No. 03-4501

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAWOUD KAREEM MUHAMMED,

Plaintiff-Appellee

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, GRAFTON CORRECTIONAL INSTITUTION, REGINALD WILKERSON, CARL ANDERSON, MARGARET VAN HOOSE,

Defendants-Appellants

UNITED STATES OF AMERICA,

Intervenor-Appellee

PROOF BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would assist the Court in resolving the complex legal issues raised in this appeal.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291, as interpreted by the Supreme Court in *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993).

ISSUE PRESENTED

Whether, in extending the reach of Title VII to cover state employers, Congress validly abrogated States' Eleventh Amendment immunity to religious

discrimination suits for damages by private parties.[1]

STATEMENT OF THE CASE

On July 18, 2001, plaintiff-appellee Dawoud Kareem Muhammed filed suit against two agencies of the State of Ohio – the Ohio Department of Rehabilitation and Correction and the Grafton Correctional Institution – alleging that they discriminated against him on the basis of religion in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.* (R. 1 Complaint, ¶¶ 2, 52-91, Apx. pp. __.) Muhammed also filed suit against three state officials, in their personal and official capacities, under 42 U.S.C. 1983, alleging that they violated his rights under the First and Fourteenth Amendments to the United States Constitution. (R. 1 Complaint, ¶¶ 2, 12-51, Apx. pp. __.) His complaint also alleges that all of the defendants violated Ohio state law. (R. 1 Complaint, ¶¶ 2, 92-131, Apx. pp. __.) Muhammed seeks injunctive and monetary relief. (R. 1 Complaint, pp. 26-27, Apx. pp. __.)

The defendants filed a Motion for Judgment on the Pleadings on November 27, 2001, claiming that the state agency defendants are entitled to Eleventh Amendment immunity to all of Muhammed's claims and that the individual defendants are entitled to qualified immunity to the claims under Section 1983 and to statutory immunity to the state law claims. (R. 15 Motion for Judgment on the

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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.

Pleadings, Apx. pp. __.) In support of their motion, the state agency defendants argued that Title VII's prohibition of discrimination on the basis of religion, which includes a requirement that employers accommodate their employees' religious practices where doing so does not impose an undue burden, is not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment and, therefore, does not validly abrogate States' Eleventh Amendment immunity. (R. 15 Motion for Judgment on the Pleadings, Apx. pp. __.) The United States intervened pursuant to 28 U.S.C. 2403(a) for the limited purpose of defending the constitutionality of Title VII's abrogation of state employers' Eleventh Amendment immunity to claims of religious discrimination. (R. 22 Motion to Intervene, Apx. pp. __.)

On September 18, 2003, the district court granted the defendants' motion for judgment on the pleadings as to the state law claims, but denied the motion as to the Title VII claims against the state defendants and the Section 1983 claims against the individual defendants. (R. 31 Order, Apx. pp. __.) The district court held that Title VII's prohibition of religious discrimination, including its accommodation requirement, is a valid exercise of Congress's Section 5 authority, and thus effectively abrogates States' Eleventh Amendment immunity. (R. 31 Order pp. 4-23, Apx. pp. __.) The court also held that the individual defendants are not entitled to qualified immunity to the Section 1983 claims. (R. 31 Order pp. 25-32, Apx. pp. __.)

The defendants filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B) on November 13, 2003. (R. 34 Notice of Appeal, Apx. p. __.)

STATEMENT OF FACTS

As alleged in the complaint, plaintiff Muhammed was employed as a corrections officer at the Grafton Correctional Institute (GCI) beginning in July 1994. (R. 1 Complaint ¶ 13, Apx. p. __.) Muhammed converted to Orthodox Islam after he began working at GCI. (R. 1 Complaint ¶ 14, Apx. p. __.) In 1999 and 2000, Muhammed attempted to wear a religious skullcap called a *kuffi* under his uniform cap and was informed by the defendants that he was not permitted to do so. (R. 1 Complaint ¶¶ 59-62, 66, 68, 72, 76, Apx. pp. __.) He was denied access to the correctional facility on several occasions because he was wearing a *kuffi*. (R. 1 Complaint ¶¶ 66, 68, 72, Apx. pp. __.) Muhammed also requested an accommodation that would permit him to pray at specified times during his shift. (R. 1 Complaint ¶ 65, Apx. p. __.) That request was denied and the denial was affirmed by the Ohio Department of Rehabilitation and Correction. (R. 31 Order p. 2, Apx. p. __.)

