No. 19-1388

In The Supreme Court of the United States

JASON SMALL,

Petitioner,

v.

MEMPHIS LIGHT, GAS, & WATER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

The Court Should Reconsider the *TWA v. Hardison* Definition of "Undue Hardship" as "Anything More than *De Minimis* Harm." 5

A. The *De Minimis* Standard is Inconsistent with the Text of Title VII 7

B. The Premise Underlying *Hardison*'s "*De Minimis*" Standard Has Been Undercut by This Court's Decision in *Abercrombie & Fitch* 11

C. The *De Minimis* Standard Particularly Harms Accommodation of Religious Minorities, as an Examination of Lower-Court Cases Confirms 15

CONCLUSION 17

APPENDIX

Breakdown by Employee's Religion in Religious Accommodation Cases in which Summary Judgment Was Granted, 2000-Present ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ansonia Bd. of Educ. v. Philbrook,
479 U.S. 60 (1986) 13

Bostock v. Clayton County, Ga.,
140 S. Ct. 1731 (2020) 7, 10

BP America Production Co. v. Burton,
549 U.S. 84 (2006) 7

Dickerson v. United States,
530 U.S. 428 (2000) 11

EEOC v. Abercrombie & Fitch Stores,
135 S. Ct. 2028 (2015) .....*passim*

EEOC v. Abercrombie & Fitch Stores,
731 F.3d 1106 (10th Cir. 2013), *rev'd*,
135 S. Ct. 2028 (2015) 17

Hussein v. The Waldorf-Astoria,
134 F. Supp. 2d 591 (S.D.N.Y. 2001) 17

Mohamed v. 1st Class Staffing, LLC,
286 F. Supp. 3d 884 (S.D. Ohio 2017) 17

National Ass'n of Manufacturers v.
Dep't of Defense,
138 S. Ct. 617 (2018) 7, 9

Patterson v. Walgreen Co.,
140 S. Ct. 685 (2020) 9

Puerto Rico v. Franklin Cal. Tax-Free Trust,
136 S. Ct. 1938 (2016) 9

Sebelius v. Cloer,
569 U.S. 369 (2013) 7

TABLE OF AUTHORITIES—Continued

Page

State Oil Co. v. Khan,
522 U.S. 3 (1997) 10

Trans World Airlines v. Hardison,
432 U.S. 63 (1977) .....*passim*

Wisconsin Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 7

STATUTES, REGULATIONS, AND RULES

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e(j) 2

42 U.S.C. § 2000e-2(a) 12

Americans with Disabilities Act,
42 U.S.C. § 2112(b)(5)(A) 10

42 U.S.C. § 12112(10)(A) 10

Sup. Ct. R. 10(c) 3

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 8

Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107 (2015) 13

Petition for Certiorari, *Patterson v. Walgreen Co.*,
No. 18-349.....15

Pew Research Center, *America's Changing Religious Landscape* (May 12, 2015).....16

TABLE OF AUTHORITIES—Continued

Page

Random House Dictionary (1973) 8

Webster's New American Dictionary (1965) 8

INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** (CLS) is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights, especially the free exercise of religion, of all Americans are protected.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical ministries.

The **Association of Christian Schools International** (ACSI) is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 2500 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member schools educate some 5.5 million children around the world.

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[1] Pursuant to Rule 37.2(a), all parties' counsel of record received timely notice of the intent to file this brief and, in turn, gave written consent to its filing. In accordance with Rule 37.6, neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amicus curiae*, its members, or its counsel) made a monetary contribution intended to fund its preparation or submission.

ACSI members advance the common good by providing quality education and spiritual formation to their students.

The **Institutional Religious Freedom Alliance** (IRFA), founded in 2008 and now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based service organizations.

Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a vital question under the religious-accommodation provision, section 701(j), of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(j). That provision makes it illegal for an employer to act against an employee based on the employee's religiously grounded observance or practice, unless the

employer "demonstrates that he is unable to reasonably accommodate to [the] observance or practice without undue hardship on the conduct of the employer's business." In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), this Court read the phrase "undue hardship" to mean that an employer's statutory duty to accommodate an employee's religious exercise is met if doing so would require the employer "to bear more than a de minimis cost." *Amici* agree with petitioner that the "de minimis" standard grossly misconstrues the phrase "undue hardship" and should be overruled.

We write to focus on the fact that this misreading of "undue hardship" undermines the protection that the accommodation provision gives to employees in their religious practices, especially to employees of minority faiths. Therefore, the ruling below raises "important questions of federal law" that call for this Court's review. Sup. Ct. R. 10(c).

This Court should reconsider and overturn *Hardison*'s holding that anything more than "*de minimis* harm" from an accommodation constitutes "undue hardship." The *de minimis* standard has multiple fundamental flaws.

