No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "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 * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" includes "all aspects of religious observance and practice" unless "an employer demonstrates that he is unable to reasonably accommodate" a religious observance or practice "without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

The question presented is whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

PARTIES TO THE PROCEEDING

Petitioner, the Equal Employment Opportunity Commission, was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids, was the defendant in the district court and the appellant in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 731 F.3d 1106. The opinion and order of the district court (Pet. App. 92a-120a) is reported at 798 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2013. A petition for rehearing was denied on February 26, 2014 (Pet. App. 121a-123a). On May 19, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including June 26, 2014. On June 17, 2014, Justice Sotomayor further extended the time to July 25, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 2, 2014.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against job applicants or employees based on religion, among other attributes. The statute provides:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or 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.

42 U.S.C. 2000e-2(a)(1). The statute further provides that an employer commits an unlawful hiring practice "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)).

In 1972, Congress clarified that employment decisions are impermissibly based on "religion" when they are based on religious practices that the employer could reasonably accommodate. Congress provided that "[t]he 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 * * * an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (42 U.S.C. 2000e(j)). Accommodation of a religious practice causes undue hardship when it would impose more than *de minimis* costs on the employer. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977); see also 29 C.F.R. 1605.2(e)(1).

Under Title VII, the term "employer" includes, with exceptions not relevant here, certain individuals and companies engaged in commerce and "any agent of" a covered employer. 42 U.S.C. 2000e(a)-(b).

2. a. Respondent operates clothing stores under brand names including Abercrombie & Fitch, Abercrombie Kids, and Hollister. Pet. App. 2a. The company requires all of its store employees to comply with a "Look Policy" set out in its employee handbook. *Id.* at 94a; J.A. 42, 124-128. The policy applies to all store employees once hired, but job applicants are not required to be in compliance during job interviews. Pet. App 94a; J.A. 46.

The policy contains rules for clothing, jewelry, facial hair, and footwear. Pet. App. 3a, 94a; J.A. 124-128. It is intended to signal to shoppers that respondent is a purveyor of "a classic East Coast collegiate style of clothing." Pet. App. 2a-3a (citation omitted). As relevant here, the Look Policy bars employees from wearing "caps," which respondent deems "too informal for the image we project." J.A. 127. While the policy does not define "caps," the district manager responsible for the store at issue in this case interpreted the

prohibition on caps to apply to headscarves. Pet. App. 3a, 9a; J.A. 127, 134-137. Respondent also bars its employees from wearing black clothing on the job. Pet. App. 3a. Respondent's human resources section may grant exceptions to these rules, so long as the exceptions do not undermine respondent's brand identity. Pet. App. 94a; J.A. 49-50.

Respondent has policies that govern its hiring process, as well. Interviewers evaluate applicants using the company's "official interview guide," which requires interviewers to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether the applicant has "sophistication & aspiration." Pet. App. 8a (quoting J.A. 119). Applicants are rated on a three-point scale in each category. *Ibid.*; see also J.A. 119. An applicant who receives a score in "appearance" of less than two, or a total score of five or less, is not recommended for hiring. Pet. App. 8a; see also J.A. 119.

b. Samantha Elauf identifies as a Muslim. Pet. App. 94a-95a. She has worn a headscarf, or hijab, every day since she was 13 years old. *Id.* at 95a & n.1; J.A. 18-19. This practice reflects Elauf's understanding of what the Quran requires. J.A. 17-18.

In 2008, when Elauf was 17, she applied for a sales position at an Abercrombie Kids store operated by respondent in the Woodland Hills Mall in Tulsa, Oklahoma. Pet. App. 5a; J.A. 19-20. Respondent refers to sales positions as "model" positions. Pet. App. 3a; J.A. 105-106. The position's responsibilities include operating the cash register; opening and closing the store; greeting customers and helping them find clothing; cleaning, organizing, and maintaining the store; train-

ing other employees; preventing shoplifting; and "represent[ing] the brand" in the store. J.A. 106-107; see also J.A. 60-61.

Elauf was unaware of the "Look Policy" when she applied to work at the Abercrombie Kids store. Pet. App. 97a; J.A. 21, 29. Nonetheless, prior to her job interview, Elauf asked her friend, Farisa Sepahvand, a current employee, whether her headscarf would be permissible attire as an employee of respondent. Pet. App. 5a; J.A. 26-28. Sepahvand raised the issue with Kalen McJilton, an assistant manager at the store. Pet. App. 6a; J.A. 252-254. McJilton had previously worked at one of respondent's stores with an employee who wore a white yarmulke, and he told Sepahvand that he did not see any problem with Elauf's wearing a headscarf, especially if she did not wear a headscarf that was black. Pet. App. 6a; J.A. 254. Sepahvand communicated to Elauf that a headscarf would be permitted, but that because of respondent's prohibition on black clothing, she should wear a headscarf in a different color. Pet. App. 6a-7a; J.A. 255. Elauf seemed agreeable to that restriction. Pet. App. 6a-7a.

Elauf was interviewed for a job by Heather Cooke, an assistant store manager. In that capacity, Cooke was "in charge of hiring new employees." J.A. 53; see also J.A. 54-56. Cooke would consult with higher-level managers if she had a question regarding whether an applicant was an appropriate candidate, but would make "the final decision on whether an applicant for a model position would be hired." J.A. 55-56.

At the interview, Elauf wore jeans and a t-shirt in styles consistent with those sold under the Abercrombie brand, as well as the black headscarf that Elauf typically wore. Pet. App. 7a; J.A. 26-27, 30-31. To

Cooke, who had also seen Elauf wearing a headscarf on other occasions, see J.A. 68-69, 72-73, the headscarf signified "[t]hat [Elauf] was a Muslim" and that "that was the religious reason why she wore her head scarf," J.A. 76-77; see also J.A. 102. During the interview, Cooke asked Elauf questions about her job qualifications and described responsibilities of the position Elauf was seeking. J.A. 78, 115-120. Cooke did not suggest that wearing a headscarf would be prohibited. See Pet. App. 97a; J.A. 30-33, 63-65, 80-81.