In September 2000, Muhammed filed discrimination charges with the Equal Employment Opportunity Commission (EEOC). (R. 1 Complaint ¶ 75, Apx. p. __.) After conciliation attempts failed, the EEOC issued a right to sue letter to Muhammed in April 2001. (R. 1 Complaint ¶ 86, Apx. p. __.) This suit followed.

SUMMARY OF ARGUMENT

Title VII's prohibition of religious discrimination in state employment, including its requirement that state employers reasonably accommodate their employees' religious practices where doing so does not impose an undue burden, is valid legislation under Congress's Section 5 authority because the statute targets unconstitutional conduct. When a government employee is treated adversely by his employer because of his religion, that employer's conduct is subject to heightened scrutiny under the Free Exercise Clause. In addition, where such conduct violates the Free Exercise Clause, it is subject to heightened scrutiny under the Equal Protection Clause. Because Title VII targets conduct that is subject to heightened constitutional scrutiny, Congress has greater leeway to craft appropriate remedies. Title VII's broad exemption from liability for employers, pursuant to which an employer need not provide a religious accommodation where doing so would impose more than a *de minimis* burden on the employer, ensures that a great majority of the conduct prohibited by Title VII is also prohibited by the Constitution. To the extent that Title VII prohibits some constitutionally permissible conduct, that margin of prophylactic protection is justified by the legislative and historical record of state-sponsored religious discrimination. Thus, Title VII's prohibition of religious discrimination is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment and, therefore, validly abrogates States' Eleventh Amendment immunity.

STANDARD OF REVIEW

The question whether the state defendants are entitled to Eleventh Amendment immunity to the plaintiff's claims under Title VII is a question of law subject to *de novo* review. See *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997).

ARGUMENT

TITLE VII'S PROHIBITION OF RELIGIOUS DISCRIMINATION, INCLUDING ITS ACCOMMODATION REQUIREMENT, IS VALID SECTION 5 LEGISLATION

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits a State 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 has repeatedly held, "[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 "unequivocally expresse[d] its intent to abrogate the immunity," *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 55 (1996) (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)), and "acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment," *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1976 (2003). The Supreme Court has held 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, and the defendants do not challenge that holding. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976); see also *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.), cert. denied, 531 U.S. 1052 (2000).

Title VII prohibits, *inter alia*, employment discrimination on the basis of religion. 42 U.S.C. 2000e-2. 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). The question in this appeal is whether Title VII's prohibition of religious discrimination by state employers is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. 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*, 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532). In discussing the bounds of Congress's authority under Section 5, the Supreme Court recently reaffirmed that:

> Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. "'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 Amendments' text.'" * * * In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

Hibbs, 123 S. Ct. at 1977 (quoting *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Because Title VII's prohibition of discrimination on the basis of religion, as applied to state employers, targets conduct that is prohibited by Section 1 of the Fourteenth Amendment, it is appropriate Section 5 legislation even though it may prohibit some conduct that is constitutionally permissible.

A. *Title VII's Prohibition Of Discrimination On The Basis Of Religion Targets Conduct Subject To Heightened Scrutiny Under The Constitution*

In considering whether the Family and Medical Leave Act's (FMLA) family leave provisions are appropriate prophylactic Section 5 legislation, the Supreme Court in *Hibbs* first determined that the purpose of the legislation – namely, "to protect the right to be free from gender-based discrimination in the workplace" –

was to target conduct that is subject to heightened constitutional scrutiny. 123 S. Ct. at 1978. The FMLA's family leave provisions require covered employers to provide at least 12 weeks of unpaid family leave to all employees. 29 U.S.C. 2612(a)(1). Although the failure to provide such leave does not violate the Constitution, the Supreme Court upheld the family leave provisions because the statute is "congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Hibbs*, 123 S. Ct. at 1984 (quoting *City of Boerne*, 521 U.S. at 532).