A. First and foremost, the *de minimis* standard is inconsistent with the text of Title VII. This Court has repeatedly and recently emphasized that a statute must be interpreted according to the ordinary public meaning of its words at the time of enactment. The ordinary meaning of "undue hardship" at the time the

accommodation provision was enacted (1972) included not only that some "suffering" or "deprivation" existed—"a condition that is difficult to endure"—but also that it was serious enough as to be "excessive" or "inappropriate." That meaning is irreconcilable with a standard of mere "*de minimis*" cost.

B. Moreover, the premise of the *de minimis* standard has been undercut by this Court's recent decision in *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015). The Court in *Hardison* adopted the weak *de minimis* standard largely on the basis that Title VII aims only at preventing intentional discrimination against religion. But *Abercrombie* makes clear that Title VII, in its accommodation provision, also requires protection against the effects of a religion-neutral employer policy.

C. A weak interpretation of Title VII's religious-accommodation provision is particularly harmful to religious minorities, who are particularly likely to come into conflict with formally neutral employer policies reflecting the majority's norms. Such effects are apparent in the accommodation cases listed in the Appendix to this brief, a disproportionate number of which involve religious minorities. In the list, which includes Title VII cases in which summary judgment was granted between 2000 and the present, Muslims account for 18.6 percent of the cases even though they made up only 0.9 percent of the overall population in 2014. Members of non-Christian faiths together account for 34.5 percent of the cases, compared with only 5.9 percent of the population in 2014 (and less in

earlier years). The share of cases involving minorities climbs to 62.8 percent when one adds Seventh-day Adventists and other Christian groups that follow the minority practice of Saturday Sabbath observance. The "undue hardship" standard, as interpreted in *Hardison*, has a severe real-world impact on religious freedom for these Americans, among many others.

ARGUMENT

The Court Should Reconsider the *TWA v. Hardison* Definition of "Undue Hardship" as "Anything More than *De Minimis* Harm."

Jason Small, an elder in a Jehovah's Witnesses congregation, worked as an electrician for Memphis Light, Gas and Water (MLGW) for more than a decade. His work schedule allowed him to satisfy his religious obligations, which include attending mid-week and Sunday services and performing community work on Saturdays. Pet. App. 2a. After sustaining a work-related injury, he sought an alternative position that would allow him to meet his religious obligations. Under pressure from MLGW, he took a position that involved mandatory overtime scheduling which conflicted with his religious obligations. MLGW continued to deny the accommodations requested by Mr. Small, asserting that they would impose an undue hardship on the company. *Id.*

MLGW eventually suspended Mr. Small for two days without pay for missing work to attend religious

services. He filed a Title VII lawsuit for religious discrimination and lost in the court below, which applied the *Hardison* definition of "undue burden" as "anything more than *de minimis* harm." Pet. App. 5a. As Judge Thapar observed, *Hardison* is "[t]he source of the problem." *Id.* at 11a. And, as this brief explains, "[t]he irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities." *Id.* at 14a.

This Court should reconsider the *de minimis* standard adopted in *Hardison*.[2] For multiple reasons, this standard is fundamentally flawed as a definition of "undue hardship." This mistaken definition has had important and recurring consequences for individuals, especially those of minority faiths, who of necessity rely on Title VII's protection against religious discrimination in the workplace.

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[2] *Amici* focus here on the flaws in *Hardison*'s reasoning in adopting the *de minimis* standard. A further reason to reconsider that standard is that *Hardison*'s discussion of "undue hardship" was technically dicta. Pet. 29, citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2040 n.* (2015) (Thomas, J., concurring in part and dissenting in part); see also *id*. ("Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an 'undue hardship' defense—not the amended statutory definition.").

A. The *De Minimis* Standard Is Inconsistent with the Text of Title VII.

First and foremost, the phrase "undue hardship" in Title VII simply will not bear the meaning that expands it to "[anything] more than a *de minimis* cost."

As this Court reaffirmed just recently in interpreting Title VII itself, the Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1738 (2020). The Court "'start[s], of course, with the statutory text,'" and "proceed[s] from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (some brackets in original) (quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). Consequently, the Court sharply rejects interpretations that are "completely unmoored from the statutory text." *Nat'l Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018). And to reiterate, ordinary meaning is determined "at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018).