Cooke was impressed by Elauf and rated her accordingly. J.A. 84-86, 92-93. She gave Elauf two out of three points on each of the three criteria in respondent's official interview guide—"appearance and sense of style," "outgoing and promotes diversity," and "sophistication and aspiration." Pet. App. 101a; J.A. 84-86. This score amounted to an assessment that Elauf "meets expectations" and should be hired. Pet. App. 8a; J.A. 119.

Although Cooke had the authority to make hiring decisions without further consultation, see J.A. 54-56, she decided to ask the manager of her store whether Elauf's headscarf violated respondent's policies, J.A. 79. Cooke was "unclear" about whether the headscarf would conflict with the Look Policy, which by its terms prohibited "caps," not headscarves. J.A. 80, 99.

After the store manager was unable to clarify the application of respondent's Look Policy, Cooke consulted with Randall Johnson, the district manager. Pet. App. 8a-9a; J.A. 87. Johnson oversaw seven stores operated by respondent, but was not responsible for hiring sales associates—those decisions were "solely * * * the store manager's responsibility." J.A. 132-133.

Johnson told Cooke that a headscarf would violate respondent's Look Policy. J.A. 87, 134. Cooke testified that after Johnson did so, Cooke explained that she understood Elauf to be a Muslim for whom the headscarf was religious garb:

> I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them."

J.A. 87. Cooke said that she protested, telling Johnson that she "believed that [Elauf] was Muslim, and that was a recognized religion"; "that she was wearing it for religious reasons"; and that Cooke "believe[d] that we should hire her." *Ibid.*

According to Cooke, Johnson was unmoved, and instructed her not to hire Elauf. J.A. 87. She said that Johnson directed her to lower Elauf's applicant score in the category of "appearance and sense of style" from two to one, yielding an overall score that corresponds to a rating of "below expectations" and to a recommendation that the applicant not be hired. Pet. App. 101a-102a; J.A. 85-86, 93-94; see also J.A. 119. Cooke said she did so, filling out a new form and throwing away the original rating sheet. Pet. App. 102a; J.A. 93-94.

Johnson gave a different account. He recalled Cooke asking for guidance concerning Elauf's headscarf. See J.A. 134. Johnson recalled asking Cooke, "is she compliant with the [Look Policy], does she pass," and after Cooke responded in the negative, he responded that "there's your answer. You cannot hire her." *Ibid.* But he denied that Cooke had told him

that she thought Elauf wore the headscarf for religious reasons, and he also denied making a comment about people painting themselves green. J.A. 146-147. He said he did not instruct Cooke to fill out a new rating form that changed Elauf's applicant scores. J.A. 147.

Cooke did not extend Elauf a job offer, nor did she contact Elauf to notify her of the decision. See J.A. 89. After Sepahvand pressed Cooke on the reason that Cooke had not hired her friend, however, Cooke told Sepahvand that she had not hired Elauf because of her headscarf. J.A. 90-91. Elauf learned the reason she had not been hired from Sepahvand. J.A. 35-36.

3. The Equal Employment Opportunity Commission (EEOC) filed suit, alleging that respondent had violated Title VII by "refus[ing] to hire Ms. Elauf because she wears a hijab" and "fail[ing] to accommodate her religious beliefs by making an exception to the Look Policy." Pet. App. 9a (citation omitted). Both parties moved for summary judgment. *Id.* at 10a.

4. The district court granted summary judgment to the EEOC. Pet. App. 92a-120a. The court approached the case using a burden-shifting framework that courts of appeals have applied to claims of religious discrimination. The district court noted that the Tenth Circuit had adopted a framework modeled on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), to address claims of unlawful discrimination based on religious observance or practice. Under that framework, a plaintiff seeking to make out a prima facie case of discrimination must show that (1) the applicant had a bona fide religious belief that conflicts with an employment requirement; (2) she informed

the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement. Pet. App. 108a-109a (citing *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)). If the plaintiff makes these showings, the district court noted, the burden shifts to the defendant to rebut one or more elements of the plaintiff's case; show that it offered a reasonable accommodation; or show that it was unable to accommodate the religious practice without undue hardship. *Id.* at 109a (citing *Thomas*, 225 F.3d at 1156).

The district court found no question that the EEOC had established the first and third elements of a prima facie case—that Elauf wore a headscarf as part of her Muslim faith and that respondent declined to hire Elauf because her headscarf conflicted with its Look Policy. Pet. App. 109a-115a. The court further concluded that respondent had failed to rebut these showings, because respondent had not disputed that it declined to hire Elauf as a result of her headscarf, *id.* at 110a, and because the record was devoid of evidence contradicting Elauf's testimony that her practice of wearing a hijab reflected her religious beliefs, *id.* at 114a-115a.

The district court also found that the EEOC had presented sufficient evidence to establish that respondent had notice of the religious nature of Elauf's practice when respondent declined to hire Elauf, rejecting the notice standard proposed by respondent in favor of the standard adopted by a number of courts of appeals. Pet. App. 109a, 115a. Respondent, the court explained, had contended that it could not be on notice of the religious nature of Elauf's practice because "Elauf did not tell the interviewer she had a religious

belief that conflicted with the Look Policy and that she needed an accommodation." *Id.* at 115a. The court held, however, that explicit, direct notice of a conflict from an employee was not a prerequisite for Title VII protection. Instead, accepting a standard adopted by three courts of appeals, the court concluded that the notice requirement is met "when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* at 115a-120a (citing *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999)).

