No. 18-349

IN THE
Supreme Court of the United States

DARRELL PATTERSON,
Petitioner,
v.
WALGREEN CO.,
Respondent.

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

AMICUS CURIAE BRIEF OF ROBERT P. ROESSER IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Title VII prohibits an employer from firing an employee for engaging in a religious practice—here, abstaining from work on his Sabbath—"unless [the] employer demonstrates that he is unable to reasonably accommodate to" the employee's "religious ... practice without undue hardship ...." 42 U.S.C. 2000e(j). This Court has not addressed the proper interpretation of the "reasonable accommodation" part of this test since *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1960), or the "undue hardship" defense since *TWA v. Hardison*, 432 U.S. 63 (1977). The federal circuits are now split over what constitutes a "reasonable" accommodation and the evidence required to establish an "undue burden" under these decisions. The questions presented are:

1. Is an accommodation that merely lessens or has the *potential* to eliminate the conflict between work and religious practice "reasonable" per se, as the First, Fourth, and Eleventh Circuits hold, does it instead create a jury question, as the Eight and Tenth Circuits hold, or must an accommodation fully eliminate the conflict in order to be "reasonable," as the Second, Sixth, Seventh, and Ninth Circuits hold?

2. Is speculation about possible future burdens sufficient to meet the employer's burden in establishing "undue hardship," as the Fifth, Sixth, and Eleventh Circuits hold, or must the employer demonstrate an actual burden, as the Fourth, Eighth, Ninth, and Tenth Circuits hold?

3. Should the portion of *Hardison* opining that "undue hardship" simply means something more than a "*de minimis* cost" be disavowed or overruled?

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INTEREST OF THE AMICUS[1]

In 1984, the University of Detroit fired *Amicus* Robert P. Roesser from his job as a professor of electrical engineering because of his faithfulness to Catholic social teaching. Dr. Roesser refused to fund a union—a union he did not belong to—because it campaigned for abortion rights. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 332-333 (6th Cir. 1990). As a Catholic who believes abortion is a mortal sin, *Amicus* would not acquiesce in being forced to choose between his conscience and his career. *See id.* at 333.

Amicus filed an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") against his employer and union arguing that firing him was illegal religious discrimination under Sections 703(a) and (c) of Title VII, 42 U.S.C. §§ 2000e-2(a) and (c). *Id.* The EEOC found merit in *Amicus*'s charge, and filed a suit, in which Dr. Roesser intervened, against the employer and union.[2] The district court ruled against the EEOC and intervenor *Amicus* because the union offered a par-

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[1] Pursuant to Rule 37.2(a), all counsel of record received notice, at least ten days prior to the due date, of Roesser's intention to file this brief. Both parties consented to the filing of Roesser's brief. Pursuant to Rule 37.6, Roesser affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Roesser or the National Right to Work Legal Defense Foundation made a monetary contribution to its preparation or submission.

[2] The National Right to Work Legal Defense Foundation provided counsel for *Amicus* as intervenor throughout the University of Detroit litigation. See *id.*

tial accommodation for his religious beliefs—a reduced agency fee that would still require Roesser to support and to associate with the union. *University of Detroit,* 904 F.2d at 333-34.

In reversing the district court, the Sixth Circuit held that Title VII required the employer to address all of the religious objections mandated by Roesser's religious beliefs. *See id.* at 335. In so holding, the Sixth Circuit cited a previous case that held an accommodation is not reasonable when it fails to "resolve the inherent conflict between the employee's religious beliefs and his work obligations." *Id.* (citing *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987)).

Amicus submits this brief to highlight the national importance of this case for Catholics, Seventh-day Adventists, and all other employees of faith who believe that they must be fully obedient to their understanding of God's will. Partial accommodation is partial obedience to God. *Amicus* would not render partial obedience, even though it cost him his faculty position. *Amicus* desires to uphold the hard fought vindication of his rights rendered so many years ago in the Sixth Circuit.

SUMMARY OF ARGUMENT

Amicus agrees with petitioner Patterson that there is a circuit split, among other things, that warrant this Court's review, but writes this brief to highlight a different approach to resolving the issue of courts allowing a partial accommodation to mean a "reasonable" accommodation. *Amicus* suggests that the answer to this issue lies in a correct application of this Court's recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), which

dramatically altered the proper approach to religious accommodation claims. *Abercrombie & Fitch* eliminated a free-standing religious accommodation cause of action, directing instead that courts and counsel address them as disparate treatment claims—thus analyzing those cases under the disparate treatment framework. Using this framework, and defining the protected class, eliminates the problems associated courts determining what constitutes a "reasonable" religious accommodation.

Moreover, by eliminating the problems associated with determining "reasonable" partial accommodations, courts will avoid the serious Establishment Clause problems that are inherent in the judiciary determining what is reasonable to satisfy an employee's religious obligations.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's opinion conflicts with this Court's precedent.

A. The *McDonnell Douglas Corp. v. Green* framework is the proper analysis for a disparate treatment claim under Title VII.

Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII") "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin[.]" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964) (quotation marks and citations omitted). The text of Title VII furthers this purpose by protecting employees' religious beliefs against discrimination in the workplace. 42 U.S.C. § 2000e-2(a)(1). Specifically, the text

of Title VII provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 703(a).

42 U.S.C. § 2000e(j) defines religion to include:

> 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.

§ 701(j).

These prohibitions provide for two—and only two—causes of action. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 at 2031-32 (2015); *see also, id.* at 2041 (Thomas, J., concurring in part, dissenting in part) ("[M]any lower courts, including the

Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact."). The result is that disparate treatment claims—like Patterson's here—are evaluated under the *McDonnell Douglas Corp. v. Green* framework. 411 U.S. 792, 802 (1973).

Despite a clear statement from this Court, the Eleventh Circuit, like the Tenth Circuit in *Abercrombie & Fitch*, devoted almost all of its opinion to a traditional analysis of a freestanding religious accommodation claim—barley discussing disparate treatment at all.

Had the Eleventh Circuit analyzed this as a disparate treatment claim, it would have begun with the *McDonnell Douglas* requirement that a plaintiff must prove: (1) that he or she is a member of a protected class; (2) that he or she was qualified for a position; (3) that despite his or her qualifications, he or she was rejected or suffered an adverse employment action; and (4) that after his or her rejection, the position was filled by someone with the same qualifications, or the position remains open and the employer seeks someone with the same qualifications. *Id.* (footnote omitted).

Because the Eleventh Circuit ignored this Court's clear direction in *Abercrombie & Fitch*, and applied the traditional three-pronged test for a *religious accommodation* cause of action, (Pet. App. 6a), it virtually ensured it would reach an invalid conclusion.

B. Applying the *McDonnell Douglas* framework negates any problems with courts finding partial accommodation to mean "reasonable accommodation."

McDonnell Douglas first requires proof that an employee is a member of a protected class. The way in which this Court in *Abercrombie & Fitch* applied Title VII to eliminate religious accommodation as a free-standing cause of action, is critical to the analysis of this first element. This Court used Title VII's definition of religion, which "include[s] all aspects of religious observance and practice, as well as belief," *Abercrombie & Fitch*, 135 S.Ct. at 2032, to define "the protected class." Thus, the protected class for Patterson is not simply a person of religious faith, a Christian, or even a Seventh-day Adventist. Instead, Patterson's protected class is a Seventh-day Adventist who cannot work on his Sabbath—a time period from Friday sundown to Saturday sundown. Nothing in the record shows that any of respondent Walgreens's other employees is a member of this protected class.

The next three elements of *McDonnell Douglas*—qualification for the job, adverse action, and employees outside the protected class being treated more favorably—appear to be without dispute here, thus they are not further discussed.

After proof of these elements, *McDonnell Douglas* then shifts the burden of production of evidence to respondent to put forth a nondiscriminatory reason for its actions. *Id.* at 802. The record shows that Walgreens fired Patterson because of his protected class—a Seventh-day Adventist who could not work on his Sabbath. (Pet. Brief 9). This sweeps away any

argument that Patterson somehow failed in his obligation to find replacement workers or failed to take a job demotion. It is the employer that must put forth a reason for the adverse action that stands completely apart from Patterson's protected class of those who cannot work on their Sabbath. As *Abercrombie & Fitch* held, the "disparate-treatment provision forbids employers to [take adverse action] "because of" such individual's ... religion (which includes his religious practice."). 135 S.Ct. at 2032. All of Walgreen's arguments accepted by the Eleventh Circuit for its "reasonable accommodation" conclusion are directly related to Patterson's religious practice of refraining from work on his Sabbath—which is a fundamental belief of the Seventh-day Adventist.

This, of course, is not the end of the road for Walgreen's defense, but it does spell the end to any defense that the employer had a nondiscriminatory reason for Patterson's discharge. Walgreens did not accommodate Patterson's religious practice—it fired him for his religious practice. (Pet. Brief 9). No definition of accommodation can end with the employee of faith being fired precisely because of his protected class.

The failure of the Eleventh Circuit to comprehend *Abercrombie & Fitch* also explains its acceptance of Walgreen's argument that Patterson was reasonably accommodated when he was offered a demotion. An employer may no more demote an employee based on his protected class (not working on his Sabbath) than it may demote an individual for his or her race, gender, color, or national origin. Rather than constituting a reasonable accommodation, the offer of demotion—or a discharge for failing to accept a demotion—is itself disparate treatment.

This analysis leaves the "reasonably accommodate" language of the statute in precisely the same posture this Court adopted in *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60 (1986). After identifying a religious accommodation that "eliminates the conflict between employment requirements and religious practices," *id.* at 70, this Court applied a "reasonable" lens to that accommodation. It held that a reasonable accommodation may not be a discriminatory accommodation–meaning that the employer's accommodation cannot visit another kind of discrimination on the employee of faith. *Id.* at 71 (accommodation that "would display a discrimination against religious practices is the antithesis of reasonableness").

The split between the Circuits, like the failure of the Eleventh Circuit, is due largely to a failure to read the protection for religious practice under Title VII in the manner this Court mandated in *Abercrombie & Fitch*, and then to follow the established *McDonnell Douglas* approach in analyzing disparate treatment claims.

