No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the position of Respondent before this Court and in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants to Title VII discrimination charges and lawsuits, EEAC's members have a substantial interest in the circumstances under which an employer's obligation to consider workplace religious accommodations is triggered. The Tenth Circuit below properly rejected Petitioner EEOC's contention that an employer's obligation under Title VII to eliminate conflicts between a work rule and the sincerely-held religious beliefs of an individual through religious accommodations is triggered whenever the employer indirectly has acquired "'enough information'" about or "assumes correctly the existence of" such a conflict. Petition for a Writ of Certiorari at 16, 17.

Many of EEAC's member company representatives are professionals whose primary responsibility is compliance with equal employment opportunity laws

and regulations. Accordingly, EEAC has a perspective and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions.[2] Because of its practical experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

In urging this Court to reject the Tenth Circuit's decision below, the EEOC advances its own, new policy position – which purports to replace decades of settled legal principles – that an employer will be considered to be on notice of its obligation to provide religious accommodations under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, when it has acquired enough information on its own to perceive a conflict between the individual's religious beliefs and a work requirement; according to the EEOC, actual notice based on an explicit request from the individual is not required. The EEOC's new interpretation not only is unsupported by Title VII's text and underlying policy objectives, as well as the agency's own longstanding interpretations, but it also is unworkable as a practical matter.

Title VII prohibits workplace discrimination because of, *inter alia*, religion. Religion "includes all

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[2] *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate … without undue hardship ….” 42 U.S.C. § 2000e(j).

For the better part of four decades, both the federal courts and the EEOC have interpreted Title VII as imposing upon an employer a duty to accommodate only after first being informed that an applicant or employee, due to a sincerely-held religious belief, cannot comply with a conflicting work requirement. In an effort to upend those legal principles, and ostensibly in response to the decision below, the EEOC published a new technical assistance guidance document supporting its litigation position in this case – that an employer violates Title VII by failing to accommodate a conflict between what it correctly perceives to be an applicant or employee’s religious belief and an assumed conflict with a work rule, even where the individual never placed the employer on actual notice of his or her religious beliefs or requested a workplace accommodation.

Requiring employers to bear the burden of (1) identifying a religious practice or belief in the first instance; (2) divining a conflict between the perceived religious belief and a work requirement; (3) exploring possible reasonable accommodations; and (4) if no accommodation can be provided without imposing undue hardship, demonstrating by a preponderance of the evidence that more than a *de minimis* burden in fact would result cannot be what Congress envisioned when enacting Title VII. As this Court observed, “The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with

respect to … religion ….” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (footnote omitted). That aim would be frustrated by a rule that requires managers and supervisors to make assumptions about the possible religious practices of applicants and employees in an effort to provide possible reasonable accommodations that may, or may not, actually be necessary.

ARGUMENT

I. NEITHER TITLE VII'S PLAIN TEXT NOR THE EEOC'S LONGSTANDING ENFORCEMENT GUIDANCE PURPORTS TO IMPOSE AN AFFIRMATIVE OBLIGATION ON EMPLOYERS TO REASONABLY ACCOMMODATE PERCEIVED RELIGION-BASED WORK CONFLICTS

Title VII prohibits discrimination in the terms, conditions and privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). In 1972, Congress amended the statute to provide that the term “religion” “includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.” 42 U.S.C. § 2000e(j).[3] Petitioner

[3] As this Court observed in *International Brotherhood of Teamsters v. United States*, “This subsection was added ‘to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metal Company*, 429 F.2d (324) (6th Cir. 1970), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L.Ed.2d 267 (1971).’ *Dewey* had questioned the authority of

EEOC contends that an employer's duty to accommodate religion is triggered whenever it "correctly assumes" that a conflict exists between a work requirement and an individual's undisclosed religious belief. Because Title VII does not even contemplate, much less mandate, that an employer make such assumptions about a particular individual's religious practices or beliefs, the EEOC's position is incorrect as a matter of law. Rather, actual notice is essential not only to Title VII's religious accommodations framework, but also to promote compliance with the statute's broader nondiscrimination aims and purposes.

For that reason, and as the Tenth Circuit below correctly held, Title VII "places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation …." Pet. App. 55a. Because the Tenth Circuit's commonsense ruling is consistent with Title VII's plain text and purposes, as well as the EEOC's own longstanding interpretation, the decision below should be affirmed.