The district court found that the approach of those courts better served the objectives of Title VII than a rule under which an employee had protection against religious-practice-based discrimination only if the employer received explicit, direct notice from the employee that a practice was religious. The district court explained that a rule requiring an employer to have enough information to make it aware of a conflict "prevent[s] ambush of an unwitting employer." Pet. App. 117a. Such a rule also serves Title VII's objective of encouraging an interactive process in which employers and employees strive for mutually acceptable accommodations. See *id.* at 116a-117a (discussing *Thomas*, 225 F.3d at 1155; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1171-1172 (10th Cir. 1999)). Under a rule requiring explicit and direct notice from an employee, however, no interactive process concerning

accommodation would occur when only the employer was aware of a potential conflict, because job applicants could not be expected to request an accommodation when they were unaware of a conflict in the first place. *Id.* at 118a n.11. Here, "there could be no bilateral, interactive process of accommodation because, although [respondent] was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why." *Ibid.*

The district court found that respondent had adequate notice of religious practice under the standard applied in a number of courts of appeals, because respondent's hiring personnel had correctly inferred that Elauf's headscarf reflected religious practice. Specifically, the court found respondent had "enough information to make respondent aware there exist[ed] a conflict between [Elauf's] religious practice or belief and a requirement for applying for or performing the job," Pet. App. 115a, because it was "undisputed" that Cooke, who interviewed Elauf wearing a headscarf, "knew [Elauf] wore the head scarf based on her religious belief," *id.* at 117a & n.10. And because Cooke "had responsibility for hiring decisions at the Abercrombie Kids store," her correct understanding was properly attributed to respondent, regardless of whether Cooke had (as she testified) told her district manager that Elauf wore a headscarf for religious reasons. *Id.* at 117a n.10.

The district court also found respondent had offered only speculation to support its claim that granting Elauf a religious accommodation would have resulted in "undue hardship." Pet. App. 119a (citation omitted). It emphasized that respondent could not

cite studies or identify examples from respondent's own past experience that supported its contention that permitting Elauf a religious accommodation would have negatively impacted respondent's brand. *Id.* at 118a. Although respondent called a witness, Dr. Erich A. Joachimsthaler, who opined about the importance of in-store experience to respondent's marketing strategy, the court noted that Dr. Joachimsthaler had not "collect[ed] or analyze[d] data to corroborate his opinion" that religious exceptions to respondent's Look Policy would undermine respondent's brand. *Id.* at 119a. Further, the court noted, the numerous exceptions respondent had granted to the Look Policy in the past—including eight or nine headscarf exceptions—undercut the claim that a religious accommodation for Elauf would have been an undue hardship. *Ibid.*

After finding no dispute of material fact concerning whether respondent had notice of Elauf's religious practice; whether respondent had declined to hire Elauf because of her religious practice; and whether accommodation would have posed undue hardship, the district court ordered summary judgment in favor of the EEOC as to liability. Pet. App. 92a-120a. After a trial limited to damages, a jury awarded $20,000 in compensation. *Id.* at 12a.

5. a. The court of appeals reversed, ordering summary judgment in favor of respondent. Pet. App. 1a-91a. The court concluded that an employer is not prohibited under Title VII from taking action against an applicant or employee based on the religious practice of the applicant or employee unless the applicant or employee has given the employer explicit, verbal notice of a religious conflict, *id.* at 28a, giving rise to

"particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," *id.* at 34a. As to the source of notice, the court rejected the EEOC's position that Title VII's notice requirements are met when an employer has notice of a conflict between an applicant's religious practice and a workplace rule "from an affirmative statement by the individual, *or some other source*." *Id.* at 30a; see also *id.* at 29a (explaining the EEOC's position that "although [respondent] is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting an accommodation") (citation omitted). Instead, the court concluded, explicit notice from the applicant herself was required: "[A] plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule." *Id.* at 28a; see *id.* at 46a.

The court of appeals "recognize[d] that some courts have taken a different path on this question" but stated that the court was "confident" that it was correct to require explicit and direct notice from the employee or applicant. Pet. App. 46a. First, it found support in its own prior cases stating that a plaintiff must establish that an employee "informed his or her employer" of the religious belief requiring accommodation. *Id.* at 30a (quoting *Thomas*, 225 F.3d at 1155); see *id.* at 32a-33a.

Second, the court of appeals concluded that its approach properly allocated burdens under Title VII because important facts about the religious beliefs of

an applicant or employee are typically known only to the applicant or employee. Pet. App. 46a. In particular, only an applicant or employee would typically know if particular practices reflected religious faith, personal preferences, or culture. *Id.* at 46a-50a. Similarly, the court reasoned, only an applicant or employee would typically know whether the belief underlying a religious practice was inflexible, which the court understood to be a requirement in order for a practice to merit accommodation under Title VII. *Id.* at 52a-53a. In addition, the court deemed its rule to be most compatible with the EEOC's practice of discouraging employers from inquiring as to an applicant's religious beliefs as part of the hiring process. *Id.* at 53a-55a.

The court of appeals concluded its rule was further supported by EEOC guidance stating that an employer has an obligation to reasonably accommodate religious practices "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation." 29 C.F.R. 1605.2(c)(1); see Pet. App. 55a-56a. The court also relied on agency manuals stating that an applicant or employee "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" and "cannot assume that the employer will already know or understand it." *Id.* at 56a (quoting 2 EEOC Compl. Man. (BNA) § 12-IV(A)(1), at 628:0020 (July 2008) (*EEOC Compliance Manual*)).

Applying its standard, the court of appeals concluded that respondent was entitled to summary judgment because respondent had not received notice of a conflict through Elauf's verbal statements. Pet. App. 28a. "[T]here is no genuine dispute of material

fact," the court wrote, that Elauf "never informed [respondent] before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and [respondent's] clothing policy." *Ibid.*

The court of appeals added that even if Title VII permitted notice of a conflict between a work rule and a religious practice to come from a source other than a job applicant or employee, the notice respondent received fell short, because it did not meet what the court took to be a further requirement that an employer have "particularized, actual knowledge" of a conflict before an applicant or employee could receive Title VII protections. Pet. App. 39a-40a; see also *id.* at 34a. It found insufficient an employer's correct inference that a conflict existed. Thus, the court concluded, it was not relevant in the instant case that the assistant manager responsible for hiring at the Abercrombie Kids store had correctly "assumed that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to [do] so," *id.* at 40a (emphasis omitted), because "a correct assumption does not equal actual knowledge," *id.* at 42a n.9.

