Nos. 02-1247, 02-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BENJAMIN P. ENDRES, JR.,
Plaintiff-Appellee

v.

INDIANA STATE POLICE DEPARTMENT,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
Honorable Robert L. Miller

PATRICIA HOLMES,
Plaintiff-Appellee

v.

MARION COUNTY OFFICE OF FAMILY AND CHILDREN,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
Honorable Larry J. McKinney

BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

The defendants-appellants' jurisdictional statement is complete and correct.

ISSUE PRESENTED

Whether, in extending the reach of Title VII to cover state employers, Congress validly abrogated States' Eleventh Amendment immunity to suits for damages by private parties.[1]

STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. On July 17, 2001, Benjamin P. Endres, the plaintiff in appeal No. 02-1247, filed a complaint alleging that his employer, the Indiana State Police Department (Indiana), discriminated against him on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII). In his complaint, Endres alleged that Indiana hired him as a certified Indiana State Trooper in 1991 and that, in March 2000, he received notification from Indiana "of his assignment as a Gaming Commission Agent to the Blue Chip Casino, in Michigan City, Indiana" (App. 24-25).[2] Endres further alleged that he is a member of the Community Baptist Church in South Bend, Indiana, a "religious organization that holds as a tenant [sic] of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should

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[1] The United States takes a position only on the validity of the abrogation of sovereign immunity in Title VII, and expresses no view on any other legal issue presented in these appeals or on the merits of the underlying claims.

[2] References to "App. __" are to pages in the appendix attached to the Appellants' opening brief; references to "Endres R .__" are to entries on the district court docket sheet of appeal No. 01-1247; references to "Holmes R. __" are to entries on the district court docket sheet of appeal No. 01-1377; references to "Br. __" are to pages in the Appellants' opening brief; references to "Amicus Br. __" are to pages in the brief of *amicus curiae* State of Ohio.

not, in any way, participate in and/or facilitate gambling" (App. 25). He claimed that he "informed the Defendant of his religious convictions and beliefs that would prevent him from accepting the assignment as a Gaming Commission Agent," that he requested an alternative assignment, that Indiana "failed or refused to attempt to make any reasonable accommodation to Plaintiff's sincerely held religious beliefs," and that Indiana charged him "with [a] refusal to comply with a written order and insubordination" and "subsequently terminated * * * his employment" (App. 25-26). He further alleged that Indiana's acts "were performed * * * with malice and/or with intentional indifference and/or with reckless indifference to the civil rights, state and federal, of the Plaintiff" (App. 26).

On August 10, 2001, Indiana moved to dismiss the action, claiming that the district court "lack[ed] subject matter jurisdiction over plaintiff's claim of religious discrimination pursuant to Title VII * * * because Congress was not authorized to abrogate the States' sovereign immunity as to claims of religious discrimination" (Endres R. 5 at 1). The United States intervened to defend the constitutionality of Title VII's abrogation of States' Eleventh Amendment immunity (Endres R. 12, R. 13). On December 28, 2001, the district court denied Indiana's motion to dismiss, finding that Title VII validly abrogates States' immunity to suits for claims of religious discrimination (App. 1-9). Indiana filed a timely notice of appeal on January 25, 2002.

2. On April 24, 2000, Patricia C. Holmes, the plaintiff in appeal No. 02-1377, filed a *pro se* complaint alleging that her employer, Marion County Office of

Family and Children (Indiana)[3] discriminated against her on the basis of her religion in violation of Title VII. In her complaint, Holmes alleged that she "wore a geles (headwrap) as part of [her] religious practice," and that her supervisor informed her that she "would be written up for insubordination for violating a dress code policy" unless she abstained from wearing her headgear (App. 30). Holmes further alleged that she "informed [her supervisor] that due to religious reasons [she] could not take [her] geles off" and that she "had to take two vacation days to avoid being disciplined" (App. 30). She also maintained that, while her employer refused to allow her to wear her geles, "[o]ther employees wore headgear or hats and were not threatened as [she] was" (App. 30).

On September 19, 2000, Indiana moved to dismiss the action, claiming that, "[w]hen Congress authorized private Title VII religious discrimination suits against States, it exceeded its authority under Section 5 of the Fourteenth Amendment" (Holmes R. 22 at 1). The United States intervened to defend the constitutionality of Title VII's abrogation of States' Eleventh Amendment immunity (Holmes R. 58, R. 59). On January 28, 2002, the district court denied Indiana's motion to dismiss, finding that Title VII validly abrogates States' immunity to suits for claims of religious discrimination. Indiana filed a timely notice of appeal on February 8, 2002. The appeals were consolidated in this Court.