Following the *McDonnell Douglas* burden shifting approach does not eliminate an "undue hardship" defense. As to that, *Amicus* agrees with Patterson that *Trans World Airlines v. Hardison*, 432 U.S. 83 (1977) should be revisited. A reading of that decision, followed by a reading of *Abercrombie & Fitch*, reveals that the two are in utter conflict, especially in former Justice Scalia's rejection of the idea that Title VII requires merely equal treatment for religious practice. Instead, this Court held that it affords for religious practice "favored treatment." *Abercrombie & Fitch*, 135 S.Ct. at 2034.

II. The Eleventh Circuit's analysis as to what is "reasonable" under the statute raises serious constitutional questions and thus raises a question of national importance.

Although the Eleventh Circuit specifically acknowledged the complete accommodation requirement of Title VII—"a reasonable accommodation is one that eliminates the conflict between employment requirements and religious practices," (Pet. App. 7a) (citations and quotations omitted)—it misapplied that requirement. More specifically, the panel held that Walgreens reasonably accommodated Patterson even though it fired him for practicing his religious beliefs. Furthermore, the panel even held that it could rule for Walgreens if it considered only its reasonable accommodation argument. (Pet. App 11a). This misapplication raises serious constitutional questions about the Eleventh Circuit's opinion—and the constitutionality of Title VII as applied to Patterson.

Petitioner sets out the circuit split in which some courts have held it is a reasonable accommodation when an employer actually violates the religious beliefs and practices of an employee. (Pet. Brief 13-23). Like the Eleventh Circuit below, those courts ruled that employees of faith can be fired even though the employer has not eliminated the conflict with the employee's religious beliefs—and without proof of undue hardship. *See id.*

The conclusion is logically inescapable that those courts are making a judgment as to what should be reasonable for the employee to believe. These cases do not involve a dispute about what the employee believes, thus "reasonable" represents some sort of the-

ological conclusion about a religious "good enough." Partial obedience to God should be sufficient; therefore, a partial accommodation is valid.

This type of judgment about "reasonable," when measuring religious requirements, conflicts with the First Amendment's Establishment Clause. It impermissibly entangles courts and judges—and by extension Congress, when courts interpret Title VII to require insensitive religious inquiries. This and other courts have been careful to note that it is not only the conclusions reached by a government entity that may infringe on the rights guaranteed by both religion clauses, "but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). There, this Court held that the National Labor Relations Board's jurisdiction over religious schools would lead to impermissible entanglement, because jurisdiction would necessarily require resolving theological issues whenever a school maintained that its challenged actions are religiously mandated. *Id.* Thus the Court denied jurisdiction because the very process of "inquiry into the good faith of the position asserted by the clergy-administrators" impinged upon "rights guaranteed by the Religious Clauses." *Id.*

Likewise, in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002), the D.C. Circuit referred to religious examination and inquiry by courts and government entities as "offensive," citing a plurality opinion by this Court that rejected "inquiry into . . . religious views." *Id.* (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)). The D.C. Circuit panel further held that it is "well established" that "courts should refrain from trolling through a person's or institution's religious beliefs," *id.*, and

"[j]udging the centrality of different religious claims." *Id.* at 1343 (citing *Emp't Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 887 (1990).

When "reasonable" is used to judge the adequacy of a partial accommodation, it necessarily involves an inquiry into the religious faith and practice of the employee, and into the good faith position asserted by such individuals. This is seen in the district court's opening statement below, when it noted Patterson's signature on an employer form acknowledging that Walgreens operated all days and hours and all employees should be available for work. (Pet. App. 21a). It is also reflected in the statements of both the district and circuit court below that Patterson was repeatedly accommodated in the past, (Pet App. 31a), and that he sought a "guarantee" for the future that he would not have to work on his Sabbath. *Id.* The first suggested an inconsistency in Patterson's beliefs and the second suggested a rigid inflexibility in his religious beliefs and practices.

Neither of these types of observations is appropriate because they are constitutionally irrelevant. They are only relevant if a court is making a judgment on the reasonableness of Patterson's religious beliefs. As this Court has held, "religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). Likewise, the government is not constitutionally permitted to require a minimum basis of religious faithfulness in order to establish a religious belief entitled to protection. *See W.Va.State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Indeed, drawing lines between strict and lax observance of religious beliefs creates a preference for

one or the other. "The clearest command of the Establishment Clause is that one religious denomination [or kind of religion] cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Therefore, it is constitutionally improper to discriminate between those who take a lax approach and those who take a rigorous approach to their religious faith. *See Univ. of Great Falls*, 278 F.3d at 1342.

Finally, a judgment that a partial accommodation reasonably accommodates an employee's belief violates the guarantee of the Free Exercise Clause protecting "a religious [individual's] right to shape [his] own faith." *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 188 (2012).

Because a judicial determination that a partial accommodation reasonably accommodates an employee's religious belief and practice is at odds with the right to exercise freely one's faith, using the *McDonnell Douglas* framework focuses courts on the protected class rather than the reasonableness of the employee's religious belief, which better accords with the First Amendment.

* * * *

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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