Because the court of appeals concluded that respondent was entitled to summary judgment on notice grounds, it did not address respondent's other challenges to the district court's holding. Specifically, it did not address respondent's challenges to the district court's determinations that there was no material dispute of fact concerning Elauf's bona fide religious beliefs or concerning whether accommodating Elauf's headscarf would have imposed an undue hardship on respondent.

b. Judge Ebel concurred in part and dissented in part. Pet. App. 73a-91a. He dissented from the court of appeals' conclusion as to the notice required to trigger an employer's obligations under Title VII. *Id.* at 74a-81a, 84a-88a. Judge Ebel explained that it "makes no sense to apply, reflexively and inflexibly," a requirement that a job applicant give notice of a religious conflict to an employer through explicit verbal notice. *Id.* at 76a. In some cases, he observed, it is the employer, not the applicant, that has superior knowledge of a conflict between work rules and an applicant's religious practices. Here, for instance, "the reason Elauf never informed" respondent of the conflict between her religious practice and respondent's Look Policy was that "Elauf did not know that there was a conflict." *Id.* at 75a-76a. In contrast, respondent "did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy * * * prohibited its sales models from donning headwear." *Id.* at 76a.[1] He wrote that under these circumstances it would make little sense to require the employee to

[1] Judge Ebel noted that the evidence in this case "arguably suggests that [respondent] affirmatively misled Elauf into believing that there was no problem with her wearing a hijab while working in one of [respondent's] stores, which may explain why she did not raise the issue during her job interview." Pet. App. 83a n.6. Elauf, he emphasized, had reason to believe based on representations from a managerial employee that her headscarf would pose no problem. In particular, he noted, "Elauf, through a friend, inquired of one of [respondent's] store managers whether there was a problem with her wearing a hijab while working" at respondent's store, and she "was told that it would be no problem so long as the hijab was not black." *Id.* at 82a; see p. 5, *supra*.

give notice of a religious conflict in order for Title VII's protections of religious observance to apply. Doing so, he emphasized, would undercut Title VII's objective of promoting dialogue regarding possible religious accommodations, because it would permit an employer to decline to hire an applicant (or to fire an employee) when it suspected a religious conflict.

Rejecting the panel majority's direct, explicit notice requirement, Judge Ebel stated that he would hold an employer had adequate notice of a conflict between work rules and an applicant's religious practice when the employer understood there was a possible conflict. He found this conclusion consistent with decisions of other circuits that a plaintiff established a prima facie case under Title VII if she showed "that the employer knew of a conflict between the plaintiff's religious beliefs and a job requirement, regardless of how the employer acquired knowledge of that conflict." Pet. App. 84a-85a (citing *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 652-653; *Heller*, 8 F.3d at 1436-1437; *Hellinger*, 67 F. Supp. 2d at 1361-1363). See also *id.* at 87a (stating Judge Ebel "would follow the holdings" in those cases).

Applying this standard, Judge Ebel concluded that the majority had erred in granting summary judgment to respondent. Judge Ebel wrote that the EEOC had established a prima facie case—and that a jury could find in the EEOC's favor—in light of the evidence that respondent "assumed Elauf was a Muslim, that she wore a hijab for religious reasons, that she would insist on wearing a hijab when working in an Abercrombie store, and then, based on those assumptions and without first initiating any dialogue with Elauf * * * refused to hire Elauf because she

wore a hijab." Pet. App. 87a. Judge Ebel stated, however, that he would have remanded the case for trial, rather than affirming summary judgment in favor of the EEOC, because he believed there were factual disputes relevant to liability. He stated, in particular, that there were "factual disputes as to whether the circumstances presented here triggered [respondent's] duty to initiate an interactive dialogue with Elauf in order to determine whether she had a religious practice that conflicted with [respondent's] Look Policy." *Id.* at 90a-91a. And there were in his view factual disputes concerning whether granting Elauf a religious accommodation would constitute an undue hardship for respondent. *Id.* at 91a n.2.

6. By an evenly divided vote among active judges, the court of appeals denied rehearing en banc. Pet. App. 121a-123a.

SUMMARY OF THE ARGUMENT

Title VII prohibits an employer from refusing to hire a job applicant based on what the employer correctly understands to be the job applicant's religious observance or practice, unless accommodating that practice would cause the employer undue hardship.

A. 1. The text of Title VII reaches employers who discriminate in hiring based on what they understand to be religious practices. Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of such individual's * * * religion," including because of any aspect of such individual's "religious observance and practice" that could be accommodated without undue hardship. 42 U.S.C. 2000e(j), 2000e-2(a)(1). An employer who refuses to hire a person on the basis of what it correctly understands to be a religious prac-

tice has refused to hire a person "because of" the religious practice in the ordinary sense—that is, "by reason of" or "on account of" the religious practice. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (citation omitted). And the employer's actions also satisfy the lesser contributing-causation standard—under which a refusal to hire is a prohibited employment practice if the religious practice was a "motivating factor" in the employment decision. 42 U.S.C. 2000e-2(m).

2. Intentional discrimination based on "race, color, religion, sex, or national origin" is the core conduct that Congress sought to prohibit under Title VII. 42 U.S.C. 2000e-2(a)(1). "Disparate treatment"—in which an employer has the intent or motive to discriminate based on a protected attribute—was "the most obvious evil that Congress had in mind." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Discrimination against a job applicant based on what the employer correctly understands to be the applicant's religious practice is just this type of core prohibited conduct.