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[3] Because it is undisputed that the defendant agencies in each case are arms of the State of Indiana, and because there is no need to distinguish between the agencies for the purposes of deciding the issue addressed in this brief, the United States refers to the defendants collectively as "Indiana" or "the defendants."

SUMMARY OF ARGUMENT

Congress may abrogate the Eleventh Amendment immunity of States when it both clearly expresses its intent to do so and acts under the authority of Section 5 of the Fourteenth Amendment. In extending the reach of Title VII to cover state employers, Congress unquestionably satisfied both of these requirements. The defendants do not even contest the fact that Congress clearly expressed its intent to abrogate States' immunity. Title VII's prohibition of discrimination on the basis of religion is aimed at conduct that is prohibited by Section 1 of the Fourteenth Amendment. By enacting that prohibition, Congress was, by definition, acting pursuant to its Section 5 powers. Both the Equal Protection Clause and the Free Exercise Clause of the Constitution prohibit state employers from subjecting their employees to disparate treatment on the basis of religion. Moreover, the Free Exercise Clause prohibits state employers from refusing to accommodate their employees' religious exercise where such an accommodation is sought in a system in which employees are permitted to seek individual exemptions from general rules. Thus, to a large degree, Title VII's prohibition of discrimination on the basis of religion proscribes unconstitutional state conduct. Contrary to the defendants' contentions, when Congress merely codifies the protections of the Constitution, it need not compile evidence of a widespread pattern of unconstitutional conduct by States. To the extent that Title VII's prohibition of discrimination on the basis of religion reaches constitutionally permissible state conduct, it is congruent and

proportional to the constitutional harm it seeks to root out, and is therefore valid Section 5 legislation.

STANDARD OF REVIEW

Because the question whether Congress properly exercised its power to abrogate the States' Eleventh Amendment immunity in extending the reach of Title VII to cover state employers is purely one of law, this Court reviews the issue *de novo*. See *Thiel* v. *State Bar of Wis.*, 94 F.3d 399, 400 (7th Cir. 1996).

ARGUMENT

CONGRESS VALIDLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER TITLE VII OF DISCRIMINATION ON THE BASIS OF RELIGION

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Section 5 of that Amendment commands that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress's power under Section 5 includes the authority to enact "corrective legislation * * * such as may be necessary and proper for counteracting * * * such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883). As the Supreme Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions

are entitled to much deference." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997)).

It is now firmly established that Congress may abrogate States' Eleventh Amendment immunity to suit by private parties in federal court where Congress has both "unequivocally expresse[d] its intent to abrogate the immunity," and "acted 'pursuant to a valid exercise of power.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 55 (1996) (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). The defendants concede (Br. 24), as they must, that, in subjecting States to liability under Title VII of the Civil Rights Act of 1964, Congress clearly expressed its intent to abrogate the Eleventh Amendment immunity of state employers. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 717-718 (7th Cir. 1998) (*Varner I*), vacated and remanded, 528 U.S. 1110 (2000), reinstated, 226 F.3d 927 (7th Cir. 2000).

The central inquiry in determining whether legislation is a valid exercise of Congress's Section 5 authority is whether the legislation is an appropriate means of deterring or remedying constitutional violations or whether it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (quoting *City of Boerne*, 521 U.S. at 532). Because Title VII's prohibition of discrimination on the basis of religion substantially codifies the protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation.

Title VII makes it unlawful for employers (including state employers) "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." 42 U.S.C. 2000e-2(a)(1). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). By defining "religion" thus, Title VII both prohibits disparate treatment of employees on the basis of religion, see, *e.g.*, *Venters* v. *City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997), and places a duty on covered employers to provide reasonable accommodations for their employees' religious observances unless providing such an accommodation would create an "undue hardship" for the employer, see *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-76 (1977).

The defendants do not appear to contest that Title VII's prohibition of disparate treatment on the basis of religion codifies the protections of the Equal Protection Clause and the Free Exercise Clause and is, therefore, appropriate Section 5 legislation. Thus, to the extent that the plaintiffs in these consolidated cases have stated claims of disparate treatment under Title VII, the defendants apparently concede that those claims are not barred by the Eleventh Amendment.