A. Title VII Leaves No Room For Speculation By An Employer Regarding An Individual's Personal Religious Observance, Practices, Or Beliefs

1. An individual's concept of religion can be deeply personal, and entirely subjective

The term "religious practices" is defined broadly to include an individual's "moral or ethical beliefs as to

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the EEOC to define 'religion' to encompass religious practices." 431 U.S. 324, 391 n.20 (1977) (citations omitted).

what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. As the court of appeals below observed, religion thus "is a uniquely personal and individual matter." Pet. App. 16a.

The deeply-held religious conviction of one person may be nothing more than a purely secular, personal preference to another. There are a number of practices and activities that can hold both religious, as well as secular, meaning. *See, e.g., Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (peyote use); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (body piercing). The EEOC itself identifies several practices having both religious and non-religious significance, such as the display of tattoos, maintaining facial hair or hair of a certain length, and wearing particular items of clothing, head or face coverings, jewelry, or "other items." EEOC Compl. Man. Section 12: RELIGIOUS DISCRIMINATION, *Notice of the Conflict Between Religion and Work* [Sec. 12 – 4(C)(4)(a)] (July 22, 2008).[4]

It follows that religion is something that is not necessarily immediately apparent to others. Indeed, "A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka [sic], this may not pinpoint his particular beliefs and observances." *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935-36 (7th Cir. 2003). Accordingly, courts have held that Title VII does not require employers to have any particular knowledge about "the beliefs and observances associated with particular sects." *Adeyeye*

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[4] *Available at* http://www.eeoc.gov/policy/docs/religion.html#Toc203359534 (last visited Jan. 26, 2015).

v. Heartland Sweeteners, LLC, 721 F.3d 444, 450 (7th Cir. 2013). For that reason, an applicant or employee "who wishes to invoke an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict." *Id.*

2. Because of the personal nature of religious belief, proof of actual notice to the employer is an essential element of a plaintiff's failure to accommodate claim

"The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Smith v. Pyro Mining Co*., 827 F.2d 1081, 1085 (6th Cir. 1987). The federal courts of appeals consistently have held that in order to make out a prima facie case of failure to accommodate religion, the plaintiff must prove that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she *informed the employer of this belief*; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir.1985), *aff'd on other grounds*, 479 U.S. 60, 65-66 (1986) (emphasis added) (citations omitted); *see also Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004); *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996); *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013); *Reed v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 569 F.3d 576 (6th Cir. 2009); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997);

Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000); *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010).

"Implicit within plaintiff's prima facie case is the requirement that *plaintiff* inform his employer of both his religious needs and his need for an accommodation." *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (emphasis added). A plaintiff alleging a failure to accommodate religion thus cannot establish the basis for a successful claim without demonstrating that he or she provided the employer with actual notice of the conflict posed by a sincerely-held religious belief.

B. Until Very Recently, The EEOC Consistently Interpreted Title VII's Religious Accommodation Requirement To Be Triggered Only Upon Actual Notice From The Applicant Or Employee Of A Religion-Based Work Conflict

The EEOC glosses over the fact that until just last year, its own enforcement guidance "repeatedly, expressly, and unequivocally" assigned to the individual seeking religious accommodation the responsibility for notifying the employer of that fact – not the other way around. Pet. App. 55a; *see also* EEOC Compl. Man. Section 12: RELIGIOUS DISCRIMINATION, *Notice of the Conflict Between Religion and Work* [Sec. 12 – 4(A)(1)] (July 22, 2008).[5] There is no indication, express or implied, in any agency pronouncement prior to March 2014 that the EEOC ever understood Title VII to encourage, much less require,

[5] *Available at* http://www.eeoc.gov/policy/docs/religion.html#_Toc203359520 (last visited Jan. 26, 2015).

an employer to initiate a discussion of possible workplace religious accommodations based on its own, subjective perceptions of and assumptions about an individual's religious beliefs.[6]

The EEOC first promulgated regulations interpreting Title VII's religion discrimination provision in 1966. *Guidelines on Discrimination Because of Religion*, 31 Fed. Reg. 8370 (June 15, 1966); *see also* 29 C.F.R. Part 1605, Appendix A to §§ 1605.2 and 1605.3—*Background Information*. The agency explained that:

> [T]he duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business.