3. Consideration of Title VII's well-settled purposes reinforces the applicability of Title VII to cases in which an employer discriminates based on what it correctly understands to be a job applicant's religious practice. By enacting Title VII, Congress sought to eliminate decision-making based on particular aspects of identity that Congress deemed categorically improper grounds for hiring decisions. The court of appeals' rule would undermine this objective, by permitting employers to choose job applicants based on one of the attributes that Congress sought to remove from hiring processes.

In enacting the portion of Title VII requiring reasonable accommodations of religious practices that would not pose undue hardship, Congress also sought to generate "bilateral cooperation" between employers and employees to reach acceptable accommodations between religious practices and work rules. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted). The court of appeals' rule would undermine this objective as well, by permitting employers to act against employees based on what they correctly understand to be religious practices, instead of attempting a "reconciliation of needs," *ibid.* (citation omitted), whenever the court of appeals' stringent notice requirements are not met.

B. 1. None of the reasons offered by the court of appeals justify the court's deviation from text, precedent, and purpose. The court's decision relied to some degree on its own prior decisions formulating a burden-shifting framework for religious-accommodation claims. But no part of this Court's jurisprudence concerning burden-shifting frameworks supports a rigid notice requirement for religious-accommodation claims.

The court of appeals next suggested that Title VII protections are appropriately conditioned on notice from applicants because applicants are best positioned to identify conflicts between work rules and religious practices. This premise, however, was incorrect. While applicants have superior knowledge of their religious beliefs, employers have superior knowledge of work rules. Thus, as this case illustrates, employers sometimes identify religious conflicts not known to applicants. Moreover, the court was mistaken in thinking its limitations on Title VII were necessary to

ensure that employers do not feel obligated to routinely inquire into the sensitive area of religious practices. Employers who suspect a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would be unable to comply.

2. The court of appeals also erred in drawing support for its limitations on Title VII from statements in EEOC guidance. Statutory text, precedent, and purposes leave no room for debate concerning Title VII's applicability to intentional discrimination based on religious practices such as that at issue here. To the extent that consideration of agency views is useful, however, the relevant inquiry would be whether the agency's position—that Title VII does not incorporate the notice limitations imposed by the court of appeals—warrants deference under the framework of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The EEOC's position—taken in this case, in prior litigation, and in recent guidance—is consistent with the EEOC's earlier published guidance.

C. On the undisputed facts in this case, the EEOC's claim against respondent was not deficient on notice grounds. There is no material dispute of fact that the assistant manager who failed or refused to hire Elauf for a position in respondent's store did so because Elauf wore a headscarf, which the assistant manager correctly understood to reflect religious practice. That manager therefore "fail[ed]" and "refuse[d] to hire" Elauf "because of" an aspect of "religious observance and practice." The court of appeals' decision with respect to notice should be reversed, and the case remanded for determination of the remaining aspects of respondent's appeal.

ARGUMENT

TITLE VII BARS AN EMPLOYER FROM REFUSING TO HIRE AN APPLICANT BASED ON WHAT THE EMPLOYER CORRECTLY UNDERSTANDS TO BE A RELIGIOUS PRACTICE, ABSENT A SHOWING OF UNDUE HARDSHIP

Under Title VII, it is an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of such individual's * * * religion," including because of any aspect of such individual's "religious observance and practice" that could be accommodated without undue hardship. 42 U.S.C. 2000e(j), 2000e-2(a)(1). The plain terms of this provision, this Court's past decisions, and consideration of the statute's well-settled purposes establish that Title VII forbids an employer from refusing to hire a job applicant based on what the employer correctly understands to be the job applicant's religious practices.

A. Text, Precedent, And Considerations Of Purpose Establish The Applicability Of Title VII Protections

1. The "starting point" for analysis of Title VII is the "statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98-99 (2003). By its terms, Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of" religion, 42 U.S.C. 2000e-2(a)(1), which "includes all aspects of religious observance and practice," unless the company demonstrates that accommodating the practice would have constituted an undue hardship, 42 U.S.C. 2000e(j); see also 42 U.S.C. 2000e-2(m) (further stating that an unlawful employment practice is "established when the complaining party demonstrates that race, color, religion, sex, or

national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

The language of this prohibition easily reaches cases in which an employer declines to hire someone based on what it correctly understands to be a religious practice. When an employer deliberately chooses not to hire an applicant based on a religious practice, the employer's failure or refusal to hire is "because of" a religious practice in its ordinary sense—that is, it is "by reason of" or "on account of" the employee's religious practice. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (quoting *Gross* v. *FBL Fin. Servs.*, 557 U.S. 167, 176 (2009)) (setting forth "ordinary meaning" of "because of"). The employer's decision also satisfies the contributing-causation standard that is equally sufficient to establish liability under Title VII. When an employer chooses not to hire a person based on what the employer understands to be a religious practice, the religious practice was a "motivating factor" in the employment decision. 42 U.S.C. 2000e-2(m). Giving the text of Title VII its ordinary meaning, an employer that declines to hire an applicant based on what the employer correctly understands to be a religious practice violates Title VII unless accommodating the religious practice would have posed an undue hardship.