Because, on the face of their respective complaints, the plaintiffs in these appeals have implicated both of Title VII's religious nondiscrimination obligations, the United States addresses the validity under Section 5 of both Title VII's prohibition of disparate treatment and Title VII's reasonable accommodation requirement (see App. 30-31 (Holmes's complaint asserts both that, although she was instructed to remove her religious headgear, "[o]ther employees wore headgear or hats and were not threatened" as Holmes was, and that her "right to religious accommodation was denied" by the defendant); App. 25 (Endres's complaint alleges that the defendant "failed or refused to attempt to make any reasonable accommodation to [Endres's] sincerely held religious beliefs")).

A. *Title VII's Prohibition Of Disparate Treatment On The Basis Of Religion Codifies Guarantees Of The Equal Protection Clause And The Free Exercise Clause*

Like Title VII, the Equal Protection Clause prohibits intentional discrimination on the basis of religion by government entities. See *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). This Court has stated that disparate treatment analysis in Title VII cases follows the same general contours as 42 U.S.C. 1983 cases alleging violations of the Equal Protection Clause. *McPhaul* v. *Board of Comm'rs of Madison County*, 226 F.3d 558, 567 n.6 (7th Cir. 2000), cert. denied, 532 U.S. 921 (2001); see also *Helland* v. *South Bend Cmty. Sch. Corp.*, 93 F.3d 327, 329-330 (7th Cir. 1996).

Title VII's prohibition of disparate treatment also codifies the First Amendment's guarantee of the right to free exercise of religion as applied to the

States by the Fourteenth Amendment.[4] Specifically, the prohibition of disparate treatment enforces the First Amendment's general prohibition of the intentional uneven application of government rules to infringe upon religious observance.[5] In *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that the Free Exercise Clause is violated when a government exempts numerous secular activities from a law's requirements but denies an exemption for a religious activity, despite the fact that the permitted secular activities cause a harm to the governmental interests underlying the legal requirement that is the same as or greater than the proposed religious activity would cause. 508 U.S. at 542-543 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment * * * and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.'" (citation omitted)). The extension of exemptions to secular activities but not to analogous religious activities that would cause the same or lesser harm to the governmental interest at

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[4] The First Amendment's right to free exercise of religion is protected against infringement by States by the "fundamental concept of liberty" under Section 1 of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

[5] Title VII's prohibition of disparate treatment on the basis of religion also codifies the Establishment Clause's prohibition of discrimination among religious sects. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); see also *Board of Educ.* v. *Grumet*, 512 U.S. 687, 707 (1994) (stating that, in order to comport with the mandate of the Establishment Clause, "it is clear that neutrality as among religions must be honored").

stake constitutes impermissible discrimination. See *id.* at 545 (stating that the ordinances at issue "'ha[d] every appearance of a prohibition that society is prepared to impose upon [religious worshipers] but not upon itself'" (citation omitted)); see also *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 877 (1990) ("[A] State would be prohibiting the 'free exercise [of religion]' if it sought to ban such acts * * * only when they are engaged in for religious reasons, or only because of the religious belief that they display."). Indeed, the Court was careful in *Lukumi* to note that situations of unequal treatment involving even fewer secular exemptions than the ordinances at issue in *Lukumi* nevertheless could constitute unconstitutional religious discrimination. See 508 U.S. at 543 (declining to "define with precision the standard used to evaluate whether a prohibition is of general application," but noting that the challenged ordinances fell "well below the minimum standard necessary to protect First Amendment rights").

The Third Circuit's decision in *Fraternal Order of Newark Police Lodge No. 12* (*F.O.P.*) v. *City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), applied this same principle in a case where only a single secular interest was accommodated to the exclusion of a religious interest. The court held that a police department policy that prohibited officers generally from wearing beards, but granted an exception to that prohibition for health reasons, violated the Free Exercise Clause by not also allowing an exception for Sunni Muslim officers who were required to wear beards for religious reasons. See *id.* at 360, 367. The Third Circuit explained that such unequal treatment of otherwise analogous activities

"indicates that the [government] has made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366. The Third Circuit concluded that, "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Ibid.* Title VII's prohibition of disparate treatment on the basis of religion thus codifies, in the employment context, constitutional guarantees preventing government from treating religious activity on less than equal terms with similar nonreligious activity.