31 Fed. Reg. 8370 (June 15, 1966) (to be codified at 29 C.F.R. § 1605.1(a)(2)). Approximately one year later, it amended that provision as follows:

> [T]he duty not to discriminate on religious grounds … includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

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[6] To the contrary, an employer's unsolicited inquiries into the religious beliefs and practices of applicants or employees may, according to the EEOC, give rise to an inference of unlawful discrimination. EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs* (2010), *see infra* note 16.

32 Fed. Reg. 10,298 (July 13, 1967) (to be codified at 29 C.F.R. § 1605.1(b)).[7]

The EEOC's early regulatory interpretations of the duty to accommodate religion were silent as to *when* an employer's obligation to consider accommodations is triggered. The EEOC offered further clarification in 1980, however, revising its regulations to provide, "*After an employee or prospective employee notifies the employer* … of his or her need for a religious accommodation, the employer … has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer … can demonstrate that an undue hardship would in fact result …." 29 C.F.R. § 1605.2(c)(1) (emphasis added). That version of the regulations remains in effect today.

Over the years, the EEOC has published additional sub-regulatory guidance on various religious accommodations issues, including in the context of dress and grooming policies. Until last year, every EEOC guidance document on the subject either expressly provided or strongly implied that an employer's duty to accommodate would not arise unless and until it was notified of a religion-based conflict by the applicant or employee.[8]

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[7] Congress codified the EEOC's policy position when it amended Title VII in 1972 to expressly impose a duty to accommodate religion, unless doing so would impose an undue hardship. *See Hardison*, 432 U.S. at 74.

[8] The same is, and always has been, generally true of the duty to accommodate disability under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. There, an employer's obligation to consider workplace reasonable accommodations ordinarily is not triggered until an applicant or employee requests one. EEOC

In its *Questions And Answers About The Workplace Rights Of Muslims, Arabs, South Asians, And Sikhs Under The Equal Employment Opportunity Laws* (2002),[9] for instance, the EEOC offers its advice, by way of example, to applicants and employees on seeking religious garb-related workplace accommodations:

> Q: I am a Sikh man and the turban that I wear is a religiously-mandated article of clothing. My supervisor tells me that my turban makes my coworkers "uncomfortable," and has asked me to remove it. What should I do?
>
> A: If a turban is religiously-mandated, *you should ask your employer for a religious accommodation to wear it at work*. Your employer has a legal obligation to grant your request if it does not impose a burden, or an "undue hardship," under Title VII. Claiming that your coworkers might be "upset" or "uncomfortable" when they see your turban is not an undue hardship.

Id. In other words, the EEOC instructs an employee seeking to be permitted to wear religious garb at work for religious reasons to "ask" the employer for a reasonable accommodation, sensibly suggesting – contrary to its position here – that without a specific request for a religious accommodation, the employer has nothing to "grant."

Comp. Man., *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, REQUESTING REASONABLE ACCOMMODATION (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html#requesting (last visited Jan. 26, 2015).

[9] *Available at* http://www.eeoc.gov/eeoc/publications/backlash-employee.cfm (last visited Jan. 26, 2015).

That Questions and Answers document fails to even hint at the notion that an employee need not provide actual notice of his religious observance and attendant conflict with a work rule, so long as the employer "correctly understood" such a conflict to exist. Nor does the EEOC make any such suggestion in its accompanying Question and Answer document geared towards employers. *See* EEOC, *Questions And Answers About Employer Responsibilities Concerning The Employment Of Muslims, Arabs, South Asians, And Sikhs* (2002).[10]

To the contrary, the EEOC in that guidance document cautions employers *against* speculating about the need for workplace religious accommodations, even among employees who appear to share religious beliefs. It also reiterates that the responsibility for notifying the employer of a religious conflict lies squarely with the employee, even where the conflict appears to impact a substantial number of workers (and thus could lead the employer theoretically to presume that all the employees in question require the same, or similar, accommodation). The agency explains, again by way of Question and Answer:

> Q: Three of the 10 Muslim employees in XYZ's 30-person template design division approach their supervisor and ask that they be allowed to use a conference room in an adjacent building for prayer. Until making the request, those employees prayed at their work stations. What should XYZ do?
>
> A: XYZ should work closely with the employees to find an appropriate accommodation that meets

[10] *Available at* http://www.eeoc.gov/eeoc/publications/backlash-employer.cfm (last visited Jan. 26, 2015).