Title VII is a nondiscrimination statute targeting intentional discrimination by employers, including state employers, on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Religion is afforded special protection under various provisions in the Constitution. Consequently, the Free Exercise Clause subjects "[o]fficial action that targets religious conduct for distinctive treatment" to heightened scrutiny.[2] *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) ("The [Free Exercise] Clause 'forbids subtle departures from neutrality' * * * and 'covert suppression of particular religious beliefs." (internal citations omitted)); see also *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."). Where state action

[2] 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).

violates an individual's rights under the Free Exercise Clause, that action will also be subject to heightened scrutiny under the Equal Protection Clause. See *Locke* v. *Davey*, No. 02-1315, 2004 WL 344123, at *4 n.3 (U.S. Feb. 25, 2004) ("Because we hold that the program is not a violation of the Free Exercise Clause, * * * we apply rational-basis scrutiny to [the plaintiff's] equal protection claims.""); see also *Board of Educ.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). As the Supreme Court recently made clear in *Hibbs*, when Congress targets conduct subject to heightened constitutional scrutiny, Congress is entitled to greater deference with respect to the means it employs to implement constitutional protections.

Title VII's prohibition of religion-based discrimination encompasses both an outright prohibition of religion-based disparate treatment and a requirement that employers accommodate employees' religious beliefs and practices unless doing so would impose more than a *de minimis* burden on the employer. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986). Taken as a whole, Title VII's prohibition of religion-based discrimination targets unconstitutional conduct by state employers, thereby enforcing the protections of Section 1 of the Fourteenth Amendment. Although the defendant does not appear to claim that Title VII's prohibition of disparate treatment on the basis of religion is not a valid exercise of

Congress's Section 5 powers, it claims that the accommodation requirement goes beyond those powers and thus does not validly abrogate States' Eleventh Amendment immunity. But the two parts of the provision prohibiting religious discrimination are not so easily separated; indeed, the complaint in this case alleges both disparate treatment and a failure to accommodate. Both aspects of the provision are aimed at preventing and remedying unconstitutional discrimination.

In addition to enforcing the Constitution's prohibition of religion-based disparate treatment, Title VII's inclusion of a reasonable accommodation requirement in its statutory definition of "religion" implements the guarantees of the Free Exercise Clause. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Supreme Court recognized that, where government administrators have discretion to make exceptions to general rules, that discretion provides an opportunity for private prejudices to influence decisionmaking. For that reason, the application of such a system of individual 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 work at available jobs 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 401, the State could not refuse to accept the 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.

In 1990, the Supreme Court decided *Employment Division* v. *Smith*, holding that strict scrutiny does not apply to neutral laws of general applicability that incidentally affect religious practices. See 494 U.S. 872, 885 (1990). The defendants rely on this ruling in arguing that Title VII's accommodation provision provides a right not protected by the Constitution. However, the Supreme Court in *Smith* specifically distinguished the facts in that case from situations involving systems of individualized governmental assessment of the reasons for particular conduct. *Id.* at 884.

Moreover, in *Lukumi*, which was decided after *Smith*, the Court made clear that the application of the *Sherbert* test was not limited to the area of unemployment benefits. See 508 U.S. at 537. See also *Locke,* 2004 WL 344123, at *4 (reaffirming the continuing validity of the *Sherbert* line of cases). In that case, the 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 harm the proposed religious activity would cause. *Lukumi*, 508 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."). 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 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"); see also *Smith*, 494 U.S. at 877 ("[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 discrimination 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.

The defendants' primary argument is that its workplace rules regarding such topics as dress and shift duties are neutral and generally applicable rules to which it is not required under the Constitution to provide religious accommodations. But, as the Supreme Court found in *Hibbs* with respect to employment rules relating to leave policy, workplace rules and standards are frequently subject to discretionary application and are frequently "applied in discriminatory ways" even when neutral on their face.[3] See 123 S. Ct. at 1980. Where an employer has a system of

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[3] Although the defendant relies heavily on the Supreme Court's decision in *Smith* to justify its argument that the Constitution does not require it to provide religious accommodations to workplace rules, *Smith* itself, when read in tandem with the *Sherbert* line of cases, supports our position that workplace rules inherently lend themselves to individualized assessments and exceptions. Both

(continued...)

individualized assessments, whether formal or informal, Title VII's duty of reasonable accommodation implements the Supreme Court's "individualized assessments" doctrine in the employment context and, therefore, is a valid enactment under Section 5 of the Fourteenth Amendment. As the Supreme Court stated in *Lukumi*, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." 508 U.S. at 534.

