

No. 17-2926

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Equal Employment Opportunity Commission, *Plaintiff-Appellant*

v.

North Memorial Health Care, *Defendant-Appellee*

Appeal from the U.S. District Court for the District of Minnesota
Civil Case No. 1:15-cv-03675 (Judge David S. Doty)

**Amicus Brief of the General Conference of Seventh-day
Adventists, the Mid-America Union Conference of Seventh-day
Adventists, the Minnesota Catholic Conference, the American
Jewish Committee, the Union of Orthodox Jewish
Congregations of America, the Christian Legal Society,
the American Civil Liberties Union, and
the American Civil Liberties Union of Minnesota**

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CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1 and 29(4)(A), *amici* the General Conference of Seventh-day Adventists, the Mid-America Union Conference of Seventh-day Adventists Christian Legal Society, the Union of Orthodox Jewish Congregations of America, the American Jewish Committee, the American Civil Liberties Union, and the American Civil Liberties Union of Minnesota all note that they have no parent corporation and do not issue any stock.

The Minnesota Catholic Conference is a nonprofit corporation, the directors of which are the Roman Catholic bishops of Minnesota. It issues no stock.

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INTRODUCTION, SUMMARY, AND INTERESTS OF *AMICI*¹

This case presents a legal question of crucial importance for employees of faith throughout this Circuit: whether a request for a religious accommodation is protected by Title VII's retaliation provision. Under that statute, if an employee requests a reasonable accommodation for her religious practices, the law allows an employer one of two options: either provide the accommodation by eliminating the conflict or show that providing the accommodation would cause undue hardship. Properly applied, this balanced approach allows almost all employees of faith to live their religion at work without significant hardship to the employer.

The district court's ruling changes all this. In the district court's telling, the employer has a third option: firing an employee (or rescinding an employment offer) for merely *requesting* an accommodation. But this option is squarely foreclosed by Title VII's retaliation provision and the religious liberty policy on which it is based. Indeed, if employers had this option, that alone would nearly eliminate the rights of employees who

¹ No one other than *amici*, their members, and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. *Amici* seek leave to file without consent.

would seek accommodations. And avoiding that result is the whole point of the retaliation provision.

Given these consequences, as explained in Part I, it is not surprising that the decision below has numerous legal flaws. Title VII's plain language requires that an employee be protected from retaliation if she "oppose[s]" an illegal practice, but without specifying the nature or form of that opposition. That is important because, as a textual matter, "opposition" can be expressed in many ways short of overt criticism or refusal to comply. Indeed, in an analogous context the Supreme Court has ruled that "opposition" includes merely "disclosing" a position with respect to a particular practice (*see Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271, 279–80 (2009))—just what Ms. Sure-Ondara did when she said she would need a religious exemption from the employer's weekend-work policy.

The district court opinion also contravenes Title VII's plain language by engrafting a *scienter* requirement onto the statute—that is, that the employee herself actually "believe" the policy at issue is illegal. This defies the Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), which forcefully corrected the Tenth

Circuit when it tried to add an analogous *scienter* requirement to Title VII's accommodation provision.

The district court's opinion likewise finds no support in precedent or logic. Indeed, most courts that have reached the issue have held that a request for accommodation *is* protected from retaliation. And several other strands of case law and legislative history make the district court's holding implausible.

Further, as explained in Part II, Ms. Sure-Ondara's situation is typical of those often faced by Adventist healthcare workers. And even if one views the evidence here in the light most favorable to the *employer*—rather than, as the law requires, to the employee—Ms. Sure-Ondara's conduct and statements reflect full fidelity to Adventist beliefs.

Protecting the ability of people of faith like Ms. Sure-Ondara to request religious accommodations in the workplace is critically important to the *amici*, each of which is a religious or civil rights organization, and each of which is described in the Addendum. Those organizations include the worldwide and local administrative bodies of the Seventh-day Adventist Church, the faith group to which Ms. Sure-Ondara belongs.

STATEMENT

Under Title VII of the Civil Rights Act, it is “an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Moreover, when an employer can do so “without undue hardship on the conduct of [its] business,” it must “reasonably accommodate” “*all* aspects” of an “employee’s . . . religious observance or practice.” 42 U.S.C. § 2000e(j) (emphasis added). Under what is known as Title VII’s “retaliation clause,” it is likewise illegal “for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter[.]” 42 U.S.C. § 2000e-3(a).