> their religious needs without causing an undue hardship for XYZ. Whether a reasonable accommodation would impose undue hardship and therefore not be required depends on the particulars of the business and the requested accommodation.
>
> * * *
>
> In evaluating undue hardship, XYZ should consider only whether it can accommodate *the three employees who made the request*. If XYZ can accommodate three employees, it should do so. Because individual religious practices vary among members of the same religion, XYZ *should not deny the requested accommodation based on speculation that the other Muslim employees may seek the same accommodation*. *If other employees subsequently request the same accommodation* and granting it to all of the requesters would cause undue hardship, XYZ can make an appropriate adjustment at that time. For example, if accommodating five employees would not cause an undue hardship but accommodating six would impose such hardship, the sixth request could be denied.

Id. (emphasis added).

In perhaps its most detailed statement on the subject, the EEOC in its *Questions and Answers: Religious Discrimination in the Workplace* (2008 & Supp. 2011)[11] explains that Title VII "requires an employer, *once on notice that a religious accommoda-*

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[11] *Available at* http://www.eeoc.gov/policy/docs/qanda_religion.html (last visited Jan. 26, 2015).

tion is needed, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship." *Id.* at 6. (emphasis added). Later, in response to the question "How does an employer learn that accommodation may be needed?", the agency provides, "An applicant or employee who seeks religious accommodation *must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work*." *Id.* at 7. (emphasis added).

The EEOC goes on to describe some common types of workplace religious accommodations, including exceptions to employer dress and grooming policies. Pointing out, for instance, that "religious dress" may include head coverings, the agency advises that "[w]hen an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee *may ask* for an exception to the policy as a reasonable accommodation." *Id.* at 13. (emphasis added). As in its earlier guidance, the EEOC does not claim, even in the case of an individual who wears a clearly visible head covering, that the employer is better suited to divine a potential or actual conflict between the employee's religious beliefs and a work requirement.

Accompanying that Question and Answer guidance is a separate document outlining a number of "best practices" for eliminating workplace religious discrimination. There again, the EEOC explicitly instructs employees seeking religious accommodations to "advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules," [providing] "enough information to enable

the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief." EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* (July 23, 2008).[12] The EEOC's recommendations to employers further confirm its position that individuals faced with a religion-based conflict will be expected to provide actual notice in order to initiate the reasonable accommodations process. For instance, the EEOC suggests that employers should, among other things:

- Inform employees that they will make reasonable efforts to accommodate the employees' religious practices (i.e., convey that the company welcomes such requests and will consider them in good faith, as required by law);
- Train managers and supervisors on *how to recognize religious accommodation requests* from employees (not on how to identify the beliefs or practices of particular religions);
- Consider developing internal procedures *for processing religious accommodation requests* (suggesting that a request must precede any action by the employer); and
- Individually assess each request and *avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate* (signaling to employers that they may not unilaterally identify a perceived conflict and purport to

[12] *Available at* http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan. 26, 2015).

> implement an accommodation based on nothing more than that perception).

Id. (emphasis added).

As the EEOC's own regulations and enforcement guidance make clear, the agency always has understood Title VII's religious accommodation duty to be triggered only after an employer receives from the applicant or employee actual, explicit notice of the religious practice in question and the conflict presented by a work rule. It was not until March 6, 2014 – roughly five months after losing its appeal below – that the EEOC published "two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming" under Title VII, in which it adopted the radically different position that employers have a legal obligation under Title VII to, in effect, accommodate perceived religion-based work conflicts.[13]

The first document is comprised of a series of Questions and Answers specifically on grooming policy-related religious accommodation issues. Regarding when an employer will be deemed to have "knowledge" of an applicant or employee's religious beliefs and need for accommodations due to a work conflict, Question and Answer 7 of the guidance provides:

> Q: How will an employer know when it must consider making an exception to its dress and

[13] *See* EEOC Press Release, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm (last visited Jan. 26, 2015).