Because disparate treatment on the basis of religion triggers the application of strict scrutiny under both the Equal Protection Clause and the Free Exercise Clause, such discrimination is presumed to be unconstitutional unless the State can demonstrate that the treatment is justified by a compelling government interest and is narrowly tailored to satisfy that interest. See *Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); cf. *Cherry* v. *Univeristy of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 551 (7th Cir. 2001) (holding that the Equal Pay Act "targets gender-based classifications which are 'afforded heightened scrutiny,' which means that they are presumed to be unconstitutional unless the State can demonstrate 'an exceedingly persuasive justification for them'" (citing *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000) (*Varner II*), cert. denied, 533

U.S. 902 (2002))). Accordingly, this Court should reach the same conclusion here that it and numerous other Courts of Appeals have reached with respect to Title VII's other prohibitions[6] – that Title VII's prohibition of disparate treatment on the basis of religion codifies Fourteenth Amendment protections by targeting unconstitutional discrimination and, therefore, that Congress's abrogation of Eleventh Amendment immunity is valid.[7] See *Varner II*, 226 F.3d at 934-35.

B. *Title VII's Religious Accommodation Provision Prohibits Little Or No Constitutional Conduct And Essentially Codifies Constitutional Guarantees Of Free Exercise Of Religion*

1. In order to establish a *prima facie* case of discrimination in a religious accommodation case under Title VII, a plaintiff must demonstrate that: (1) she has a *bona fide* religious observance, practice, or belief that conflicts with an

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[6] See, *e.g.*, *Okruhlik* v. *University of Ark.*, 255 F.3d 615, 624-627 (8th Cir. 2001) (race discrimination, sex discrimination, disparate impact, and retaliation); *Holman* v. *Indiana*, 211 F.3d 399, 402 n.2 (7th Cir.) (sex discrimination), cert. denied, 531 U.S. 880 (2000); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.) (race discrimination and retaliation), cert. denied, 531 U.S. 1052 (2000); *Jones* v. *WMATA*, 205 F.3d 428, 434 (D.C. Cir. 2000) (retaliation); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999) (disparate impact); *Ussery* v. *Louisiana*, 150 F.3d 431, 434-435 (5th Cir. 1998) (sex discrimination).

[7] The assertion of *amicus curiae* State of Ohio (Amicus Br. 22-24) that Title VII is not valid Section 5 legislation because it might cause States to be subject to unmeritorious law suits is simply incorrect. Where Congress creates a statutory remedy for unconstitutional conduct by States, the fact that private litigants might seek redress for conduct that a court ultimately determines not to violate the Constitution has no bearing on whether the remedy created by Congress is valid. Certainly, the fact that defendants frequently prevail in claims of constitutional violations under 42 U.S.C. 1983 has no bearing on whether Section 1983 was validly enacted pursuant to Congress's authority under Section 5.

employment requirement; (2) she brought the observance, practice, or belief to the employer's attention; and (3) the religious observance, practice, or belief was the basis for an adverse employment decision. *EEOC* v. *United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996). Once a plaintiff has satisfied the *prima facie* showing, the burden shifts to the employer to prove "that it was unable to provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation which was not accepted by the employee." *Id.* at 318.

The religious accommodation provision of Title VII applies to cases arising in two different contexts: those in which an employer has in place a mechanism for handling employee requests for individualized, discretionary exemptions from broadly applicable rules, and those in which an employer has established no such mechanism. With respect to the first category of cases, the protections afforded in Title VII not only do not go beyond the guarantees of the Free Exercise Clause, but are in fact less protective than the Constitution itself. With respect to the second category, although Title VII may impose liability for some conduct that would not violate the Free Exercise Clause, the religious accommodation provision is well within Congress's Section 5 powers because it is intended to root out unconstitutional state action and because it prohibits very little conduct that is constitutionally permissible.

2. Where an employer has in place a system for discretionary consideration of employee requests for religion-based or other exemptions from general rules, Title VII's duty to accommodate the religious observances of employees

implements the mandate of the Free Exercise Clause in the context of individualized assessments. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Supreme Court recognized that, because state administrative schemes that employ individualized assessments often are employed by government officials to discriminate against religious adherents, the application of such a system of individualized determinations to substantially burden religious exercise must be justified by a compelling interest. *Sherbert* involved a state denial of unemployment benefits to a member of the Seventh Day Adventist Church who could not find work because her religious convictions prevented her from working on Saturdays. The Court reasoned that, because the statute's distribution of benefits permitted individualized exemptions based on "good cause," *id.* at 400, the state could not refuse to accept plaintiff's religious reason for not working on Saturdays unless the state could show that the denial of the exemption furthered a compelling state interest and did so by the least restrictive means available. *Id.* at 405-407 ("For even if the possibility of spurious claims did threaten to dilute the [unemployment compensation] fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights." (emphasis added)).

