No. 24-1271

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KRISTEN M. BARNETT,
PLAINTIFF-APPELLANT,
v.
INOVA HEALTH CARE SERVICES,
DEFENDANT-APPELLEE.

On Appeal from the United States District Court
for the Eastern District of Virginia

Case No. 1:23-cv-01638-MSN-WEF

BRIEF OF *AMICI CURIAE* OF FORMER EEOC GENERAL COUNSEL AND RELIGIOUS NONDISCRIMINATION EXPERT SUPPORTING PLAINTIFF-APPELLANT'S APPEAL

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Sharon Fast Gustafson, former General Counsel for the Equal Employment Opportunity Commission ("EEOC" or "Commission"), and Rachel N. Morrison, former attorney advisor to General Counsel Gustafson, are experts in religion-related employment discrimination. During her time at the EEOC, *Amicus* Gustafson established a Religious Discrimination Work Group to promote religious nondiscrimination and accommodation. Ms. Gustafson has worked to promote religious nondiscrimination and accommodation, as well as litigated these cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *Amicus* Morrison was a member of the Religious Discrimination Work Group. Ms. Morrison has written and spoken as an expert on employees' religious rights in the workplace.

Amici offer this brief to explain Title VII's religious discrimination and accommodation standards and how the district court departed from Title VII's legal standards.

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[1] All parties received timely notice to the filing of this brief. Plaintiff-Appellant has given consent; Defendant-Appellee has refused its consent. No party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves whether Defendant-Appellee Inova Health Care Services lawfully denied Plaintiff-Appellant Kristen Barnett a religious accommodation to Inova's COVID-19 vaccination policy.

This policy was issued in response to the federal government's November 2021 vaccine mandate for healthcare workers funded by the Centers for Medicare & Medicaid Services (CMS). Mem. in Supp. of Inova's Mot. to Dismiss at 1-5, *Barnett v. Inova Health Care Servs.*, No. 23-1638 (E.D. Va. *dismissed* Mar. 26, 2024) (referencing CMS, Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021)). The mandate—"compelled" by the need "to protect the health and safety" of staff and patients—reiterated that "employers must comply with applicable Federal anti-discrimination laws and civil rights protections," including Title VII. 86 Fed. Reg. at 61,560, 61,568. As such, employers must "provide appropriate accommodations, to the extent required by Federal law, for employees who request and receive exemption from vaccination because of a . . . sincerely held religious belief, practice, or observance." *Id.* at 61,569. The mandate directed employers to consult the Equal Employment Opportunity Commission's

(EEOC) religion guidance and COVID-19 guidance for evaluating and responding to religious accommodation requests. *See id.* at 61,572. In its decision upholding the mandate, the Supreme Court reiterated that the mandate "requires providers to offer medical and religious exemptions." *Biden v. Missouri*, 595 U.S. 87, 91 (2022).

Under Title VII, when a workplace policy violates an employee's sincerely held religious belief, an employer must reasonably accommodate the employee's religious belief if it can do so without undue hardship to the employer's business.

The EEOC—the federal agency tasked with enforcing Title VII—has set out what is required of a religious accommodation, including what beliefs and practices qualify as religious.

Ms. Barnett, a devout Christian, requested a religious accommodation to Inova's COVID-19 vaccination policy. JA8. On the application form, she provided a detailed explanation of her religious objection based on reading holy Scripture and prayer. *Id*. She explained that according to Scripture her body is a "temple" of God and that she believes that receiving a COVID-19 vaccine "would be violating a sacred trust to honor God with [her] body." JA8-9.

Nevertheless, Inova denied Ms. Barnett's request formulaically: "Your request did not meet the criteria for exemption, did not demonstrate a religious belief that conflicts with the vaccination requirement, or could not be accommodated in your role without posing an undue hardship to Inova's operations." JA9. Ms. Barnett appealed, elaborating on her religious objection, but Inova again denied her religious accommodation request and terminated her employment. JA9-10, JA24.