> grooming policies or preferences to accommodate the religious practices of an applicant or employee?
>
> A: Typically, the employer will advise the applicant or employee of its dress code or grooming policy, and subsequently the applicant or employee will indicate that an exception is needed for religious reasons. *Applicants and employees will not know to ask for an accommodation until the employer makes them aware of a workplace requirement that conflicts with their religious practice.* The applicant or employee need not use any "magic words" to make the request, such as "accommodation" or "Title VII." If the employer reasonably needs more information, however, the employer and the employee should discuss the request. *In some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed.*

EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* (2014)[14] (emphasis added). To reinforce the point, the agency offers the following example, which appears to be based on, or at least motivated by, the factual allegations underlying this case:

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[14] *Available at* http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Jan. 26, 2015).

EXAMPLE 7

Employer Believes Practice Is Religious and Conflicts with Work Policy

> Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. *This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation*, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation.

Id. (emphasis added). Read together, these statements signal to the EEOC's stakeholders – employers as well as employees – that the agency now will treat any situation in which an employer "believes" or even simply "presumes" that an individual's garb is "religious" in nature and requires workplace accommodation as a facial violation of Title VII where an accommodation is not made. The EEOC's current policy stance as outlined in the new guidance not only represents a complete reversal of its decades-old interpretations, but also expressly endorses the very policy position that the court of appeals rejected

below.[15] Thus, the agency's contention that its position "in this case, in prior litigation, and in recent guidance—is consistent with the EEOC's earlier published guidance," Brief of Petitioner at 21, is plainly false.

II. PLACING THE BURDEN ON EMPLOYERS TO IDENTIFY A RELIGION-BASED WORK CONFLICT AND POTENTIAL NEED FOR RELIGIOUS ACCOMMODATIONS UNDERMINES THE POLICIES AND AIMS UNDERLYING TITLE VII AND IS UNWORKABLE AS A PRACTICAL MATTER

A. Anything Short Of An Actual Notice Standard Would Force Employers To Make Assumptions About Possible Religious Beliefs Based Purely On An Individual's Personal Appearance

Simply put, the EEOC's new interpretation of Title VII's religious accommodation requirement is anathema to the goals and objectives underlying Title VII,

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[15] The practical consequences of the EEOC's new policy position are much more significant than may appear at first glance. Before a plaintiff can bring a religious accommodation lawsuit in federal court, he or she must first exhaust administrative remedies by filing a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(f)(1). In addition to the fact that EEOC charge investigations have become increasingly time-consuming and expensive to defend, to the extent that the EEOC now has conveyed the message that it will find reasonable cause in cases such as this one – and also may consider suing, as it did here – employers will be under great pressure to settle such claims, even if a court ultimately may not agree with the EEOC's interpretation of Title VII.

including the key purpose of ensuring that employment decisions are made in a nondiscriminatory manner, without regard to personal characteristics unrelated to the job.

In *Hardison*, this Court observed that:

> From the outset, Congress has said that "(t)he purpose of (Title VII) is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." When Congress amended Title VII in 1972, it did not waver from its principal goal. While Congressmen differed on the best methods to eliminate discrimination in employment, no one questioned the desirability of seeking that goal.

432 U.S. at 72. Contrary to those aims, the EEOC's construction of the statute would encourage employers to make assumptions about an individual's religious beliefs, often based on nothing more than his or her personal appearance.

Under the agency's rationale, an employer could be hauled into court for rejecting an applicant for a "front of the house" job due to excessive body piercings without first inquiring as to whether the applicant might require a workplace religious accommodation due to a possible, undisclosed religious belief. Requiring employers to make assumptions about what may be complex, deeply personal religious (or explicitly non-religious) beliefs of applicants and employees – and then purport to implement workplace accommodations to eliminate any perceived religion-based work conflicts – would frustrate, rather than advance, Title VII's aim to eliminate unfounded myths and

stereotypes that so often lead to discrimination against protected groups.

More directly, such a rule would seriously impair meaningful efforts to determine whether and to what extent reasonable accommodation to an individual's religious beliefs are possible. As a practical matter, the successful implementation of workplace accommodations depends heavily, if not exclusively, upon the specific needs of the applicant or employee at that particular time. Actual notice from the individual of the religion-based work conflict is a crucial first step to the religious accommodations process.

As the Tenth Circuit observed below:

> [T]he answers to the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee; because an employer's obligation to engage in the interactive religion-accommodation process is only triggered when the employer has answers to those questions; and because, in implementing Title VII's anti-discrimination mandate, the EEOC has expressly disapproved of employers inquiring in the first instance or speculating about the answers to such questions.

