

IN THE
Supreme Court of the United States

DAN GIURCA,

Petitioner,

v.

BON SECOURS CHARITY HEALTH SYSTEM, *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
REPLY	1
1. The Court of Appeals' decision adequately implicates the question presented.....	1
2. The question presented involves an issue of national importance	4
3. The case provides an adequate vehicle to address the question presented.....	5
4. The Court of Appeals' decision misapplied, and therefore conflicted with, this Court's decision in <i>Abercrombie</i>	6
CONCLUSION	9

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Becker v. Bateman</i> , 709 F.3d 1019 (10th Cir. 2013)	5
<i>EEOC v. Abercrombie & Fitch Stores, Inc.</i> , 575 U.S. 768 (2015)	6, 7, 9
<i>Manuel v. City of Joliet</i> , 580 U.S. 357 (2017)	5
<i>Manuel v. City of Joliet</i> , 590 Fed.App'x. 641 (7th Cir. 2015)	5
Rules	
Fed. R. App. P. 32.1	5

REPLY

Petitioner Dr. Dan Giurca respectfully submits this reply brief in further support of his Petition for a Writ of *Certiorari* and in response to the arguments raised by Respondents in opposition, which he now addresses *seriatim*.

1. The Court of Appeals' decision adequately implicates the question presented.

Respondents contend that the Court of Appeals did not reach the issue Dr. Giurca presents to this Court. *See* Opp. At 16-17. They are incorrect.

In so arguing, Respondents omit half the proposed question presented, which reads in full:

Does an employer violate Title VII when it fails to hire a person because his sincerely held religious beliefs prohibit him from agreeing to recognize and adhere to the employer's religious views and, if so, did Petitioner plausibly allege he was denied employment because of his religious beliefs such that he amply stated a claim for religious discrimination under Title VII?

See Pet. at i. Respondents argue that the Second Circuit did not answer the first half of the question, but rather premised its decision on the specific allegations of the Amended Complaint. But the second half of the question presented expressly asks the Court to assess the sufficiency of Dr. Giurca's allegations. In other words,

even accepting Respondents' characterization, the Second Circuit's decision implicates the question presented.

Further, Respondents' own characterization of the Second Circuit's holding – that the “Amended Complaint did not allege that Bon Secours asked Dr. Giurca to recognize or adhere to its religious views,” *see Opp.* at 16 – also implicates the first half of the question presented. Indeed, the Amended Complaint includes the following allegations:

- Respondents' proposed employment contracts required Petition to perform his services (1) “in accordance with . . . the [ERDs] promulgated by the United States Conference of Catholic Bishops, as interpreted by the Sisters of Bon Secours”; and (2) “subject to . . . the ERDs” (JA-22 ¶¶ 28-29).
- “Upon review of the [first] Agreement, Dr. Giurca noticed language in the contract that ***he believed to be at odds with his own religious beliefs***” and “[a]ccordingly, ***he believed he was religiously prohibited from subscribing*** to said Agreement (¶¶ 17-18 [emphasis added]).
- Petitioner emailed one of Respondents' agents “seeking an accommodation with regard to the contract language in the Agreement, stating: ‘There are some issues ***such as agreeing to the policies of a religious organization.*** This is very unusual language for employment’” (¶ 19 [emphasis added] [cleaned up]).
- “While Dr. Giurca clearly communicated his need for a religious accommodation, Bon Secours nonetheless

refused to even engage in the sort of dialogue that would explore Dr. Giurca's concern" (¶ 21).