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[3](...continued)
Sherbert and *Smith* are unemployment compensation cases. In *Sherbert*, the state unemployment compensation scheme made individualized decisions about whether a particular applicant was "[d]ischarge[d] for misconduct" because the employee "[f]ail[ed] to accept work * * * without good cause." 374 U.S. at 400 n.3. In *Smith*, the state unemployment compensation scheme made individualized decisions about whether a particular applicant was discharged for "misconduct" because the employee engaged in "a wilful violation of the standards of behavior which an employer has the right to expect of an employee." *Smith* v. *Employment Div.*, 721 P.2d 445, 448 (Or. 1986). In both cases, the unemployment compensation board gave individualized consideration to the employee's reasons for engaging in the conduct for which he was discharged. The difference between the two cases is the fact that Mr. Sherbert refused to adhere to a workplace rule while Mr. Smith refused to adhere to a state criminal law. The Supreme Court in *Smith* held that individuals have no right under the Constitution to religious exemptions from "an across-the-board criminal prohibition on a particular form of conduct." 494 U.S. at 884. Because such a neutral criminal prohibition does not allow for discretionary exemptions by state actors, the unemployment compensation board was not required to inquire into the reasons for Mr. Smith's refusal to obey the State's criminal prohibition. The Court did not apply the same reasoning to the plaintiff in *Sherbert* who refused to follow a workplace rule, but required the State to consider the reasons for Mr. Sherbert's refusal.

B. *Title VII's Prohibition Of Religious Discrimination Is A Valid Means Of Targeting Unconstitutional Conduct Pursuant To Congress's Section 5 Authority*

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 or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. 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).

Title VII, like the Equal Pay Act (EPA), 29 U.S.C. 206(d), which has been upheld by this Court as valid Section 5 legislation, *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 816-821 (6th Cir. 2000), and the FMLA, which has been upheld by the Supreme Court as valid Section 5 legislation, *Hibbs*, 123 S. Ct. at 1977-1984, targets conduct that is unconstitutional. Once a Title VII plaintiff has presented a *prima facie* case demonstrating that "he holds a sincere religious belief that conflicts with an employment requirement; that he has informed his employer of the conflict; and that he was discharged or disciplined for failing to comply with the conflicting requirement * * *, the burden shifts to the employer to show that it could not

reasonably accommodate the employee without undue hardship." *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994). Whereas a state employer who discriminates on the basis of religion would be required to satisfy heightened scrutiny under the Free Exercise Clause, 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*, 479 U.S. at 67 (citing *TWA* v. *Hardison*, 432 U.S. 63, 84 (1977)). 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 such as collective bargaining agreements and the shift and job preferences of other employees. See *Hardison*, 432 U.S. at 80-84. Because an employer's obligation in satisfying the "undue burden" requirement is far from onerous, the statute treats an employer's failure to provide such a *de minimis* accommodation as equivalent to discrimination. See *EEOC* v. *UPS*, 94 F.3d 314, 317-318 n.3 (7th Cir. 1996) (finding that religious accommodation cases under Title VII "are somewhat analogous to 'disparate treatment' cases"); cf. *Kovacevich*, 224 F.3d at 820 ("Congress designed the EPA to target wage differentials due to unexplainable gender-based discrimination, providing a handful of defenses that account for legitimate causes of wage differentials."). The limited requirement in Title VII that an employer provide a reasonable accommodation *unless* doing so would impose an "undue burden" on the employer is a valid means of enforcing constitutional guarantees.

In *Kovacevich*, this Court held that Congress validly abrogated States' Eleventh Amendment immunity in passing the EPA, which prohibits gender discrimination in wages. In so holding, this Court considered both the target of the legislation – "wage differentials due to unexplainable gender-based discrimination" – as well as the statute's "remedial scheme" and "the structure of an EPA defense" in concluding that the EPA "does not prohibit substantially more state employment decisions and practices than would likely be unconstitutional." *Kovacevich*, 224 F.3d at 820. Unlike the Constitution, the EPA's *prima facie* showing does not require a showing of intentional gender-based discrimination in order for a plaintiff to prevail. But, like Title VII, the EPA does provide an employer with an affirmative defense to liability where it can provide essentially a neutral explanation for its challenged conduct. This Court has held that "the EPA's remedial scheme is proportional to its anti-discriminatory aims" regardless of the fact that the liability standard under the EPA is not identical to that under the Constitution. *Ibid.*

Because Title VII similarly targets unconstitutional state action and provides a broad exemption from liability for an employer's refusal to provide a religious accommodation – *i.e.*, anything more than either a *de minimis* cost or a nonpecuniary burden in conducting its business – Congress has effectively targeted employers who intentionally discriminate on the basis of religion. The broad exemption from liability in Title VII's religious accommodation provision indicates that it is "designed 'to confine the application of the Act'" to employment decisions "attributable" to religious discrimination. *Ibid.* Accordingly, although Title VII's

religious accommodation provision "may bring within its sweep some constitutional conduct, this slight overreaching falls well within Congress's power to enact 'reasonably prophylactic legislation' to address intentional [religion]-based discrimination." *Ibid.* (quoting *Kimel*, 528 U.S. at 88).