Pet. App. 46a.

Furthermore, forcing employers to make religious accommodation decisions based on guesses and assumptions would produce nonsensical results. For example, an employee may request that his supervisor no longer schedule him for work from sundown Friday to sundown Saturday. He has not specified whether the request is being made for religious reasons, or for

purely non-religious reasons – such as the desire to take advantage of prime deep-sea fishing time or to attend his child's little league games. Should the supervisor simply assume because many people observe Sabbath from sundown Friday to sundown Saturday that this particular employee's request (1) is religious in nature and (2) must be accommodated to the point of undue hardship? Or:

> Suppose the employee is an Orthodox Jew and believes that it is deeply sinful to work past sundown on Friday. He does not tell his employer, the owner of a hardware store that is open from 9 a.m. to 6 p.m. on Fridays, who leaves the employee in sole charge of the store one Friday afternoon in mid-winter, and at 4 p.m. the employee leaves the store.

Reed v. Great Lakes Cos., 330 F.3d 931, 936 (7th Cir. 2003). Although the Seventh Circuit opined that the employer "could fire him without being thought guilty of failing to accommodate his religious needs," *id.*, the EEOC ostensibly would disagree – and would urge this Court to do so as well. As that hypothetical illustrates, however, employers simply cannot be expected to assume the existence of a religious conflict any time an employee makes a change to his or her regular work schedule.

Moreover, managers and supervisors are not trained to independently discern an individual's religious practices and how they may or may not interfere with existing work requirements, nor are such efforts even implicitly required by Title VII. This Court has warned courts against probing unnecessarily into an individual's religious beliefs, see *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (quoted in *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir.1978)), and "[i]f

courts may not make such an inquiry, then neither should employers." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (citations and quotations omitted).

B. Asking Questions About Religious Practice And Belief Necessarily Invites Suspicion Of Disparate Treatment Discrimination

Such inquiries naturally could lead a rejected job candidate to assume, for instance, that his or her perceived religious beliefs and requirements – not a lack of qualifications – motivated the employer's actions. That assumption, in turn, could prompt the individual to file a discrimination charge with the EEOC, which undoubtedly would *not* refuse to accept it on the ground that the employer acted in conformance with the agency's re-vamped policy guidance on religious accommodations. To the contrary, the EEOC likely would pursue such a case vigorously under a traditional disparate treatment discrimination theory, pointing to its longstanding view that inquiries about an individual's religion, while not *per se* unlawful, could give rise to an inference of unlawful discrimination.

As the Tenth Circuit aptly noted below, the EEOC for that reason warns employers against initiating a discussion about religious belief. Pet. App. 25a. In a fact sheet on prohibited practices under Title VII, for instance, the EEOC states that "[q]uestions about an applicant's religious affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non job-related and problematic under federal law." EEOC, *Pre-Employment Inquiries and Religious Affiliation or*

Beliefs (2010).[16] The agency reinforces that view in a 2005 opinion letter, explaining that while it is "not *per se* illegal to ask applicants questions regarding their religious background, beliefs, and practices … such questions would be potential evidence of the employer's discriminatory intent if a religious discrimination claim was filed by an applicant alleging he or she was not hired based on religion …." EEOC, Informal Discussion Letter, *Title VII: Religious Discrimination and ADA: Disability-Related Inquiries and Medical Examinations* (Mar. 10, 2005).[17] It is entirely conceivable that individuals questioned in such a manner and who subsequently are discharged or not hired for legitimate reasons may jump to the conclusion that unlawful discrimination motivated the employer's actions. That is just the kind of case the EEOC is likely to consider litigating. *See, e.g.*, EEOC Press Release, *Guam Aircraft Company Sued for Religious Discrimination by EEOC* (Oct. 3, 2011) (declaring that the EEOC "will fight to secure equal justice at work, regardless of whether one's religious beliefs and practices are less familiar").[18]

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[16] *Available at* http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Jan. 26, 2015).

[17] *Available at* http://www.eeoc.gov/eeoc/foia/letters/2005/titlevii_religious_ada_inquiries_examinations.html (last visited Jan. 26, 2015).

[18] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/ 10-3-11f.cfm (last visited Jan. 26, 2015).

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit below should be affirmed.

Respectfully submitted,

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