Ms. Barnett sued Inova raising Title VII failure to accommodate and disparate treatment claims. The district court held that Ms. Barnett's failure to accommodate claim "would amount to a blanket privilege and that if permitted to go forward would undermine our system of ordered liberty." JA61. The district court also dismissed her disparate treatment claim because the facts were duplicative with the accommodation claim and a comparator was required to be pled. JA60-61.

But this is not what Title VII requires. Title VII requires reasonable accommodations for sincerely held religious beliefs. There is no "blanket privilege" consideration. Further, denials of religious accommodation requests can form the basis of disparate treatment claims. Comparators are not required. This Court should reverse the district court's error.

ARGUMENT

I. Title VII prohibits religious discrimination and requires reasonable accommodations for sincerely held religious beliefs.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., prohibits discrimination in the workplace on the basis of religion. *Id*. § 2000e-2(a).

Religious. Title VII defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j). Beliefs are considered "religious" if they are "sincerely held" and, "in the individual's 'own scheme of things, religious.'" EEOC, Compliance Manual: Religious Discrimination § 12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [hereinafter "EEOC Religion Guidance"][2] (quoting *Welsh v. United States*, 398 U.S. 333, 339 (1970), and *United States v. Seeger*, 380 U.S. 163, 185 (1965)); *see also* EEOC Guidelines on Discrimination Because of Religion [hereinafter "EEOC Religion Guidelines"], 29 C.F.R. § 1605.1

[2] EEOC's religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC's positions and contains extensive footnotes to case law in support.

(EEOC has "consistently applied" the *Welsh* and *Seeger* standard to Title VII). Title VII protects an *individual's* religious beliefs—including religious beliefs about vaccination—regardless of whether those beliefs are common or traditional, whether they seem logical or reasonable to others, whether they are recognized by an organized religion, and whether only a "few—or no—other people adhere to [them]." EEOC Religion Guidance § 12-I.A.1 (citing *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)); EEOC Religion Guidelines, 29 C.F.R. § 1605.1; *Welsh*, 398 U.S. at 343; *see also* EEOC Religion Guidance § 12-I.A.1 (explaining religious practices can include "refraining from certain activities"). "Title VII protects more than . . . practices specifically mandated by an employee's religion." EEOC Religion Guidance § 12-I.A.2. Religion "is often marked by external manifestations" but "such manifestations are not required for a belief to be 'religious.'" *Id.* § 12-I.A.1 n.27.

Determining whether a practice or belief is "religious" turns on the employee's motivation, not the nature of the activity. *Id.* § 12-I.A.1. Title VII protects *religious* beliefs; it does not protect "mere personal preferences" or "[s]ocial, political, or economic philosophies." *Id.* (citing

Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)); *see, e.g.*, *Dachman v. Shalala*, 9 F. App'x 186, 191-92 (4th Cir. 2001) (employee had a "religious belief that prohibited her from working after sundown on Fridays," but her preference to prepare for religious observances on the same day was not religious). But "overlap between a religious and political view does not place it outside the scope of Title VII's religious protections, as long as the view is part of a comprehensive religious belief system." EEOC Religion Guidance § 12-I.A.1. A belief that might be held by one person for religious reasons, may be held by another person for purely secular reasons. *See id*.

"In most cases whether or not a practice or belief is religious is not at issue." EEOC Religion Guidelines, 29 C.F.R. § 1605.1. While determining whether a belief is "religious" can "present a most delicate question," *Yoder*, 406 at 216, "the claim of the [individual] that his belief is an essential part of a religious faith must be given great weight." *Seeger*, 380 U.S. at 184. "[T]he [EEOC] and courts 'are not and should not be in the business of deciding whether a person holds religious beliefs for the "proper" reasons.'" EEOC Religion Guidance § 12-I.A.2 (quoting *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452 (7th Cir. 2013)); *see also*

EEOC v. Consol Energy, Inc., 860 F.3d 131, 142 (4th Cir. 2017) (It is not the employer's or court's place "to question the correctness or even the plausibility of [employees'] religious understandings.").