More recently, the Supreme Court in *Hibbs* upheld the family leave provisions of the FMLA, which completely dispensed with any requirement that employers not discriminate and instead imposed a uniform leave policy for all covered employees. Although the Constitution does not require employers to provide *any* family leave to its employees, the Supreme Court upheld the FMLA's requirement that covered employers provide 12 weeks of unpaid leave to all of their employees because the Court found that the statute was a valid prophylactic means of enforcing the Constitution's prohibition of gender discrimination in state employment. *Hibbs*, 123 S. Ct. at 1984.

C. *The Historical And Legislative Record Is More Than Sufficient To Support Title VII's Prohibition Of Discrimination On The Basis Of Religion As Valid Section 5 Legislation*

1. *Where A Statute Does Not Pervasively Prohibit Constitutionally Permissible Conduct, Courts Need Not Inquire About The Underlying Legislative Record*

As this Court held in *Kovacevich*, a lack of "extensive legislative findings on states' discriminatory practices * * * is not determinative of the § 5 inquiry." 224 F.3d at 820 n.6. In particular, this Court concluded with respect to the Equal Pay Act that:

> Because the combination of the language of the EPA, the defenses it provides, and the intermediate scrutiny applied to gender discrimination, leads us to conclude that the EPA does not substantially overreach into largely constitutional activity in the first place, there is no need to search the legislative record as [the Supreme Court did] in *Kimel*.

Id. at 821 n.6. 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. 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.

Recent cases in which the Supreme Court has struck down federal legislation as invalid under Congress's Section 5 authority 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), 42 U.S.C. 2000bb *et seq.*, 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), 29 U.S.C. 621 *et seq.*, 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 Supreme 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 Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), the Court held that the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. 271 *et seq.*, 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.

More recently, in *Board of Trustees of University of Alabama* v. *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), 42 U.S.C. 12111-12117. 531 U.S. 356, 364-374 (2001). 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'" (quoting *City of Boerne*, 521 U.S. at 520) (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. This Court has noted that the lesson of these Section 5 cases is that a court need only consider the legislative record supporting a statute where a statute "prohibit[s] substantially more state [conduct] than would likely be held unconstitutional under the Fourteenth Amendment." *Kovacevich*, 224 F.3d at 820-821 n.6. As demonstrated above, however, Title VII's prohibition of religious discrimination proscribes 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 Constitution, Title VII's prohibition of discrimination on the

basis of religion should be upheld as valid Section 5 legislation without regard to the evidence of unconstitutional state action in the legislative history.

2. *Title VII's Prohibition Of Religious Discrimination Is Based On A Legislative And Historical Record Of Religious Discrimination By States*

In any case, if this Court chooses to examine the record supporting Title VII, it will find that, to the extent that Title VII's prohibition of religious discrimination reaches conduct that is permissible under the Constitution, it is valid prophylactic legislation under Section 5 because the statutory scheme is a congruent and proportional means of targeting unconstitutional conduct and because the legislative and historical record of state-sponsored religious discrimination is similar to the record of gender discrimination relied on by the Supreme Court in *Hibbs*.

The Supreme Court in *Hibbs* upheld the family leave provisions of the FMLA as a valid exercise of Congress's authority to enforce the Fourteenth Amendment's prohibition of sex discrimination by state entities. In doing so, the Court relied on a record containing the following: (1) historic evidence of state laws that had limited the employment opportunities of women in general and had been upheld as constitutional by the Supreme Court, (2) evidence of sex-based discrimination in the provision of leave by private employers, (3) statistics demonstrating that a few States provided greater child-birth-related leave for women than for men (although the Supreme Court has held that differential treatment based on pregnancy is not sex-based discrimination under the Equal Protection Clause, see *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 & n.20 (1974)),

and (4) two isolated statements indicating that discrimination in the provision of parental leave in the public sector mirrored that in the private sector. *Hibbs*, 123 S. Ct. at 1978-1979. The *Hibbs* Court also relied on the fact that, "even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways," in large part because leave decisions are left to the discretion of individual supervisors who often rely on impermissible gender stereotypes. *Id.* at 1980.