In 1990, the Supreme Court decided *Employment Div., Dep't of Human Resources of Oregon* v. *Smith*, holding that strict scrutiny does not apply to neutral rules of general applicability that incidentally affect religious practices. See 494

U.S. 872, 885 (1990). However, the Court in *Smith* specifically distinguished situations involving systems of "individualized exemptions" by the government, and expressly affirmed the applicability of the strict scrutiny review of *Sherbert* to such cases.[8] *Id.* at 884 ("[W]here the State has in place a system of individualized assessments, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." (citation omitted)). In *Lukumi*, the Court reaffirmed this distinction between neutral rules of general applicability and cases involving individualized assessments. See 508 U.S. at 537. Thus, where an employer has a system of individualized assessments, Title VII's duty of reasonable religious accommodation follows the Supreme Court's "individualized assessments" doctrine as applied to employment and, therefore, is a valid constitutional enactment under Section 5 of the Fourteenth Amendment.

Indeed, the limited requirement in Title VII that an employer provide a reasonable accommodation *unless* doing so would impose an "undue burden" on the employer imposes a much lighter burden on employers than does the individualized assessment scheme of the Free Exercise Clause.[9] Whereas a State

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[8] Since *Smith*, district courts have applied the "individualized assessments" doctrine in reviewing discretionary determinations. See, *e.g.*, *Keeler* v. *Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996); *Rader* v. *Johnston*, 924 F. Supp. 1540, 1551-1558 & n.23 (D. Neb. 1996); *Alpine Christian Fellowship* v. *County Comm'rs of Pitkin County*, 870 F. Supp. 991, 994-995 (D. Colo. 1994).

[9] This Court should not give credence to the defendants' speculation that the relatively light "undue hardship" requirement in Title VII may "shift over time to

(continued...)

would be required to satisfy strict scrutiny under the Free Exercise Clause – a standard that will be satisfied "only in rare cases," *Lukumi*, 508 U.S. at 546 – the Supreme Court has determined "that an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer." *Ansonia Bd. of Educ.*, 479 U.S. at 67 (citing *Hardison*, 432 U.S. at 84). This Court has held that "Title VII * * * requires only 'reasonable accommodation,' not the satisfaction of an employee's every desire." *Wright* v. *Runyon*, 2 F.3d 214, 217 (7th Cir. 1993). An employer "discharge[s] its obligations" by "providing at least one reasonable accommodation." *Ibid.* Further, the Supreme Court has recognized that, in determining whether an employer has satisfied the accommodation requirement of Title VII, courts may take into account nonpecuniary concerns. See *Hardison*, 432 U.S. at 80-84 (holding that an employer need not disturb either a collective bargaining agreement or the shift- and job-preferences of other employees in order to satisfy Title VII's accommodation

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[9](...continued)
take on characteristics of the ADA version," which does not employ the *de minimus* cost standard applied in Title VII cases. See 42 U.S.C. 12111(10)(A) (defining "undue hardship" as "an action requiring *significant difficulty or expense*" (emphasis added)). The Supreme Court has had no difficultly in interpreting the standards employed in the two statutes differently, compare *Ansonia Bd. of Educ.*, 479 U.S. at 67 (under Title VII, "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer"), with *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 372 (2001) (ADA's "accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' on the employer"), and there is no reason to think that there will be a spontaneous upheaval in either settled body of law.

requirement); *Baz* v. *Walters*, 782 F.2d 701, 707 (7th Cir. 1985). Thus, as applied to employers who have established a process for considering requests for individual exemptions from general rules, the requirements of Title VII are less stringent than the requirements of the Constitution.

The defendants misunderstand their obligations under the Free Exercise Clause when they assert (Br. 33) that Title VII impermissibly "shift[s] litigation burdens to the government that would have rested with plaintiffs."[10] Contrary to the defendants' assertion (Br. 32), a government's refusal to provide a religious accommodation cannot be justified under the Free Exercise Clause by "any conceivable rational basis" if the refusal is made in an individualized assessments context. In such a context, the defendants have not pointed to any circumstance in which Title VII would impose liability where the Free Exercise Clause would not. For instance, the defendants rely on the Third Circuit's decision in *Protos* v.

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[10] It is not clear whether the defendants contend (Br. 33-39) that the alleged "shift" in "litigation burden" effected by Title VII is a substantive shift in the liability standard or an evidentiary shift in relative burdens of production and persuasion. As discussed in the text, the Free Exercise Clause imposes strict scrutiny review on a government entity's refusal to provide a religious accommodation in an individualized assessments context. In such a context, therefore, the only "shift" regarding the liability standard works to lessen the duty of the defendant as Title VII's protections are less onerous than those in the Constitution. Furthermore, Title VII does not alter traditional burdens of proof under the Free Exercise Clause by requiring employers to demonstrate that they have provided a reasonable accommodation. Title VII's burden-shifting framework is not more onerous than the burden-shifting requirement found in the Supreme Court's individualized assessments jurisprudence. See *Lukumi*, 508 U.S. at 546 ("Respondent [the city] has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling."); *Sherbert*, 374 U.S. at 407 (same).