1. Title VII’s accommodation provision was enacted by Congress in 1972 in response to judicial decisions adopting a narrow reading of the 1964 Act’s general prohibition on religious discrimination. Since then, the Supreme Court has urged the use of “bilateral cooperation,” so an employer and employee can work to “eliminate the conflict” between the employee’s religious practices and job requirements. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69–70 (1986). The retaliation clause

protects this regime of “bilateral cooperation” by ensuring that an employer cannot fire an employee simply for requesting an accommodation—and thereby initiating this process.

2. That is what happened in this case. North Memorial Hospital, defendant-appellee here, extended a job offer to Emily Sure-Ondara, and in so doing made clear that it viewed her as an outstanding candidate for its beginning nursing program. In the interview process, Ms. Sure-Ondara received twenty-six out of twenty-eight possible points from her interviewer, who commented that she was a “great . . . candidate” J.A. 140. North Memorial hired her to work evenings full-time. *See* J.A. 141.

After being hired but before her first shift, Ms. Sure-Ondara informed North Memorial that she could not work on Friday evenings. J.A. 124. As a Seventh-day Adventist, Ms. Sure-Ondara believes Sabbath runs from sundown on Friday to sundown on Saturday. J.A. 124. But numerous comments from her supervisors indicate they showed no interest in accommodating her. EEOC 7–11. Even after litigation began, North Memorial framed her objection to Friday night work as a secular convenience to prepare for church on Saturday. J.A. 167–68. It did so even though her request was to seek “Sabbath rest,” J.A. 247 (Sure-

Ondara)—a religious command reflecting the Bible’s description of God’s decision to rest on the “seventh day” after six days or periods of creation. Exodus 20:11. Rather than trying to understand why Sure-Ondara needed an accommodation, North Memorial decided not to accommodate her request and suggested she seek another position. J.A. 145.

Then, faced with the choice of not having her chosen job or continuing to press for an accommodation, Ms. Sure-Ondara told North Memorial that “I am able to work the [] position without the religious accommodation.” J.A. 148. Despite this, North Memorial claimed to rely on her earlier request that she swap shifts to avoid Sabbath work, and claimed it doubted whether she would actually work on Friday nights. J.A. 118. The hospital declined to restore her job offer. J.A. 118.

As the EEOC describes in more detail, the EEOC sued on Sure-Ondara’s behalf, bringing a retaliation claim. EEOC 11. The district court granted summary judgment for North Hospital, concluding that there was no retaliation claim because requesting a religious accommodation was (in the court’s view) not a protected activity. Order 1–12; *see also* EEOC 11–15.

ARGUMENT

Contrary to the district court's view, Title VII clearly protects from retaliation an employee who requests a religious accommodation. And Ms. Sure-Ondara's request was a *bona fide* request for such an accommodation, entirely consistent with the teachings of her faith—as authoritatively taught by *amicus* General Conference of Seventh-day Adventists.

I. Under Title VII, a request for religious accommodation is an activity protected from retaliation.

The district court's decision is wrong for several reasons: The court misread the text of Title VII's opposition provision, improperly added a *scienter* requirement where none exists, and relied on poorly reasoned and non-binding precedent. To make matters worse, the district's court decision defies logic and common sense—not to mention Congress's intent—in creating from whole cloth a rule that would make it virtually impossible for employees of faith to seek accommodations.

A. Supreme Court precedent dictates that simply stating a position—such as making a request for accommodation—is covered under the plain language of Title VII’s “opposition” clause.

To its credit, the district court acknowledged that it was required to interpret Title VII according to its “plain language,” and to “give words their ordinary, contemporary, common meaning unless they are otherwise defined in the statute itself.” Order 6 (quoting *Hennepin Cty. v. Fannie Mae*, 742 F.3d 818, 821 (8th Cir. 2014) (internal quotation marks omitted)). But the district court did not do so. Contrary to its assertion, the plain language of Title VII dictates that Ms. Sure-Ondara’s request be treated as protected activity.

Under Title VII, an employee engages in protected activity when she *either* (1) simply “oppose[s] any practice made an unlawful employment practice by [Title VII]” or (2) “ma[kes] a charge, testifie[s], assist[s], or participate[s] in any manner in an investigation, proceeding, or hearing under [Title VII].” Order 7 (quoting 42 U.S.C. §`2000e-3(a)). A request for an accommodation easily satisfies the plain language of the first provision, known as the “opposition clause.”

First, standing alone, “opposition” does not necessarily connote an *overt* statement. Indeed, numerous football players today convey their

opposition to certain police practices, not through overt statements, but simply by “taking a knee” during the playing of the national anthem. No one could dispute that they are “opposing” what they view (rightly or wrongly) as unjust police practice, even though their kneeling does not say so expressly.