The historical and legislative record supporting Title VII's religious accommodation provision tracks the record the Supreme Court relied on in *Hibbs* to uphold the FMLA as valid Section 5 legislation. This country's history of government-imposed religion-based distinctions and restrictions on citizens' free exercise of religion "is chronicled in" the opinions of the Supreme Court and various state courts. Such restrictions have taken many forms. States have a long history of codifying the beliefs and practices of certain religions at the expense of adherents of other religions. For instance, from the beginning of our nation, and continuing until the latter half of the twentieth century, state statutes made blasphemy a criminal offense.[4] States also have a long history of exposing school

[4] See *Hale* v. *Everett*, 1868 WL 2291, at *90, 53 N.H. 9 (N.H. 1868) (discussing history of laws against practices such as "idolatry" and blasphemy, which were punishable in colonial times as capital offenses); *State* v. *West*, 263 A.2d 602 (Md. Ct. Spec. App. 1970) (striking down Maryland's anti-blasphemy law).

children to only certain religious beliefs.[5] Furthermore, state actors have targeted adherents of specific faiths for unfavorable treatment, both explicitly[6] and through the use of stereotyping.[7]

In the context of government employment, citizens have faced a variety of de jure restrictions on the free exercise of their religions.[8] As recently as 1978, the Supreme Court struck down a Tennessee statute banning ministers from serving as state legislators, a practice that had been adopted by 13 States at one time or

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[5] See, *e.g.*, *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963) (official prayer in public schools); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (same).

[6] See, *e.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon law banning private school education, a law that is widely understood to have been motivated by anti-Catholic bias); *In re Adoption of E*, 279 A.2d 785 (N.J. 1971) (overturning state judge's refusal to allow adoption solely on the basis of adoptive parents' lack of belief in supreme being); Viteritti, *Choosing Equality: Religious Freedom & Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 145-147 (1996) (discussing state-enacted "Blaine Amendments," which prohibit the use of public funds in religious schools and were enacted "to protect the common culture from the growing Catholic menace"). A plurality of the Supreme Court recently noted that the judicial inquiry into whether an institution is "pervasively sectarian" for Establishment Clause purposes has tended to target Catholic institutions for unfavorable treatment. *Mitchell* v. *Helms*, 530 U.S. 793, 828-829 (2000).

[7] See, *e.g.*, *State* v. *Davis*, 504 N.W.2d 767 (Minn. 1993) (state prosecutor struck prospective juror based on stereotype about religious beliefs of Jehovah's Witness), cert. denied, 511 U.S. 1115 (1994); *Casarez* v. *State*, 913 S.W.2d 468 (Tex. Crim. App. 1995) (en banc) (state prosecutor excluded jurors who adhered to Pentecostal religion).

[8] In the last 15 years, the Department of Justice has filed a number of suits under Title VII against state and local government employers, challenging employment rules banning the wearing of religious garb, imposing grooming requirements that are contrary to the mandates of certain religions, and requiring employees to work on religious holidays.

another. *McDaniel* v. *Paty*, 435 U.S. 618, 622-625 (1978). Other States have enacted statutes or constitutional provisions requiring persons holding "any office of profit or trust" in the State to declare a "belief in the existence of God." *Torasco* v. *Watkins*, 367 U.S. 488, 489 (1961). And a number of states have prohibited or limited the outward expression of religion by public school teachers.[9]

Contrary to the defendant's assertions (Def. Br. 30-33), Congress compiled an extensive record of religious discrimination in the years leading up to the consideration and enactment of the Civil Rights Act of 1964. In particular, Congress learned that members of all sects experienced religion-based employment discrimination,[10] particularly Jews and Catholics, and, to a lesser extent Protestants.[11] Testimony indicated that such discrimination was found across a

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[9] See *Zellers* v. *Huff*, 236 P.2d 949 (N.M. 1951); *Cooper* v. *Eugene Sch. Dist.*, 723 P.2d 298, 308 (Or. 1986) (collecting cases); see also *Finot* v. *Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520 (Cal. Ct. App. 1967); cf. *People* v. *Rodriguez*, 424 N.Y.S.2d 600 (N.Y. Sup. Ct. 1979) (holding that attorney should be permitted to wear his clerical collar at trial).

[10] *Equal Employment Opportunity: Hearings Before the Spec. Subcomm. on Labor of the House Comm. on Educ. & Labor* (*EEO Hearings*), 87th Cong., 1st Sess. 20 (1961) (Statement of Raymond M. Hilliard, Director, Cook County Department of Public Aid, Chicago, IL).