Sincerely held. Instead of reviewing an employee's motives or reasons for holding a religious belief, the EEOC restricts its inquiry to whether the religious belief is sincerely held. EEOC Religion Guidance § 12-I.A.2. Employers and courts may likewise assess the sincerity of a religious belief, but sincerity is "usually not in dispute" and "generally presumed or easily established." *Id.*

Sincerity is "largely a matter of individual credibility." *Id.* Relevant factors that "might undermine an employee's credibility" include "whether the employee has behaved in a manner markedly inconsistent with the professed belief" and "whether the timing of the request renders it suspect." *Id.* But these factors are not "dispositive" because "an individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held." *Id.* ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance.").

Prohibited discrimination. Title VII forbids employers from discriminating because of an individual's religion in hiring, promotion, discharge, "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Further, employers must not "limit, segregate, or classify" employees based on religion "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Id.* § 2000e-2(a)(2). Employers are prohibited from discriminating intentionally (disparate treatment) or through policies that have a disparate impact on religious employees. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015).

Religious accommodation requirement. In addition to those proscriptions, employers are affirmatively required to "reasonably accommodate" an employee's religious beliefs, observances, and practices unless the accommodation would pose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Absent undue hardship, an employer's failure to reasonably accommodate religious belief constitutes unlawful discrimination. In *Abercrombie*, the Supreme Court held that "Title VII requires otherwise-neutral policies to give way to the

need for an accommodation." 575 U.S. at 775. The Court further explained, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment," creating an affirmative obligation on employers. *Id*.

An employee's "sincerely held" religious objection to a workplace policy or job duty qualifies for a religious accommodation. EEOC Religion Guidance § 12-I.A.2 (citing *Seeger*, 380 U.S. at 185); *id*. § 12-IV; EEOC Religion Guidelines, 29 C.F.R. § 1605.2.

An employer is not required to provide an *un*-reasonable accommodation and is not necessarily required to provide the employee's preferred accommodation. EEOC Religion Guidance § 12-IV.A.3 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986)). For an accommodation to be reasonable, it "must not discriminate against the employee or unnecessarily disadvantage the employee's terms, conditions, or privileges of employment." *Id.* (citing *Ansonia*, 479 U.S. at 70). An employer's proposed religious accommodation is not reasonable if the employer provides a more favorable accommodation to other

employees for non-religious reasons, including medical reasons. *Id.* (citing *Ansonia*, 479 U.S. at 70–71).

Likewise, a religious accommodation is not reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment" and there is another accommodation available that would not require such a harm. *Id.* When there is more than one reasonable accommodation that does not pose an undue hardship, "the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." EEOC Religion Guidelines, 29 C.F.R. § 1605.2(c)(2)(ii).

Employees who need religious accommodations should generally be accommodated in their current positions unless there is no accommodation in that position that does not pose an undue hardship. EEOC Religion Guidance § 12-IV.C.3 (citing EEOC Religion Guidelines, 29 C.F.R. § 1605.2(d)(iii)). Only when no such accommodation is possible should the employer consider reassignment or a lateral transfer as an accommodation. *Id.* (citing EEOC Religion Guidelines, 29 C.F.R. § 1605.2(d)(iii)).

Undue hardship defense. "Undue hardship" is not defined in Title VII. However, the Supreme Court recently clarified "that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." *Groff v. DeJoy*, 143 S. Ct. 2279, 2294 (2023) (rejecting reliance on the "more than a *de minimis* cost" line in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), because "showing 'more than a de minimis cost' . . . does not suffice to establish undue hardship under Title VII").[3] "Hardship" is "more severe than a mere burden" and, at a minimum, "something hard to bear." *Id.* And "*undue* hardship" is hardship that rises to an "'excessive' or 'unjustifiable' level." *Id.* To establish undue hardship, an "employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business," "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in

[3] EEOC's Religion Guidance was issued prior to the Supreme Court's opinion in *Groff*. *See* EEOC Religion Guidance, *Notice Concerning the Undue Hardship Standard in Title VII Religious Accommodation Cases* (acknowledging that "*Groff* supersedes any contrary information" in its guidance).

light of the nature, size and operating cost of an employer." *Id.* at 2295 (cleaned up).