2. This Court's decisions make clear that intentional choices by employers to disfavor applicants or employees based on protected attributes are at the heart of Title VII's prohibitions. The "most obvious evil that Congress had in mind" when it sought to prevent hiring based on impermissible considerations was "disparate treatment" based on protected attrib-

utes. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). An employer engages in disparate treatment when the employer "had a discriminatory intent or motive for taking a job related action." *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks omitted) (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)); see also, *e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007); *Teamsters*, 431 U.S. at 335 n.15. An employer has "discriminatory intent or motive" when the employer discriminates based on a protected attribute—even if the employer does so for reasons unrelated to animus. See *Ricci*, 557 U.S. at 579-580 (noting that city's use of race-based hiring to achieve "well intentioned or benevolent" aims still qualified as disparate treatment based on race for purposes of Title VII absent a valid defense); see also *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186, 1194 n.3 (2011) (noting that under tort law, intent denotes "that the actor desires to cause consequences of his act, or that he believes the consequences are substantially certain to result from it") (citation omitted). Application of these settled principles to the religious-accommodation context is straightforward: When an employer declines to hire a prospective employee based on what it correctly believes to be a religious practice—and thereby intentionally discriminates based on religious practice—the employer has engaged in the type of disparate-treatment discrimination at the heart of Title VII's prohibitions, unless the employer is excused under the undue hardship exception.

3. Consideration of statutory purpose yields the same result. Because Title VII is written "in the

broadest terms to prohibit and remedy discrimination," the statute "must be given a liberal interpretation" to achieve its objectives, and "exemptions from its sweep" must "be narrowed and limited to effect the remedy intended." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 80-81 (1982) (citation omitted). Application of this principle compels rejection of the court of appeals' limitations on Title VII protections. Permitting an employer to discriminate based on what it correctly understands to be religious practice—in those cases in which the employer has not obtained actual knowledge of the religious nature of the practice based on explicit notice from the employee—would undercut the statute's recognized objectives.

By enacting Title VII, Congress sought to eliminate decision-making based on particular aspects of identity that Congress deemed unrelated to merit. The statute thus reflects a judgment that those attributes are not proper bases for hiring decisions. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) (noting that statute reflects judgment that "sex, race, religion, and national origin are not relevant to the selection, evaluation or compensation of employees"); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971) (describing purpose of Title VII as "to promote hiring on the basis of job qualifications" rather than protected characteristics) (citation omitted). The law's "principal goal," accordingly, was to "eliminate * * * discrimination in employment" based on those attributes, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 n.6 (1977) (citation omitted), including those aspects of religious observance or practice that an employer could reason-

ably accommodate without undue hardship, 42 U.S.C. 2000e(j).

The court of appeals' holding would run contrary to this objective. Each of its requirements would permit employers to turn down applicants based on the very criteria Congress forbade. Under the court's direct-notice standards, employers would be free to discriminate in those cases in which the employer's awareness of a conflict between work rules and an applicant's religious practices comes from, for instance, a current employee; statements of an applicant that did not amount to an explicit declaration of conflict; or the employer's own accurate inference of religious practice, based on observing practices linked with religious observance. See, *e.g.*, *Hellinger* v. *Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999) (notice from different employee); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (imprecise statements of employee); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450-451 (7th Cir. 2013) (same); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc) (correct inference from employee's activities), cert. denied, 516 U.S. 1158 (1996). And under the court of appeals' "actual knowledge" requirement, employers would be free to discriminate based on the criteria Congress deemed impermissible when the employers stayed a step shy of certainty as to the religious nature of an applicant's practice. These limitations would provide a ready means to circumvent Title VII's protections.

Title VII's objective of promoting dialogue concerning possible accommodations would also fall victim to the court of appeals' requirements of explicit employee notice and "actual knowledge." When Con-

gress enacted protections for religious practice, it sought to generate "bilateral cooperation" between employers and employees concerning possible conflicts, directed at "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted); see also *ibid.* (discussing legislative history supporting this view). The court of appeals' rule reduces employers' incentives to come to the table when they become aware of conflicts between religious practice and work rules. An employer who learns of a conflict based on information other than direct, explicit notice from the employee would have no incentive to attempt cooperative "reconciliation of the needs," *ibid.* (citation omitted), with the additional obligations that process may entail. Similarly, an employer who correctly infers that a practice is a religious one, but is not certain, will have little incentive to explore accommodation, because without "actual knowledge" gleaned from the applicant, the employer is entirely freed of Title VII obligations. Such employers may find it simplest to avoid hiring the observant applicant based on religious practices—a result that Title VII sought to avoid. Cf. *ibid* (disapproving as inconsistent with purpose a statutory reading that would that give employees an incentive to "hold out" in accommodations process rather than negotiating).

The court of appeals' limitations would undercut Title VII most significantly with respect to jobseekers. A number of religions have garb and grooming requirements that some employers may readily identify as religious practices. See Religious Orgs. Pet. Stage Amicus Br. 7-9 (discussing Muslim, Sikh,

Christian, and Jewish practices). Employers who observe these practices will know whether they conflict with the employer's own expectations for garb and grooming. Yet at the application stage, jobseekers will often not know all of an employer's work rules. Accordingly, applicants may be poorly situated to identify a conflict with work rules that the prospective employer readily perceives. Permitting an employer to decline to hire job applicants based on their perceived religious practices, in these circumstances of informational asymmetry, would significantly undercut Title VII protections at the initial, critical stage of the employment process.

B. The Reasons Offered By The Court Of Appeals Do Not Justify Its Narrow Construction Of Title VII

None of the reasons offered by the court of appeals justifies the court's limitations on the scope of Title VII protections.

1. Neither precedent nor policy considerations support the court's approach

The court of appeals appears to have rested its decision in substantial part on its own prior precedent setting out a burden-shifting approach to religious accommodation claims based on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). See Pet. App. 30a-33a (discussing prior cases that stated employee's prima facie case required showing that "he or she informed his or her employer of" their religious belief). But whether or not the court of appeals correctly read its earlier decisions, cf. *id.* at 76a-79a (Ebel, J., concurring in part and dissenting in part), nothing in this Court's jurisprudence supports imposing a rigid notice requirement because a burden-shifting frame-

work is used. Burden-shifting frameworks do not impose requirements beyond those in the statute. They are instead "merely a sensible, orderly way to evaluate the evidence * * * as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); see also *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) (explaining that burden-shifting framework "serves to bring the litigants and the court expeditiously and fairly to [the] ultimate question" in the case). Thus, if Title VII does not by its terms condition protections on direct, explicit notice from an employee giving rise to actual knowledge—and it does not—no part of *McDonnell Douglas* supports imposing such a requirement.