[11] *EEO Hearings* at 14 (Raymond M. Hilliard) (one survey of "3,568 job orders showed 25 percent excluded Protestants, Catholics, or Jews"); *id.* at 298 (Statement of Edward Howden, Executive Officer & Chief, Division of Fair Employment Practices, State of Cal., Fair Employment Practice Comm'n) ("[A]bout 5 percent of our complaints alleged religious discrimination; most involved allegations of anti-Semitism, but there were some brought by Catholics and some by members of certain Protestant denominations."); *id.* at 906 (Statement of Lewis H. Weinstein, Chairman, Nat'l Cmty. Relations Advisory

(continued...)

wide range of industries,[12] and that, even when members of certain religions were hired, they found they could not be promoted above a certain level.[13] Congress also heard that even companies that held substantial contracts with the federal government – and who were therefore under a contractual obligation not to discriminate – continued to discriminate on the basis of religion.[14] Witnesses also testified that, when employers submitted job postings to employment agencies, the postings frequently contained explicit or coded instructions that members of certain

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[11](...continued)
Council) (reporting that, in a 7-year period ending in 1960, 23.4 percent of complaints received alleged religious discrimination, almost all of which involved discrimination against Jews); *ibid.* ("[A] review of reports of States' fair employment practice agencies reveals that the second most numerous category of complaints alleged discrimination against Jews.").

[12] *EEO Hearings* at 582-583 (Statement of Moses K. Kove, Chairman, Greater New York Area Anti-Defamation League) (testifying about discrimination in various industries); *Equal Employment Opportunity: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 88th Cong., 1st Sess. 117 (1963) (Statement of Murray A. Gordon, on Behalf of Am. Jewish Cong.) (stating that "many basic industries in the United States are almost exclusively non-Jewish").

[13] *EEO Hearings* at 17 (Raymond M. Hilliard) (noting that one of the largest firms in Chicago had a policy of not promoting any Catholics above a certain level).

[14] *EEO Hearings* at 24 (Statement of Mr. Joseph Levin, President of the Bureau of Jewish Employment Problems, Chicago, IL) (testifying that large number of firms who discriminated were government contractors); *id.* at 182 (Statement of Edwin C. Berry, Exec. Dir., Chicago Urban League) ("The vice president of a company holding substantial Government contracts said his company was founded by Protestants 57 years ago and is Protestant-oriented. Jews and Catholics don't fit into his organization.").

faiths were not welcome to apply.[15] Finally, Congress learned that data on religious discrimination in employment is difficult to obtain because, absent self-identification, it is difficult to determine a person's religion.[16] Statistics compiled by the EEOC during the years between the enactment of the 1964 Civil Rights Act and the 1972 Amendments to the Act indicate a steady rise in the number of religious discrimination complaints filed.[17] Moreover, hearings held by the United

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[15] *EEO Hearings* at 22 (Joseph Levin) (noting that job orders frequently contained restrictions such as "We want Christian girls," "Says is desperate, but not desperate enough to hire Jews," "Can't use any matzo-ball queens," and "Protestant only – no Catholics, Jews, or orientals"); *id.* at 77 (Statement of William Karp, President, William Karp Consulting Co., Chicago, IL) (testifying that employment orders routinely included letter codes indicating that adherents of particular religions were not welcome to apply for the job).

[16] *EEO Hearings* at 316 (Statement of John Buggs, Exec. Sec'y, Comm'n on Human Relations, Los Angeles County) (discussing difficulty of collecting data on religious discrimination in employment); *id.* at 573 (Statement of Will Maslow, Exec. Dir. & Gen. Counsel, Am. Jewish Cong.) ("Exact information is difficult to obtain. Religious groups are not easily identified and there is an almost complete lack of statistical data upon which to base any objective conclusions."); *id.* at 907 (Lewis H. Weinstein) ("The subtlety with which discrimination against Jews is practiced, the difficulty of obtaining statistical proof, the known success of individual Jews, the lack of widespread unemployment, the greater severity of discrimination against Negroes, all have tended to obscure the extent to which Jews are denied equality of job opportunity."); see also U.S. Comm'n on Civil Rights, *Religion in the Constitution: A Delicate Balance*, Clearinghouse Publication No. 80 (1983) at 39; Walter Duckat, *Should He Become An Engineer*, Congress Weekly, July 12, 1958 at 12-14.