To demonstrate undue hardship, employers must rely on "objective information," not "speculative or hypothetical hardship," including the assumption that other employees might seek accommodations. EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws §§ L.3, L.4 (last updated May 15, 2023), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [hereinafter "EEOC COVID-19 Guidance"]. Whether a reasonable accommodation exists that does not pose an undue hardship is a fact-specific inquiry appropriate for a case-by-case determination. EEOC Religion Guidance § 12-IV.B.1.

Reasonable accommodation process. To receive a religious accommodation, an employee should notify the employer of the conflict between a workplace requirement, policy, or practice and the employee's sincerely held religious belief, observance, or practice. EEOC COVID-19 Guidance § L.1. An employer should assume an employee requesting a religious accommodation is doing so based on a sincerely held religious

belief unless the employer "has an objective basis for questioning either the religious nature or the sincerity of a particular belief," in which case the employer may make a "limited factual inquiry" and seek "additional supporting information." *Id.* § L.2.

An employer and an employee should engage in a "flexible, interactive process" to identify workplace accommodations that do not impose an undue hardship on the employer. *Id.* § K.6. An employer "should thoroughly consider all possible reasonable accommodations," which in the COVID-19 vaccination context could include periodic testing, masking, social distancing, modified shifts, telework, and—as a "last resort"—reassignment. *Id.* §§ K.2, K.6, K.12, L.3; *see also Groff*, 143 S. Ct. at 2296 (2023) ("Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations.").

Religious accommodation denials as disparate treatment. Denial of religious accommodation requests can also give rise to other disparate treatment, harassment, or retaliation claims. *See* EEOC Religion Guidance §§ 12-II.A.3 Ex. 13 & n.137, 12-IV.C.4.a Ex. 48; *see*

also EEOC, Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096, 29219 (Apr. 19, 2024) (contemplating the same facts involving a failure to accommodate claim could also support a disparate treatment claim). No comparators are required. *See* EEOC Religion Guidance § 12-II.A.3 n.137 (recognizing there may be no comparator).

To the extent that an employer grants medical exemptions, but not religious exemptions, the employer must demonstrate that religious exemptions would pose an undue hardship that medical exemptions do not pose. *See id.* § 12-IV.A.3. Similarly, granting certain religious accommodation requests while denying other religious accommodation request based on the employees' religious beliefs could give rise to a disparate treatment claim. *See id*. §§ 12-I, 12-IV.A.3. Failure to treat like accommodation requests alike would give rise to an inference of pretextual religious discrimination. *Cf. Ansonia*, 479 U.S. at 71 ("unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones . . . [because] [s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness").

II. The district court departed from Title VII's legal standards.

Plaintiff-Appellant Kristen Barnett, a devout Christian, alleged sincere religious beliefs against taking the COVID-19 vaccination. After reading holy Scripture and prayer, Ms. Barnett was convicted that her body is a "temple" of God and that receiving the COVID-19 vaccine "would be violating a sacred trust to honor God with [her] body." JA8-9.

Ignoring Title VII's standard, the district court ruled that "the terms 'body is a temple' or 'self-determinism' or the various other language that's used by [Ms. Barnett] . . . would amount to a blanket privilege" and allowing Ms. Barnett's claims to proceed "would undermine our system of ordered liberty." JA61.