The court of appeals next suggested that limiting Title VII protections to those job applicants who have provided their employers with direct notice of a religious conflict is appropriate because applicants have superior knowledge of whether their particular practices are religious. See Pet. App. 46a-53a (emphasizing that whether a practice is religious depends on employee's subjective reasons for a particular practice). That reasoning is flawed. Knowledge of the need for an accommodation requires an understanding not simply of an applicant's religious practices but also of company policies. The employer almost uniformly has superior knowledge of the latter. Thus, in some cases, only the employer will perceive a conflict between religious practice and work rules. Here, for instance, while the supervisor in charge of hiring for respondent's store correctly understood there to be a conflict between respondent's work rules and Elauf's religious practices, Elauf was unaware of any conflict.

See *id.* at 75a-76a (Ebel, J., concurring in part and dissenting in part). It thus makes little sense to place deliberate religious discrimination outside the ambit of Title VII based on a superior-knowledge theory.

Nor was the court of appeals correct to suggest that an explicit, direct notice requirement is required to avoid unseemly employer inquiries into religious practices. See Pet. App. 53a-54a. Because applicants' religions are generally not relevant to their job qualifications, the EEOC discourages employers from inquiring as to job applicants' religious beliefs as a general matter. See *ibid.* But after an employer has received sufficient information about an applicant's beliefs to be on notice of a potential religious conflict, the EEOC does not discourage employers from making limited inquiries to confirm the need for an accommodation. See *EEOC Compliance Manual* § 12-I-A-3, at 628.0003; *id.* § 12-IV-A-2, Exs. 30 and 31, at 628:0022-:0023. To do so, an employer who suspects a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty complying. See generally EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace*, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008); *EEOC Compliance Manual* § 12-IV(A), at 628:0028. Accordingly, concern about the prospect of routine inquiry into religious faith does not support limiting Title VII protections.

2. EEOC guidance does not support the decision below

Finally, the court of appeals erred in relying on isolated statements in previously issued EEOC guidance materials to support its conclusions. See Pet.

App. 55a-68a. Statutory text, precedent, and purposes make plain Title VII's applicability to intentional discrimination based on protected attributes. To the extent that recourse to agency views is appropriate, however, the proper framework is to determine whether the agency's view—as articulated in this case—warrants a measure of deference under the framework of *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944). See *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013); *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).[2] Under the *Skidmore* framework, whether an agency's view warrants deference "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. at 140.

The EEOC has construed Title VII—here and elsewhere—to eschew any requirement of notice based on actual knowledge, obtained through explicit statements directly from an employee. EEOC C.A. Br. 34; EEOC D. Ct. Opp. to Resp's Mot. for Summ. J. 11-12; see EEOC Mem. in Opp. to Def's Mot. For Summ. J. 14-15, *EEOC* v. *GKN Driveline N. Am., Inc.*, 1:09CV654, 2010 WL 5093776 (M.D.N.C. 2010) (stating that "an employee need not explicitly ask for a religious accommodation" and that notice is sufficient if the employer has "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the

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[2] Congress did not vest the EEOC with the authority to enact substantive rules or regulations under Title VII. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); cf. 42 U.S.C. 2000e-12(a) (conferring authority on the EEOC to issue "procedural regulations").

employee's religious practice and the employer's job requirements") (citation omitted). The EEOC has also taken this approach in interpreting the analogous accommodation provision in the Americans With Disabilities Act. See, *e.g.*, EEOC Br. at 10-23, *Freadman* v. *Metropolitan Prop. & Cas. Ins. Co.*, 484 F.3d 91 (1st Cir. 2007) (No. 06-1486) (arguing that employer's obligation begins when employer becomes aware of employee's disability); EEOC Reply Br. at 16, *EEOC* v. *Agro Distrib. LLC*, 555 F.3d 462 (5th Cir. 2009) (No. 07-60447) (explaining that key issue with respect to notice is "whether the employee . . . provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.") (quoting *Taylor* v. *Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)); see also Pet. App. 69a (noting ADA's "analogous reasonable-accommodation scheme").

The EEOC also rejected a requirement of explicit, direct notice under Title VII in detailed written guidance in March 2014. See EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Dec. 3, 2014) (*Garb and Grooming*); see also EEOC, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm. The guidance explains that "[i]n some instances, even absent a request" from an employee to accommodate a religious practice, "it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *Garb and Grooming* Q&A 7. It

offered as an example a circumstance in which an employer correctly understood a job applicant's headscarf to be religious; presumed she would wear that headscarf at work; and declined to hire the applicant as a result. *Id.* Q&A 7, Ex. 7. In that circumstance, "because the employer believed [the applicant's] practice was religious and that she would need accommodation," the employer was not unilaterally free under Title VII to refrain from hiring her based on her religious practice. *Ibid.*

Contrary to the view of the court of appeals, these articulations are consistent with prior, less detailed guidance. The EEOC's compliance manual, on which the court of appeals relied, see Pet. App 56a, states that an employer's duties under Title VII arise in any case in which the employer is "on notice" that an employee's "sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship." *EEOC Compliance Manual*, § 12-IV Overview, at 628:0020. And while the manual emphasizes that an employee cannot simply assume that the employer will understand a practice to be religious, *id.* § 12-IV(A)(1), at 628:0020, see Pet. App. 56a, it offers examples of adequate notice that do not involve explicit statements of the employee, see *EEOC Compliance Manual* § 12-IV(A)(1) n.120, at 628:0021.