Volkswagen, 797 F.2d 129, 135 (3d Cir. 1986), to support their claim (Br. 37) that "Title VII can lead to liability for enforcing a Saturday work requirement where the Constitution would permit such enforcement." But in every case in which the Supreme Court has been faced with an employee who was subject to adverse treatment by the government for refusing on religious grounds to abide by an employer's Saturday work rule, the Court has held that the Constitution requires that the government accommodate the religious practices of those employees. See *Frazee* v. *Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Although the defendants assert otherwise (Br. 37 ("After *Smith*, such a justification would plainly meet the rational basis test if a Saturday work requirement were imposed by the government.")), the Supreme Court in *Smith* expressly affirmed the applicability of the strict scrutiny standard used in *Sherbert* and its progeny to prohibitions on religious exercise that arise from "a system of individualized exemptions." *Smith*, 494 U.S. at 884.

3. Where an employer has a neutral rule and does not receive and consider requests for individual exemptions from that rule, Title VII's religious accommodations requirement prohibits little constitutional conduct and essentially targets intentional discrimination, despite the fact that proof of a claim of failure to provide religious accommodation does not require a showing of purposeful discrimination. Once a Title VII plaintiff has presented a *prima facie* case

demonstrating that "the employer was made aware of the employee's religious practice and was given an opportunity to accommodate it," *United Parcel Serv.*, 94 F.3d at 317 n.3, the burden shifts to the employer to prove "that it was unable to provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation which was not accepted by the employee." *Id.* at 318. As discussed *supra*, at 17-19, an employer's obligation in satisfying the "undue burden" requirement is far from onerous.

Because Title VII essentially provides a "broad exemption from liability" in religious accommodation cases for employers who can offer essentially a "neutral explanation" for a decision not to provide an accommodation – *i.e.*, anything more than either a *de minimis* cost or a non-pecuniary, justified burden in conducting its business – Congress has effectively targeted employers who intentionally discriminate on the basis of religion. See *Varner II*, 226 F.3d at 934. Like the Equal Pay Act (EPA), which this Court has repeatedly found to be a valid exercise of Congress's Section 5 authority, see *Varner I*, 150 F.3d 706 (7th Cir. 1998); *Varner II*, 226 F.3d 927 (7th Cir. 2000); *Cherry*, 265 F.3d 541(7th Cir. 2001), "the broad exemption from liability" in Title VII's religious accommodation provision indicates that it "is intended to address the same kind of 'purposeful [religious] discrimination' * * * prohibited by the Constitution." *Id.* at 934 (citation omitted). This Court has recognized that: "Though the employer bears the burden of proving that it was unable to reasonably accommodate without undue hardship, the employee, in the *prima facie* case, must show that the employer *consciously* failed

to make an accommodation. In this respect, these cases are somewhat analogous to 'disparate treatment' cases, which require proof of intent." *United Parcel Serv.*, 94 F.3d at 317 n.3 (emphasis in original). Accordingly, Title VII's religious accommodation provision is a "'piece of 'remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment.'" *Varner II*, 226 F.3d at 936.

The Supreme Court repeatedly has affirmed that "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518 (1997)); see also *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001). Section 5 legislation that reaches beyond the scope of Section 1's actual guarantees and prohibitions is valid so long as there is a "congruence and proportionality between the injury to be prevented and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Where, as here, statutory protections closely track constitutional guarantees, the statute's protection of any marginal conduct that is not unconstitutional is easily justified as valid Section 5 legislation.

This is particularly true where Congress has designed legislation to target intentional discrimination, even where it does so by shifting burdens of proof.[11] In *Varner II*, this Court reaffirmed its original decision that Congress validly abrogated Eleventh Amendment immunity in passing the EPA, which "prohibits discrimination in wages based on gender." 226 F.3d at 932. The *Varner II* Court noted that, "[i]n effect, the provisions of the [EPA] establish a rebuttable presumption of sex discrimination such that once an employee has demonstrated that an employer pays members of one sex more than members of the opposite sex, the burden shifts to the employer to offer a gender neutral justification for that wage differential." *Ibid.* Thus, although the *prima facie* showing under the EPA does not require a showing of discriminatory intent, *id.* at 932, the Court concluded that, "by providing a broad exemption from liability under the [EPA] for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women," thereby addressing the kind of discrimination that is prohibited by the Constitution. *Id.* at 934. Because Title VII's religious accommodation requirement similarly targets unconstitutional action by state employers, it is valid Section 5 legislation.