The district court then summarily dismissed Barnett's Title VII denial of religious accommodation claim "for the same reasons that were articulated in *Ellison* [*v. Inova Health Care Services*, No. 23-cv-132 (E.D. Va. Sep. 14, 2023)]." JA60-61. In *Ellison*, the district court found that *those* plaintiffs' objections to the COVID-19 vaccine based on beliefs about the "body-as-a-temple" were "not rooted in concerns that are religious in nature." JA70-72; *Ellison* at 7-9.

In support, the district court quoted the Supreme Court's decision in *Wisconsin v. Yoder*, for the proposition that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." JA70; *Ellison* at 7 (quoting *Yoder*, 406 U.S. at 215–16).

The district court's reliance on *Yoder* is misplaced. *Yoder* was not a Title VII religious accommodation case and the Supreme Court's reference to concerns about "ordered liberty" in *Yoder* was in reference to *non-religious* personal beliefs. As the Supreme Court explained, "if the Amish asserted their [free exercise] claims [against a compulsory education law] because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not rest on a religious basis." *Yoder*, 406 U.S. at 216. But since the Amish's claims were "not merely a matter of personal preference, but one of deep religious conviction," they were entitled to protection. *Id.* Significantly, the Supreme Court did not state that accommodating *religious beliefs* undermines ordered liberty.

The district court erred by inserting a "blanket privilege" test into Title VII. Under Title VII, sincerely held *religious* beliefs receive

accommodation protections while *non-religious* beliefs do not. Concerns about ordered liberty are not part of the calculus.

Title VII accounts for different policy considerations by only requiring religious accommodations that are reasonable and do not pose an undue hardship on the employer. Any policy concerns about "ordered liberty" are properly accounted for under Title VII's undue hardship consideration. But since an undue hardship determination is a fact-specific inquiry, it cannot form the basis of dismissal.

Similarly, sincerity of belief—which was not raised below—is a credibility determination for the factfinder and cannot support a motion to dismiss.

The question before this Court is whether Plaintiff's sincere beliefs are religious. They are. As the EEOC recognized in another case involving Title VII claims for denial of religious accommodations to a COVID-19 vaccine mandate, beliefs about the "sanctity of the human body" that the plaintiffs' "bodies are temples to the Holy Spirit" were "religious." Br. of EEOC as Amicus Curiae in Supp. of Appellants at 25, *Ringhofer v. Mayo Clinic, Ambulance*, No. 23-2994 (8th Cir. May. 24, 2024). The Eighth

Circuit agreed. *Ringhofer* at 8-10 (finding plaintiffs "plausibly pled" religious beliefs, including beliefs that their "body is a temple").

Further, Title VII requires a case-by-case analysis of whether each *individual* plaintiff's beliefs are religious. The district court erred by pointing to the analysis of the plaintiffs' religious beliefs in *Ellison*. Although the plaintiffs in *Ellison* may have stated some similar beliefs, the plaintiffs' beliefs and motivations are not identical to Ms. Barnett's and it is inappropriate for the district court to summarily treat them the same.

Finally, the district court erred by assuming that an employer's denial of a religious accommodation cannot also form the basis of a disparate treatment claim and that a comparator was required. Title VII prohibits unequal treatment based on religion, including by granting accommodation requests for medical reasons or certain religious beliefs, but not for other religious beliefs.

By departing from Title VII's legal standards, the district court erred by ruling that Ms. Barnett's beliefs were not religious and by dismissing her Title VII failure to accommodate and disparate treatment claims.

CONCLUSION

The Court should reverse the order granting dismissal and remand the case to the district court for further proceedings as appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Microsoft Word for Mac Version 16.85.2 using a proportionally spaced typeface, 14-point Century Schoolbook.

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) (suggesting a limit of "one-half the maximum length authorized by these rules for a party's principal brief") because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 3,511 words.

s/ Rachel N. Morrison
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CERTIFICATE OF SERVICE

I, Rachel Morrison, an attorney, certify that the foregoing Brief was served electronically on all parties via CM/ECF.

s/ Rachel N. Morrison
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