The guidance in EEOC's interpretive regulations—though less explicit—is consistent with the agency's position. The interpretive regulations provide that an employer may not "fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship in the

conduct of its business." 29 C.F.R. 1605.2(b)(1). That blanket prohibition does not suggest that an employer may under any circumstance fail to accommodate what it understands to be a religious practice, absent a showing of undue hardship. The court of appeals did not address that portion of the EEOC's guidance, and instead relied on a portion of a sentence in the subsection entitled "[r]easonable accommodation." But the court misunderstood the provision it cited. The "reasonable accommodation" section is devoted to explaining the work-rule modifications that are required when an employer has a duty under Title VII, rather than to explaining when an employer has a duty of accommodation at all. 29 C.F.R. 1605.2(c); cf. 29 C.F.R. 1605.2(b)(1) (setting out when employer has "[d]uty to accommodate"). It states that "[a]fter 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," 29 C.F.R. 1605.2(c)(1), before describing the scope of "reasonable" accommodations, 29 C.F.R. 1605.2(c)(1) and (2). The guidance thus specifically describes what accommodations are reasonable after an employer's duty to accommodate is triggered by a particular kind of notice—likely the most common kind. But it does not by its terms limit an employer's duty to that subset of cases.

C. The Decision Below Should Be Reversed

The court of appeals erred in awarding summary judgment to respondent on notice grounds. On the undisputed facts in this case, it is clear that assistant manager Heather Cooke failed or refused to hire Elauf on behalf of respondent, based on Elauf's head-

scarf, despite Cooke's correct understanding that the headscarf represented a religious practice.

First, there is no material dispute of fact that Heather Cooke, as the person responsible for hiring at the Abercrombie Kids store to which Elauf applied, "fail[ed] or refuse[d] to hire" Elauf as an agent of respondent. 42 U.S.C. 2000e-2(a)(1); see also 42 U.S.C. 2000e(b) (defining "employer" to include "any agent" of the employer). Cooke sought guidance from higher-level managers regarding the meaning and application of respondent's policies, including, here, guidance regarding whether Elauf's headscarf was compatible with respondent's Look Policy. See J.A. 55-56 (Cooke explaining practice of consultation with superiors); J.A. 101 (Cooke explaining that Johnson decided Elauf was not qualified for a job based on her headscarf). But Cooke was ultimately responsible for making hiring decisions regarding particular employees—and she was the person who would ultimately extend or not extend an offer. See J.A. 53, 54 (Cooke explaining she was "in charge of hiring" store employees); J.A. 55 (Cooke agreeing that she made "the final decision on whether an applicant for a model position would be hired"); see also J.A. 56 (Cooke agreeing that she had the authority to make job offers); J.A. 133 (Johnson explaining that decisions regarding hiring for non-managerial positions were "solely * * * the store manager's responsibility" and that Cooke was the "HR manager [f]or the Abercrombie Kids store"). In sum, as the district court properly found, Cooke "had responsibility for hiring decisions at the Abercrombie Kids store." Pet. App. 117a n.10.

Second, there was no dispute that when Cooke "fail[ed] or refuse[d] to hire" Elauf for a position in

respondent's store, 42 U.S.C. 2000e-2(a)(1), she did so based on Elauf's practice of wearing a headscarf, which Cooke correctly understood to be a religious practice. To be sure, Cooke and Johnson gave different accounts regarding the information that Cooke conveyed to Johnson in discussing Elauf's hijab.[3] But there was no dispute of fact concerning Cooke's correct understanding. As Cooke explained, after seeing Elauf wearing a headscarf on multiple occasions at the mall and during the interview, Cooke correctly inferred that Elauf was a Muslim, and "figured that was the religious reason why she wore her headscarf." Pet. App. 7a (citation omitted); see also J.A. 77. Thus, there is no dispute of material fact that Cooke failed and refused to hire Elauf for respondent based on what Cooke correctly understood to be a religious practice. Because undisputed facts establish that an agent of respondent failed to hire Elauf based on what the agent correctly understood to be Elauf's religious practice, the EEOC was entitled to summary judg-

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[3] Cooke described discussing with Johnson her understanding that the headscarf reflected Islamic religious practice; described how Johnson rejected a religious exception on the ground that it would lead to spurious claims for religious accommodation by, for instance, "someone [who] can come in and paint themselves green and say they were doing it for religious reasons"; and described Johnson's rejection of her argument that a different result should apply for recognized religious practice. See J.A. 87. Johnson asserted that no discussion of the religious nature of Elauf's headscarf occurred. J.A. 146. Johnson testified that he recommended that Elauf not be hired as a result of her headscarf, without any inquiry into whether she could simply take the headscarf off, J.A. 140-141—notwithstanding that respondent does not require applicants to be in compliance with the Look Policy during a job interview, Pet. App 94a.

ment concerning the notice element of its claim.[4] Since the court of appeals did not decide whether EEOC was also entitled to summary judgment with respect to its showings of Elauf's bona fide religious belief and with respect to an undue hardship defense, the case should be remanded for the court of appeals to consider those questions in the first instance.

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[4] Cooke's correct understanding, as an agent of respondent, would suffice here even if, contrary to the record evidence, Cooke had lacked hiring authority. First, under the agency law principles that this Court has explained should inform Title VII jurisprudence, see *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998), notice is properly imputed to a principal from an agent acting in the scope of her employment duties—as Cooke was here. See Restatement (Second) Agency §§ 272, 275, at 591, 598 (1958). Second, this Court has recognized that an employer may be liable for discriminatory actions proximately caused by a supervisor who possesses the requisite mental state—even if a final employment decision is made by a "technical decisionmaker" who lacks the relevant mens rea. See *Staub*, 131 S. Ct. at 1192.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2014

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(j) 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.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice 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; * * *.

* * * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

3. 42 U.S.C. 2000e-12(a) provides:

Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5.

4. 29 C.F.R. 1605.2 provides in pertinent part:

Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

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(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

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(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization

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[2] *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

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(e) *Undue hardship.* (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demon-

strate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

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[4] *Hardison*, *supra*, 432 U.S. at 84.