Second, merely requesting an exemption can naturally be viewed as “opposition.” To pursue the football analogy, if a team were to adopt a policy of standing during the anthem, and a player were then to request an exemption from that policy (i.e., an accommodation) based on his desire to convey his concerns about police practice, surely that request would be considered an expression of “opposition”—both to the practice *and* the team policy.

Applied to Title VII, this conclusion finds ample support in Supreme Court precedent holding that “opposition” to an employer’s practice can be *implied* in the employee’s communication. For example, the Court concluded in *Crawford v. Metropolitan Government of Nashville & Davidson County* that, when an employer requests testimony regarding potential illegal activity, that testimony can itself constitute “opposition” under the opposition clause even if the testimony

does not expressly claim the activity is illegal. 555 U.S. 271, 279–80 (2009). The Court observed that, under the opposition clause, an employee is protected when she “take[s] no action at all to advance a position beyond *disclosing* it.” *Id.* at 277 (emphasis added). And the Court described a contrary rule as “freakish.” *Id.* at 278; *see also* EEOC 23–24.

Crawford’s logic likewise applies to requests for religious accommodation: By “advancing the position” that she needed a religious accommodation, Ms. Sure-Ondara was implicitly “opposing,” in advance, North Memorial’s failure to provide such an accommodation—assuming the hospital ultimately refused to provide one. Under the plain language as interpreted in *Crawford*, this is sufficient to constitute opposition—especially when the evidence is viewed, as it must be on summary judgment, in the light most favorable to the EEOC. *See, e.g., Barkley, Inc. v. Gabriel Bros.*, 829 F.3d 1030, 1038 (8th Cir. 2016); *United States CFTC v. Kratville*, 796 F.3d 873, 891 (8th Cir. 2015).

In short, requesting a religious accommodation easily counts as “opposition” to any policy that would deny the accommodation, and thus falls well within the plain language of the “opposition” clause. The district court’s contrary conclusion should be reversed.

B. Like the Tenth Circuit before it was reversed in *Abercrombie*, the district court improperly engrafted onto Title VII a *scienter* requirement that appears nowhere in the statute.

Beyond its unduly narrow view of what constitutes an “opposition,” the district court also violated Title VII by adding a *scienter* requirement that appears nowhere in the statute. The district court ruled that “[u]nder the opposition clause, a plaintiff must communicate her opposition to a practice that she *believes*, in good faith, is unlawful.” Order 7 (emphasis added). The court then rejected Sure-Ondara’s retaliation claim on the ground that “[t]here is no evidence that Sure-Ondara *believed* that North Memorial’s denial of her religious accommodation request was unlawful. And even if she did, she did not communicate that *belief* to North Memorial.” Order 7 (emphasis added). While the district court relied on *Barker v. Missouri Department of Corrections*, 513 F.3d 831, 834 (8th Cir. 2008), for this view, that reading of Title VII’s opposition clause is misguided.

The Supreme Court addressed this same type of analytical mistake in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). There the Tenth Circuit had ruled that the employee could not show disparate treatment without first showing that the employer had “actual

knowledge,” not just notice, of a need for a religious accommodation. *Id.* at 2031–33. Reversing, the Supreme Court held that, because the text lacked a knowledge requirement, “[a]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated *suspicion* that accommodation would be needed.” *Id.* at 2033 (emphasis added). Emphasizing that the text lacked an express *scienter* requirement, the Court stated, “We construe Title VII’s silence as exactly that: silence.” *Id.*

So too here. The language of the opposition clause makes it illegal to retaliate against an employee for “oppos[ing] any practice *made an unlawful employment practice* by [Title VII]” 42 U.S.C. § 2000e-3(a). The provision thus merely requires that the employment “practice” has been “made . . . unlawful” by the statute. It says nothing about the employee’s *belief* about such unlawfulness. As in *Abercrombie*, the statute is “silent” on that specific question.

Nor would it make any sense to impose a belief requirement. For example, if an immigrant female employee with limited English skills and no familiarity with U.S. law were subject to rank sexual discrimination—say, a supervisor who insists on sexual favors as a

condition of continued employment—it should make no difference whether the employee actually *knows* such conduct is illegal. It should be enough—and *is* enough under the statutory language—for the employee simply to object (using the employer’s standard process) to the supervisor’s conduct. Moreover, as this Circuit has held, that objection or “opposition” could take the form of a simple refusal to submit to the unwanted sexual advance. *See, e.g., Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000). That holding not only confirms that overt criticism is unnecessary for conduct to count as “opposition,” it also shows that the complainant’s knowledge of illegality is irrelevant.

By adding a *scienter* or “belief” requirement to Title VII, the district court overstepped its statutory authority, just as the Tenth Circuit did in the decision that was overruled in *Abercrombie*. For that reason too, the district court’s decision must be reversed.