- In another email, he stated, "I appreciate serving the poor **but signing a contract recognizing the [C]atholic [C]hurch, can be problematic for some people. I have the right to practice my own religion**" (¶ 23 [emphasis added]).
- After asserting his objection to the contractual language, Respondent's agent sent him another version for per diem work and which still included reference to the ERDs (¶¶ 26-29).
- "[D]ue to the Defendants' indifference and failure to accommodate Dr. Giurca's religious needs, he was unable to sign this Agreement as well"; it "was clear that **Dr. Giurca's issues with the Agreement related solely to the commitment it required to the Church**, not a particular code of conduct"; and "**the only impediment to beginning employment was to accept adherence to the objectionable religious directives**. Moreover, Defendants knew Dr. Giurca was well qualified to perform the job, and realized that [he] was not objecting to something that would affect his ability to perform the duties and responsibilities of a psychiatrist (¶¶ 30-32 [emphasis added]).¹

1. Respondents contend that "Dr. Giurca did not forego the contract because of the ERD contractual language requirement" but rather "that he simply took a job at ORMC because it offered a better commute." See Opp. At 11 n. 4. But this argument ignores the four corners of the pleading and misconstrues the portion of the record cited to support it. During his 2019 call with Colavito, he did not state that he took the ORMC job because it was a

In other words, the Amended Complaint plainly includes well-pled factual allegations that Dr. Giurca objected to the proposed contractual language on religious grounds and sincerely believed that signing either agreement, which required him to be subjected to a religiously-animated text, signified his recognition of the Catholic Church, in violation of his own religious beliefs. The legal question, then, is whether these allegations plausibly demonstrate a religious conflict requiring accommodation, which, again, squarely implicates the question presented.

2. The question presented involves an issue of national importance.

In his Petition, Dr. Giurca argued that his case presents an issue of national importance because the number of hospitals adhering to the ERDs is on the rise, having increased 22 percent between 2001 and 2016 to 548 hospitals nationwide, with one in six hospital beds residing in such an institution. *See Pet.* at 17-18. Respondents do not dispute these statistics or the underlying implication that this increase in the prevalence of requiring adherence to the ERDs as a condition of employment across the country demonstrates the national import of the Title VII claim Dr. Giurca advances here.

Rather, Respondents counter there is no national importance because “the Court of Appeals’ decision is unpublished, expressly states that it did not have

better commute. Rather, he noted that the ORMC commute was “a little bit too much for me,” to explain why he was then looking for something closer to home (JA-471).

precedential effect, and was entirely premised on the specific allegations in the record” *See Opp.* at 17.

But there is no requirement that an opinion be published for this Court to grant *certiorari*. Indeed, this Court has reviewed, and reversed, unpublished decisions of the Courts of Appeals. *See, e.g., Manuel v. City of Joliet*, 580 U.S. 357 (2017) (reversing *Manuel v. City of Joliet*, 590 Fed.App’x. 641 (7th Cir. 2015) (unpublished)). And while the Second Circuit’s summary order is not binding precedent, litigants may still cite it, and courts may consider it as persuasive authority. *See Fed. R. App. P.* 32.1; *See, e.g., Becker v. Bateman*, 709 F.3d 1019, 1026 n. 7 (10th Cir. 2013) (noting citation to unpublished opinion for its “persuasive value”).

Moreover, the specific factual allegations here do not diminish the national importance of the legal issue presented, which is whether, consistent with Title VII, an employer can require an applicant to agree to bound by the ERDs as a condition of employment when the applicant objects based upon his own sincerely held religious beliefs. Resolution of this particular issue does not depend on the specific circumstances of Dr. Giurca’s situation.

3. The case provides an adequate vehicle to address the question presented.

Respondents contend that this case provides a poor vehicle to address the question presented because “it is highly unlikely that Dr. Giurca could ever prevail on the merits of his Title VII claim even if this Court reversed” as he would have been unable to obtain privileges and, thus, unqualified to work. *See Opp.* At 18. Again, Respondents are wrong.