[17] See Annual Reports of the U.S. Equal Employment Opportunity Comm'n, 1964-1972. Statistics available for the last decade also show a continuing increase in the number of religious discrimination claims filed with the EEOC.

States Commission on Civil Rights in 1979 and 1983 indicated that religious discrimination in employment continued to be a problem.[18]

In addition, witnesses testified that employment decisions related to requests for religious accommodations are generally left to the discretion of individual supervisors and are frequently based on prejudicial stereotypes, and that even facially neutral rules can perpetuate the effects of past religious discrimination.[19] The Supreme Court specifically endorsed the FMLA's provision of a uniform standard of leave as a valid method of targeting impermissible gender stereotyping that Congress determined had "created a self-fulfilling cycle of discrimination" and led employers to engage in "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 123 S. Ct. at 1982; see also *id.* at 1979 (Congress was targeting "pervasive sex-role stereotypes that caring for family members is women's work"). Moreover, in upholding the EPA as valid Section 5 legislation, this Court relied on the fact that Congress was targeting "outmoded beliefs about the relative value of men's and women's work." *Kovacevich*, 224 F.3d at 821 n.6; see also *id.* at 819-820. As was the case with the FMLA and EPA with respect to gender discrimination, Title VII's religious accommodation provision addresses subtle discrimination on the basis of religion by imposing a uniform and far from onerous

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[18] See U.S. Comm'n on Civil Rights, *Religious Discrimination: A Neglected Issue* (1979); *Religion in the Constitution: A Delicate Balance*, *supra* (1983).

[19] See *Religion in the Constitution: A Delicate Balance*, *supra*, at 38-39; *Religious Discrimination: A Neglected Issue*, *supra*, at 81.

standard regarding hard-to-detect religious discrimination in employment. Cf. *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against government hostility which is masked, as well as overt.").

All of this evidence demonstrates a history of state-sponsored religious discrimination. Unlike the Religious Freedom Restoration Act, which was struck down in *City of Boerne* because it was "not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion," 521 U.S. at 534-535, Title VII targets hard-to-detect but nevertheless unconstitutional burdens on the free exercise of religion. The Supreme Court in *Hibbs* made clear that, where heightened scrutiny applies, it is "easier for Congress to show a pattern of state constitutional violations." 123 S. Ct. at 1982. Because the religious discrimination targeted by Title VII is subject to heightened scrutiny under the Fourteenth Amendment, and in light of this country's history of religious discrimination, Title VII is an appropriate means of "attack[ing] the formerly state-sanctioned stereotype[s]" by providing a uniform liability standard without requiring proof of discriminatory intent. *Id.* at 1982-1983; see also *Lukumi*, 508 U.S. at 534.

Title VII, like the Constitution, protects all citizens from unequal treatment on the basis of their religion and from more subtle forms of discrimination based on stereotypes or animus. Cf. *Lukumi*, 508 U.S. at 547 ("The Free Exercise Clause commits government itself to religious tolerance."). This country has a history of widespread discrimination on the basis of religion. The Supreme Court has noted

that the nineteenth century was "a time of pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell* v. *Helms*, 530 U.S. 793, 828-829 (2000) (plurality). Testimony before Congress around the time of the enactment of the 1964 Civil Rights Act demonstrates that discrimination against Jews was prevalent at that time. And recent times have shown an increase in discrimination against adherents of other religions. These trends demonstrate that, as immigration patterns change over time, so do the characteristics of the citizens of this country. New populations of citizens bring with them new religions, which give rise to new waves of stereotyping. And, although some of the most overt discrimination occurred in the somewhat distant past, the hearings leading to the enactment of Title VII indicate that such discrimination continued well into the more recent past and there is no basis for believing that religious persons no longer face discrimination, hostility, and stereotyping. The Supreme Court in *Hibbs* recognized that the existence of pervasive stereotypes in an employment context leads to "subtle discrimination that may be difficult to detect on a case-by-case basis" and justified Congress's decision to establish a uniform standard for family leave. 123 S. Ct. at 1982; see also *id.* at 1982-1983 ("By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."). By facilitating interaction between adherents of all faiths, Title VII's limited requirement that employers accommodate

their employees' religious practices where doing so does not impose more than a *de minimis* burden helps erode the stereotypes and prejudices that foster religious intolerance and discrimination.

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 8,962 words.

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ADDENDUM

INTERVENOR-APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Intervenor United States does not wish to designate any additional appendix contents beyond those contained in the designation of appendix contents filed by the defendants-appellants.