C. Title VII precedent in this and other jurisdictions compels protection for religious accommodation requests.

Besides departing from the plain statutory language and committing an error similar to that in *Abercrombie*, the district court’s decision departs from sound precedent interpreting the “opposition”

clause. The EEOC's brief correctly analyzes a few of those decisions—both in this Court and elsewhere. *See* EEOC 19–25. And the EEOC's analysis is supported by additional authority.

For example, the Seventh Circuit has assumed that requesting a religious accommodation is protected from retaliation. *Porter v. City of Chi.*, 700 F.3d 944, 957 (7th Cir. 2012). And several district courts—in the Second, Fourth, Seventh and Eleventh Circuits—have assumed or held the same.² Thus, if it affirmed the district court, this Court would create a conflict with an assumption made by the Seventh Circuit, as well as holdings and assumptions from district courts in other circuits.

Attempting to justify its disregard of this precedent, the district court noted (at 11) that in many of these cases, it was not disputed that a request for an accommodation is protected activity. But the fact that

² *See Nichols v. Ill. Dept. of Transp.*, 152 F. Supp. 3d 1106, 1138–39 (N.D. Ill. 2016); *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 449 (E.D.N.Y. 2014); *Jenkins v. N.Y.C. Transit Auth.*, 646 F. Supp. 2d 464, 473 (S.D.N.Y. 2009); *Johnson v. United Parcel Serv., Inc.*, Civ. No. RDB-14-4003, 2015 WL 4040419, at *11 (D. Md., June 30, 2015); *Williams v. Wal-Mart Assocs., Inc.*, Civ. No. 2:12-cv-03821-AKK, 2013 WL 979103, at *3 (N.D. Ala., March 8, 2013).

the issue typically is not disputed only shows that the protected character of such requests is not open to serious question. *See* I.A–I.B, *supra*.

Nor does the scattered contrary authority cited by the district court (at 7–8) provide any reason to depart from the majority rule. For example, in *Perlman v. Mayor & City Council of Baltimore*, No. SAG-15-1620, 2016 U.S. Dist. LEXIS 19426 (D. Md. Feb. 18, 2016), which involved a *pro se* litigant, the court decided that seeking an accommodation was not a protected activity in a single sentence—with no meaningful analysis. *Id.* at *16. Similarly, in *Payne v. Salazar*, 899 F. Supp. 2d 42 (D.D.C. 2012), the court decided the issue in a footnote. *Id.* n.7. Neither decision addressed any of the dispositive points discussed above.³

In short, the district court’s holding has no support in binding precedent in this Circuit and no persuasive support in any other decision squarely addressing whether a request for religious accommodation is protected under Title VII. The district court’s holding should be reversed.

³ The district court cited one additional case, *St. Juste v. Metro Plus Health Plan*, but that case is irrelevant. The decision’s main analysis focused on an employee who wrote a letter saying he needed to talk to a supervisor, not an employee who requested an accommodation. 8 F. Supp. 3d 287, 323 (E.D.N.Y. 2014); *see also* EEOC 34 (distinguishing *St. Juste*).

D. The district court's holding defies common sense as well as the policies underlying Title VII's accommodation provision.

Beyond its inconsistency with the text and applicable precedent, the district court's determination that requesting a religious accommodation is not protected by Title VII's retaliation provision would lead to absurd results and undermine the policies underlying the statute.

1. First, it would be absurd to allow employers to overcome Title VII's religious accommodation provisions by routinely firing employees who request such an accommodation. But that is what the district court's logic would do. Indeed, other circuits have recognized that reality in the context of the Americans with Disabilities Act (ADA), which has a similar anti-retaliation provision.

Like Title VII, the ADA allows employees to seek accommodations based on disability, 42 U.S.C. § 12112(a), and makes seeking such an accommodation a protected activity. For example, this Circuit has held that, under the ADA, "a person who is terminated after unsuccessfully seeking an accommodation may pursue a retaliation claim[.]" *Hill v. Walker*, 737 F.3d 1209, 1219 (8th Cir. 2013); *see also Heisler v. Metro.*

Council, 339 F.3d 622, 630–32 (8th Cir. 2003). At least ten sister circuits have so concluded.⁴

Moreover, two circuits have noted that, if seeking an accommodation were *not* protected activity, an employer could temporarily grant an accommodation, then quickly fire the employee. *Shellenberger v. Summit Bancorp*, 318 F.3d 183, 191 (3d Cir. 2003); *Soileau v. Guilford of Me.*, 105 F.3d 12, 16 (1st Cir. 1997). If the employer did this, there would be no failure to accommodate claim because the employee was accommodated from the day he requested an accommodation until the day he was fired. *See, e.g., Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995) (concluding that