Here, the phrase at issue is "undue hardship." Because Title VII does not "otherwise defin[e]" it (*Cloer*, *supra*), the phrase should be interpreted according to its ordinary public meaning in 1972, the time Congress added the provision to the statute. *Bostock*, 140 S. Ct. at 1738. Begin with the term "hardship": At that time,

Random House defined hardship as "a condition that is difficult to endure; suffering; deprivation; oppression; or something hard to bear, as a deprivation, lack of comfort, constant toil or danger, etc." *Random House Dictionary* 646 (1973). "[H]ardship," it added, "applies to a circumstance in which excessive and painful effort of some kind is required." *Id*. Similarly, Webster's Dictionary defined hardship as "something that causes or entails suffering or privation." *Webster's New American Dictionary* 379 (1965). Black's Law Dictionary echoes the others, defining hardship as "privation, suffering, adversity." *Black's Law Dictionary* 646 (5th ed. 1979). In a zoning example, hardship means that a restriction applied is "unduly oppressive, arbitrary or confiscatory." *Id*.

With respect to "undue," Random House defined it as "unwarranted" or "excessive"; "inappropriate, unjustifiable or improper"; or "not owed." *Random House Dictionary*, *supra*, at 1433. Webster's defined it as "not due," as "inappropriate" or "unsuitable," and as "exceeding or violating propriety or fitness." *Webster's New American Dictionary*, *supra*, at 968. And Black's defined "undue" to mean "more than necessary; not proper; illegal. It denotes something wrong." *Black's Law Dictionary*, *supra*, at 1370.

In other words, the ordinary meaning of "undue hardship" includes not only that some "suffering" or "deprivation" exists—"a condition that is difficult to endure"—but also that it is serious enough as to be "excessive" or "inappropriate."

It is impossible to reconcile that ordinary meaning of "undue hardship" with *Hardison*'s definition of it as "[anything] more than a *de minimis* cost." See also Pet. 16-17. A cost that is barely more than minimal does not correspond either with the baseline idea that a hardship involves "suffering" and "a condition difficult to endure," or with the further idea that this suffering is serious enough as to be "undue" or "excessive."

In short, as three justices pointed out recently, "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship' "—"and the [*Hardison*] Court did not explain the basis for this interpretation." *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari). They echo Justice Marshall's observation in *Hardison* itself that it is "seriously question[able] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.' " 432 U.S. at 92 n.6 (Marshall, J., dissenting).

In other cases besides *Hardison*, this Court has repeatedly "decline[d] the . . . invitation to override Congress' considered choice by rewriting the words of the statute." *Nat'l Ass'n of Manufacturers*, 138 S. Ct. at 632; see *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1948–49 (2016). As the Court just recently emphasized:

> [O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel,

> update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.

Bostock, 140 S. Ct. at 1738. This case presents the opportunity to rectify *Hardison's* mistaken rewriting of the words of Title VII's accommodation provision.

The ordinary meaning of "undue hardship" as of 1972 is far closer to the definition of that phrase under the Americans with Disabilities Act (ADA), which requires an employer to make "reasonable accommodations" of an employee's disability unless accommodation would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). According to the ADA, undue hardship means "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A). Nor is there a good reason to protect religious freedom rights less than disability rights. In fact, as we now discuss, this Court has made clear that Title VII's accommodation provision gives religious practice "favored [rather than lesser] treatment." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

B. The Premise Underlying *Hardison*'s "*De Minimis*" Standard Has Been Undercut by This Court's Decision in *Abercrombie & Fitch*.

Hardison's *de minimis* standard should be reconsidered not only because it is textually indefensible, but also because the premise underlying it has been undermined by this Court's decision in *Abercrombie & Fitch*, 135 S. Ct. 2028. This Court has revisited previous decisions, including decisions interpreting statutes, "when the theoretical underpinnings of those decisions are called into serious question." *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); accord *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings").

In *Hardison*, the Court justified its weak "*de minimis*" standard on the ground that religious practices should not be protected more than nonreligious practices: "[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." 432 U.S. at 84. The Court found such treatment unwarranted based on its conclusion that "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment." *Id.* at 85. Focusing on protecting against overt discrimination, the Court thus declined to require accommodation for the employee from a neutral policy that coincidentally interfered with his religious practice. See *id.* at 82

(refusing to order accommodation in face of seniority system because system "was not designed with the intention to discriminate against religion").

Four terms ago, however, the Court in *Abercrombie & Fitch* rejected the theoretical underpinnings of *Hardison*'s rule. Contrary to *Hardison*'s reasoning that Title VII aims only at actions treating religion worse than other practices, the Court in *Abercrombie* said:

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice."

135 S. Ct. at 2034.[3] As the Court pointed out: "An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious practice . . . ,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy." *Id.* (ellipses in original).

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[3] To make the point explicitly: When an employer takes adverse action against an employee because of an employee's practice that is religiously grounded, it is acting "because of [the employee's] religious observance and practice," 42 U.S.C. § 2000e-2(a)—even if the employer's action is "neutral" in the sense that it does not target the employee's practice only when it is religiously grounded. *Abercrombie*, 135 S. Ct. at 2034.