In so arguing, Respondents concede that the Second Circuit did not affirm on this ground and, instead, rely entirely on the district court’s analysis of this issue. *See Id.* (citing n. 8). But the district court’s analysis and conclusions are entirely irrelevant to the Title VII claim at issue here, which arises from the denial of employment in February 2017. Indeed, Respondents spill much ink challenging Dr. Giurca’s ability to obtain privileges based upon lawsuits he commenced against Montefiore in December 2018 and Orange Regional Medical Center in February 2019. *See Opp.* At 5-8, 15 n. 8, 18. And they highlight the district court’s conclusion that these issues would have raised “red flags” calling into question his ability to gain privileges in August 2019 when evaluating Respondents’ summary judgment seeking dismissal of Dr. Giurca’s retaliation claim arising from denial of a position at that later point in time. But none of these purported “issues” or “red flags” existed when he sought employment in early 2017 and was unable to accept the offered positions because of his religious objection to the ERDs. In this way, Respondents’ argument is nothing but a red herring, seemingly designed to tarnish Dr. Giurca’s reputation and distract from the issues compelling review.

4. The Court of Appeals’ decision misapplied, and therefore conflicted with, this Court’s decision in *Abercrombie*.

Finally, Respondents contend that the Second Circuit’s decision is consistent with *Abercrombie* because it cited the case and applied the standard it set forth. *See Opp.* At 23-26. Not so. It may have cited *Abercrombie*, but it did not faithfully apply it and, therefore, conflicted with it.

In *Abercrombie*, this Court recognized that an employer engages in intentional religious discrimination under Title VII when a potential employee's religious practice or belief is a factor in its refusal to hire that candidate, such as when its denial of employment arises from its failure to accommodate the candidate's religious practice or belief. *See* 575 U.S. at 773-74. In doing so, the Court held that the statute does not require the employer to have actual knowledge of the candidate's need for a religious accommodation; “[i]nstead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.” *Id.* at 772.

Yet, actual knowledge of Dr. Giurca's Romanian Orthodox religion and the specific doctrinal basis for his religious objection are exactly what the Second Circuit required of Dr. Giurca. It held that Dr. Giurca did “not allege that [Respondents] were aware of his **Romanian Orthodox religion**, much less that they took any actions based upon that religion.” *See* 3a (emphasis added). It also held that, even though the Amended Complaint “allege[s] that Defendants ‘failed to accommodate Plaintiff’s request for a reasonable accommodation, relating to modification of its standard employment agreement’ . . . [,] this is insufficient to state a claim for failure to accommodate.” 4a.

But, again, the Amended Complaint includes the following allegations:

- Petitioner emailed one of Respondents' agents “seeking an accommodation with regard to the contract language in the Agreement, stating: ‘There are some issues **such as agreeing to the policies of a religious organization**.

This is very unusual language for employment” (¶ 19 [emphasis added] [cleaned up]).

- “While Dr. Giurca clearly communicated his need for a religious accommodation, Bon Secours nonetheless refused to even engage in the sort of dialogue that would explore Dr. Giurca’s concern” (¶ 21).
- In another email, he stated, “I appreciate serving the poor *but signing a contract recognizing the [C]atholic [C]hurch, can be problematic for some people. I have the right to practice my own religion*” (¶ 23 [emphasis added]).
- “[D]ue to the Defendants’ indifference and failure to accommodate Dr. Giurca’s religious needs, he was unable to sign this Agreement as well”; it “was clear that *Dr. Giurca’s issues with the Agreement related solely to the commitment it required to the Church*, not a particular code of conduct”; and “*the only impediment to beginning employment was to accept adherence to the objectionable religious directives*. Moreover, Defendants knew Dr. Giurca was well qualified to perform the job, and realized that [he] was not objecting to something that would affect his ability to perform the duties and responsibilities of a psychiatrist (¶¶ 30-32 [emphasis added]).

And so, while Respondents might not have been aware that he was Romanian Orthodox, construing his pleading in the light most favorably him, these allegations demonstrate that Respondents certainly knew that (1) he was **not** Catholic; (2) he viewed agreement to be bound by the ERDs as contradicting his own religious beliefs;

(3) he conveyed the need for some sort of accommodation to this requirement; and (4) their failure to accommodate resulted in denial of employment. Under *Abercrombie*, these factual allegations sufficiently state a Title VII claim, and requiring more of Dr. Giurca at the pleading stage directly contravened this Court's precedent.

CONCLUSION

A writ of *certiorari* should enter.

Respectfully submitted,

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