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[11] In crafting policies to "enforce" a prohibition on intentional discrimination, Congress may take cognizance of the well-established maxim that "an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one [group] than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

C. *Title VII's Abrogation Of Eleventh Amendment Immunity For Claims Of Discrimination On the Basis Of Religion Need Not Be Supported By A Legislative Record Of Unconstitutional State Conduct*

As this Court has held, when Congress acts to prohibit unconstitutional state conduct, it has no duty to create a legislative record of constitutional violations by the States, and a court need not inquire about the frequency of such constitutional violations. See *Cherry*, 265 F.3d at 551-553. Thus, for example, the Supreme Court has twice upheld, as a proper exercise of Congress's Section 5 authority, 18 U.S.C. 242, a criminal statute that prohibits persons acting under color of law from depriving individuals of constitutional rights, without inquiring into the extent to which such criminal acts occurred or the availability of state remedies. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945).

The Supreme Court has also noted that 42 U.S.C. 1983, the civil counterpart of Section 242, "was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Ngiraingas* v. *Sanchez*, 495 U.S. 182, 187 (1990) (quoting *Quern* v. *Jordan*, 440 U.S. 332, 354 (1979) (Brennan, J., concurring in judgment)). The Court has repeatedly upheld the use of Section 1983 to enforce rights under the Fourteenth Amendment without inquiring whether there was a record of such violations before Congress when it enacted Section 1983. Indeed, the Court has permitted the use of Section 1983 to enforce constitutional rights that had not been recognized or did not exist at the time Section 1983 was enacted, even though Congress could not have established a record of States' violating those

rights before creating the cause of action in Section 1983. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (recognizing right to "one person, one vote"); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (recognizing right to desegregated public education). A violation of a single individual's constitutional rights can cause devastating harm and is a proper subject of Congress's enforcement authority, regardless of whether it is part of a larger pattern of unlawful conduct. The extent to which States have engaged in widespread constitutional violations may be relevant in determining whether a prophylactic remedy that sweeps far beyond what the Constitution requires is appropriate. But neither the language of Section 5 nor the Supreme Court's decisions support the argument that Congress's power is limited to attacking widespread constitutional violations.

The defendants' reliance (Br. 39-46) on *City of Boerne*, *Kimel*, *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), and *Garrett*, is misplaced for precisely these reasons. Those cases simply recognize that, when a statute regulates a significant amount of conduct that is not prohibited by the Constitution, it may be necessary to examine the record before Congress to determine if Congress could have reasonably concluded that such a prophylactic remedy was appropriate.

In *City of Boerne*, the Supreme Court determined that the provisions of the Religious Freedom Restoration Act (RFRA) went beyond the requirements of the Constitution as interpreted by the Supreme Court in *Smith*. See 521 U.S. at 513-514. The Court determined that "[l]aws valid under *Smith* would fall under RFRA

without regard to whether they had the object of stifling or punishing free exercise," *id.* at 534, and that, "[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry," *id.* at 535. Accordingly, the Court deemed RFRA's provisions to go far beyond redressing unconstitutional infringements of religious exercise. See *id.* at 532.

The Court has also noted that the legislative record for RFRA "contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions," *Kimel*, 528 U.S. at 81-82, and that the evidence before Congress "did not reveal a 'widespread pattern of religious discrimination in this country,'" *id.* at 82 (citing *City of Boerne*, 521 U.S. at 531). But there can be no dispute that the Court's inquiry into the legislative record of RFRA would have been unnecessary had RFRA simply codified Fourteenth Amendment protections.

The Supreme Court's more recent Eleventh Amendment decisions confirm that an exploration of the record before Congress is necessary only when the statute in question makes unlawful a significant amount of constitutional conduct. In *Kimel*, the Supreme Court held that the Age Discrimination in Employment Act (ADEA), which prohibits employers, subject to a limited *bona fide* occupational qualification defense, from taking age into account in making employment decisions, was not appropriate Section 5 legislation. The Court emphasized that intentional discrimination based on age is subject to rational basis review under the Equal Protection Clause and that the Court had upheld, as constitutional, governmental age classifications in each of the three cases that had come before it.