As one commentator has put it, this Court in *Abercrombie*, "for the first time, emphasized that § 701(j) mandates more than formal equality. . . . The Court used different rhetoric than it had in its earlier decisions in *Hardison* and [*Ansonia Bd. of Ed. v.*] *Philbrook*, [479 U.S. 60 (1986),] where it emphasized formal equality." Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 130 (2015). *Abercrombie* has cut the legs out from under the *de minimis* standard, and this case presents the opportunity for this Court to confirm that fact.

This reasoning in *Abercrombie* was important to the Court's ultimate holding there: that an employer can be held liable for refusing to accommodate an employee's practice that is religiously grounded even if the employer had no actual knowledge the practice was religious. Abercrombie & Fitch, the employer, had argued that a claim for accommodation could be brought only as a disparate-impact claim, not as a disparate-treatment (or intentional-discrimination) claim. 135 S. Ct. at 2033. Specifically, the company argued that "the statute limit[s] disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices." *Id.* at 2034. This Court held that disparate-treatment claims were not so limited, and explained its holding on the basis that Title VII's accommodation provision gives "favored treatment," not "mere neutrality[,] with regard to religious practices." *Id.*

The reasoning in *Abercrombie* aligns with Justice Marshall's dissent in *Hardison*, not with the majority. As that dissent explained, the *Hardison* majority's claim that Title VII focuses only on "intentional discrimination" against religion, and rejects "unequal treatment" favoring employee religious practices, is irreconcilable with the very concept of accommodation:

> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. . . . In each instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs," unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

Hardison, 432 U.S. at 87-88 (Marshall, J., dissenting). *Hardison*'s *de minimis* standard, which could be read to reject "even the most minor special privilege to religious observers to enable them to follow their faith" (*id.* at 87), therefore rests on the very misunderstanding of Title VII that this Court has now rejected in *Abercrombie*.

C. The *De Minimis* Standard Particularly Harms Accommodation of Religious Minorities, as an Examination of Lower-Court Cases Confirms.

Title VII's religious-accommodation provision is particularly vital to the protection of minority religious practices. Because facially or formally neutral workplace policies by nature reflect the perspective of the cultural majority, they will disproportionately come into conflict with the practices of religious minorities. Therefore, a meaningful requirement of religious accommodation disproportionately protects religious minorities—but a weak accommodation requirement, conversely, disproportionately hurts them.

These disproportionate effects appear in a list of reported religious accommodation cases, from 2000 to the present, decided on summary judgment motions concerning "undue hardship." See Appendix to this brief.[4] In the Appendix, we identify the religion of the employee claimants in those cases. Of 113 cases where the employee's religion is apparent, the number of cases involving claimants of varying faiths are:

General Christian	30
Seventh-day Adventist	25
Muslim	21
Sabbatarian Christian sects	7
Jehovah's Witness	6

[4] The list in the Appendix here draws on, and updates, a table of cases set forth in the Appendix to the petition for certiorari in *Patterson v. Walgreen Co.*, No. 18-349, at 35a-67a.

Jewish	5
Idiosyncratic religions	4
Pentecostal Christian	4
Hebrew Israelite	3
Non-religious	2
Rastafarian	2
Sikh	2
African religions	2

Muslims, a classic religious minority in the United States, constitute 18.6 percent of this large set of accommodation decisions (21 of 113), even though, according to a comprehensive 2014 study, they constitute only 0.9 percent of the population. Pew Research Center, *America's Changing Religious Landscape*, at 4 (May 12, 2015), http://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf. Overall, claims by members of non-Christian faiths (Muslims, idiosyncratic faiths, Jews, Hebrew Israelites, Rastafarians, Sikhs, and African religions) make up 34.5 percent of the accommodation cases (39 of 113), even though non-Christian faiths made up only 5.9 percent of the population in 2014 (and significantly less than that in earlier years). *America's Changing Religious Landscape*, *supra*, at 4. The percentage of cases in the Appendix involving religious minorities climbs to 62.8 percent when one combines the various non-Christians (34.5 percent of the cases) with Christian groups that follow the minority practice of Saturday Sabbath observance: Seventh-day Adventists (25 of 113, or 22.1 percent of the cases) and other small

Saturday-observing sects (7 of 113, or 6.2 percent of the cases).[5]

CONCLUSION

For the foregoing reasons, the Court should grant review in this case to reconsider *Hardison*'s "*de minimis*" standard and adopt an interpretation consistent with the text and purpose of Title VII.

The petition for certiorari should be granted.

Respectfully submitted.

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[5] The overall list of cases reflects a variety of religious observances and practices conflicting with employer rules. For example, among Muslims the cases involve the ability to conduct prayer during the workday, see, e.g., *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017) (space for prayer); to wear a beard, see, e.g., *Hussein v. The Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001); and to wear a hijab or woman's head-scarf, see, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).