.S. CONST. amend. VI; MICH. R. EVID. 611(b).

255 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-40, 542-45 (1993).

256 *See infra* Part IV.C.2.

2. The Confrontation Clause and *Craig* Exceptions to the Face-to-Face Requirement

The Confrontation Clause "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[257] As noted above, the reliability prong in *Craig* only allows exceptions if three of the following four prongs are satisfied: (1) the opportunity to examine the witness in person; (2) the opportunity for cross-examination; (3) testimony under oath; and (4) the opportunity to assess witness demeanor.[258] Additionally, a witness would have to demonstrate that the State's public policy interest in protecting the free exercise rights of a veil-wearing witness outweighs the defendant's right to confrontation.[259]

The Sixth Amendment does not literally reference demeanor evidence.[260] Courts, however, often emphasize the importance of viewing witness demeanor.[261] Particularly in the context of the Confrontation Clause, demeanor evidence is noted for its importance not only to the factfinder, but also for allowing counsel to make an effective cross-examination, an important part of the confrontation right.[262] Some have raised serious questions, however, about the effectiveness and necessity of demeanor evidence for aiding fact finders in their truth-seeking function.[263] Still others point out that a number of blind jurors and blind judges have acted as fact finders, thus showing that demeanor evidence is not a necessity.[264] Despite this evidence and the exceptions for blind fact finders, courts around the world continue to place a high value on demeanor evidence.[265]

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257 Maryland v. Craig, 497 U.S. 836, 850 (1990).

258 McAllister, *supra* note 145, at 499.

259 This analysis assumes that a veiled witness testifying in person in the courtroom violates a defendant's confrontation rights. There is an argument to be made, reserved for another time, that this is the "face" a veiled woman presents to the world at all times and because one can see it, the face-to-face requirement is satisfied. Additionally, one could easily construe the confrontation right as a right for the defendant to have the witnesses brought before him in person to make their accusations publicly and in person. Construing "confrontation" in this way would deemphasize the need for the defendant to literally see a witness's face.

260 *See* U.S. CONST. amend. VI.

261 *See, e.g.*, MICH. R. EVID. 611 nns. (discussing the importance of demeanor evidence and citing numerous sources on the topic).

262 *Craig*, 497 U.S. at 847.

263 Blumenthal, *supra* note 172, at 1159 ("This article will explain why the long-standing confidence in the principle of demeanor evidence is unfounded . . . ."); Wellborn, *supra* note 167, at 1075 ("With impressive consistency, the experimental results indicate that this legal premise [that demeanor aids truth seeking] is erroneous.").

264 *See, e.g.*, Schwartzbaum, *supra* note 15, at 1569.

265 *See* MICH. R. EVID. 611 nns. (discussing the importance of demeanor evidence for truth seeking); *Police v. Razamjoo* [2005] DCR 408 (N.Z.) (explaining the importance of demeanor evidence);

Craig, though, does allow for the reliability prong to be satisfied when witness demeanor is unavailable if the other three requirements are met.[266] A veiled witness would probably fail the reliability portion of the *Craig* test because the test requires an opportunity to cross-examine the witness face-to-face.[267] In *Craig*, the procedure allowed opposing counsel to cross-examine the child witness face-to-face, whereas in the case of a veiled witness, cross-examination would be hindered by the fact finder's inability to see the witness's face.

Even assuming that veiled testimony did satisfy the reliability prong, an exception must still serve an important public policy.[268] To satisfy this requirement, the state interest in protecting a Muslim woman's free exercise rights must be greater than the interest in protecting a criminal defendant's confrontation rights.[269] In *Craig*, protecting a child abuse victim served as the important public policy at issue.[270] Though there is evidence to suggest that free exercise is an important public policy on some level,[271] compromising an adult's religious practice likely differs from protecting a child victim from a potentially traumatic experience. Ultimately, a court will have to balance the value of free exercise against the confrontation rights of a criminal defendant who may ultimately be stripped of his liberty as a result of a witness's testimony; the answer to this problem is unclear.[272] Considering the difficulty of this question, a court would, more than likely, err on the side of protecting the individual who might ultimately be jailed and would decline a request for an exemption under *Craig*.

Australia Judge Orders Witness to Remove Niqab in Court, BBC NEWS (Aug. 19, 2010, 1:22 AM), http://www.bbc.co.uk/news/world-asia-pacific-11020700 (describing the importance of demeanor evidence for a fair trial); *Niqab Ruling Raises Legal and Religious Issues in Toronto Court*, EURO ISLAM.INFO (Feb. 2, 2009), http://www.euro-islam.info/2009/02/02/niqab-ruling-raises-legal-and-religious-issues-in-toronto-court/ (describing the conflict between free exercise of religion and right of accused to face their accuser and also the importance of demeanor evidence).

266 *Craig*, 497 U.S. at 845-46.

267 *See id.*

268 *See id.* at 850.

269 Houchin, *supra* note 243, at 826-28 (identifying the difficulty of the issue and recognizing that courts must execute a balancing test).

270 *Craig*, 497 U.S. at 855.

271 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (2006) (demonstrating support in the U.S. Congress to legislate on the issue of free exercise of religion), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997). It is important to note that this policy only increased the standard of review from rational basis to strict scrutiny. *Id.* at § 2000bb-1(b). It is quite possible that a court would find the Confrontation Clause qualifies as a compelling state interest.

272 Murray, *supra* note 136, at 1755-57 (acknowledging the difficulties surrounding this issue).

CONCLUSION

As the Muslim population in the United States continues to grow, conflicts like Ginnah Muhammad's will occur more frequently.[273] Additionally, the nature of U.S. foreign policy as it relates to Muslim-majority countries and threats from radical elements of Islam like Al Qaeda tend to cause nervousness about—and even animosity towards—the religion. In times of heightened cultural tension, protecting the free exercise rights of minority religions is both important and difficult.

If the Court intends to maintain *Smith* as a viable standard capable of protecting free exercise rights, it should reaffirm and strictly apply the framework outlined in *Church of Lukumi*. Additionally, lower courts should explicitly focus on the underlying theme of legislative timing the Supreme Court considered in *Church of Lukumi*. While not conclusive, courts should consider a timeline of events, based on an objective review of historical facts, to determine whether a law was passed in response to controversy over a particular religious practice; they should also consider how the timeline informs the rest of the analysis. The best method for determining whether a law lacks neutrality and general applicability involves considering the timing element in combination with whose conduct the law actually impacts.

The above application of the *Church of Lukumi* framework to restrictions on veiled testimony under three possible legal scenarios exemplifies the results of this approach. This Comment argues that strict scrutiny should apply to restrictions on veiled testimony in civil cases. Additionally, this Comment maintains that the lower standard of review, rational basis, is triggered in the criminal context and that Muslim women are unlikely to receive an exemption under *Craig*. The result of this analysis is that the free exercise rights of Muslim women are better protected than most may think and only cede to a criminal defendant's constitutional right to confrontation when that defendant is at risk of criminal penalty. These results not only show stronger protection for Muslim women, but for free exercise rights more generally.

By faithfully applying the *Church of Lukumi* framework along with the proposed focus on legislative timing, courts will find that the "neutral law of general applicability" test is a significant standard that is not easily satisfied. Therefore, the proposed framework and the analysis in this Comment demonstrate that free exercise rights need not be dead under *Smith*.

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273 Hacking, *supra* note 5, at 917 (describing the continuing growth of the Muslim population in the United States).