528 U.S. at 83. Measuring the scope of the ADEA's requirements "against the backdrop of * * * equal protection jurisprudence," the Court concluded that the ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 86.

The Court therefore found it necessary to analyze whether a "[d]ifficult and intractable" problem of unconstitutional age discrimination existed that would justify the broad and "powerful" regulation imposed by the ADEA. *Id.* at 88. Surveying the record before Congress, however, the Court determined that "Congress never identified any pattern of age discrimination by the States, much less *any* discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89 (emphasis added). The Supreme Court thus concluded that the application of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." *Ibid.*

Similarly, in *Florida Prepaid*, the Court held that the Patent Remedy Act, which authorized damage claims against States for patent infringement was not a valid exercise of Congress's Section 5 authority. The Court emphasized that patent infringement by States violates the Due Process Clause only if: (1) it is intentional (as opposed to inadvertent) and (2) state tort law fails to provide an adequate remedy. See *Florida Prepaid*, 527 U.S. at 643-645. In contrast to the narrow application of the Due Process Clause to patent infringement, the Court found that the federal legislation applied to an "unlimited range of state conduct" and that no

attempt had been made to confine its sweep to conduct that was "arguabl[y]" unconstitutional. See *id.* at 646. The Court further determined that Congress had found little, if any, evidence that States were engaging in unconstitutional patent infringement that would justify such an "expansive" remedy. See *id.* at 645-646.

Most recently, in *Garrett*, the Court held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the Americans with Disabilities Act (ADA). 531 U.S. at 364-374. The Court in *Garrett* reaffirmed that, in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. *Id.* at 365. Because there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce through Title I of the ADA. *Ibid.* And because classifications based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents in which state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Id.* at 366.

Only after the Court determined that Title I of the ADA did not codify constitutional prohibitions did the Court proceed to determine the adequacy of the legislative record. See *id.* at 365 (stating that "§ 5 legislation *reaching beyond the scope of § 1's actual guarantees* must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end'" (emphasis added)). The Court then concluded that Congress had identified

only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as employers against people with disabilities), *id.* at 369, and had not made a specific finding that discrimination in public sector employment was pervasive, *id.* at 370. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id.* at 374.

It is clear that the Court looked for evidence of constitutional violations in *City of Boerne*, *Kimel*, *Florida Prepaid*, and *Garrett* only because it determined that some evidence of constitutional violations was necessary to justify the breadth of the statutory remedies at issue. See *Cherry*, 265 F.3d at 553 ("All *Garrett* does is further demonstrate that the legislative record is an important factor *when the statute in question pervasively prohibits constitutional State action.*" (emphasis added)). As demonstrated above, however, Title VII's abrogation of Eleventh Amendment immunity, as applied to both intentional religious discrimination and the refusal to accommodate religious practices in an individualized assessments context, is effective because it prohibits state action that is itself unconstitutional.

Moreover, to the extent that Title VII's reasonable accommodation requirement reaches a small amount of constitutionally permissible conduct, the requirement need not be justified by a legislative record of unconstitutional state action because the statutory provision targets unconstitutional conduct. This Court has repeatedly held that the Equal Pay Act is a valid exercise of Congress's authority under Section 5 notwithstanding the lack in the legislative record of

"explicit findings as to the problem of gender discrimination by the States," because "the value of congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct." (citation omitted). *Varner II*, 226 F.3d at 935. In *Cherry*, this Court again refused to disturb the holding of *Varner* based on the Supreme Court's intervening decision in *Garrett*, and instead reaffirmed that, "unlike the statutes at issue in [*Kimel* and *Garrett*,] which pervasively prohibit constitutional State action, the EPA 'prohibits very little constitutional conduct.'" 265 F.3d at 553 (citing *Varner II*, 226 F.3d at 935). The Court concluded that, "because the EPA essentially targets only unconstitutional gender discrimination, the importance of congressional findings of unconstitutional State action is 'greatly diminished.'" *Ibid.*

As discussed *supra*, pp. 20-23, the religious accommodation provision in Title VII prohibits very little constitutionally permissible conduct and essentially targets actions that are unconstitutional when taken by state employers. Because the requirements of this provision so closely track the requirements of the Free Exercise Clause, Title VII's prohibition of discrimination on the basis of religion should be upheld in its entirety as valid Section 5 legislation without regard to the evidence of unconstitutional state action in the legislative history.

CONCLUSION

The Eleventh Amendment is no bar to the plaintiffs' Title VII claims.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points and contains 7,578 words.

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