⁴ *Solomon v. Vilsack*, 763 F.3d 1, 15 (D.C. Cir. 2014); *A.C. ex rel. J.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687, 698 (6th Cir. 2013); *Cassimy v. Bd. of Educ.*, 461 F.3d 932, 938 (7th Cir. 2006); *Coons v. Sec'y of the U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004); *Shellenberger v. Summit Bancorp*, 318 F.3d 183, 191 (3d Cir. 2003); *Wright v. CompUSA, Inc.*, 352 F.3d 472, 477–78 (1st Cir. 2003); *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 149 (2d Cir. 2002); *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 706–07 (4th Cir. 2001); *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1264 (10th Cir. 2001). As the EEOC explains (at 27–32), the ADA and Title VII should be interpreted consistently. Indeed, “courts of appeals routinely apply the same standards to evaluate Title VII claims as they do ADA claims[.]” *Brown v. Brody*, 199 F.3d 446, 456 n.10 (D.C. Cir. 1999).

because employer offered reasonable accommodation until employee was fired, employee's failure to accommodate claim failed). A robust retaliation claim is thus crucial for making the accommodation claim effective. Accordingly, requesting an accommodation must be protected under the ADA, as federal courts "cannot interpret federal statutes to negate [the statutes'] own stated purposes[.]" *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

But that is exactly what the district court's rule would do in the context of religious accommodations: An employer could lawfully listen to an accommodation request, provide the accommodation, and then immediately fire the employee, openly admitting it was because of the request. And here again, under the district court's reasoning, the employee would have neither a failure to accommodate claim *nor* a retaliation claim. That would be a death blow to religious accommodations.

The district court's contrary reasoning is unpersuasive. The district court (at 8–9) placed great weight on *dicta* in *Kirkeberg v. Canadian Pacific Railway*, 619 F.3d 898 (8th Cir. 2010), which questioned binding Circuit precedent holding that requesting an accommodation is protected

activity, *id.* at 906–07. But the panel in *Kirkeberg* ultimately *followed* the circuit precedent it questioned. *Id.*

In any event, reliance on *Kirkeberg*'s dicta is misplaced: First, as explained above, Title VII's text dictates that the opposition clause extend to requesting a religious accommodation. *See* I.A, *supra*. Second, lower courts cannot be permitted to negate the purpose of Title VII by giving employers a back door to avoid accommodating employees. *King*, 135 S. Ct. at 2493.⁵ As shown above, that is exactly what the district court's holding would do.

2. The district court's rule would also inappropriately discourage bilateral cooperation between them and their employers. Ordinarily, when employers decide whether to accommodate a request for accommodation, they have two legal options. The first is to eliminate the work-religion conflict and absorb any resulting difficulties. The second is

⁵ The district court also relied on another provision in the ADA. *See* Order 10 (citing 42 U.S.C. § 12203(b)). It used this language to argue that, as the ADA's text is broader than Title VII's, Congress acknowledged that Title VII's scope was narrower. Order 10. But this is a red herring: the opposition clause does cover requests for religious accommodations, and any other interpretation would provide a perpetual way to fire employees who seek such accommodations. *See* EEOC 33.

to deny the request, claiming it was unreasonable or created undue hardship, and risk being sued for religious discrimination. But under the district court's ruling, many employers, like the appellee here, would choose a third option: firing or choosing not to hire the employee or applicant requesting an accommodation. This would likely become a routine choice for many employers, as it would limit the costs of religious accommodation, the burden of negotiating with employees and applicants, and the potential for religious discrimination lawsuits.

This result would seriously undermine the “bilateral cooperation” endorsed by the Supreme Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 69 (1986). There, the Court explained that “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.” *Id.* (citation omitted). “Bilateral cooperation” permits employees and employers to work together to resolve issues concerning religious accommodation, rather than permitting employers to dispose of religious accommodation claims by disposing of the employee or applicant!

Here, Sure-Ondara attempted to engage in “bilateral cooperation” with her potential employer by requesting not to work on her Sabbath day—but her request was denied. Sure-Ondara then *accepted* the hospital’s decision and offered to “find [her] own replacement” and, if she was unsuccessful, to “work the shift anyway,” even if that meant working with no accommodation. J.A. 146. However, reading the evidence in the light most favorable to Sure-Ondara (as it must be on summary judgment), the hospital, rather than cooperate with her, decided to punish her for her request and rescind its employment offer. J.A. 147.

Indeed, it appears the district court would have *recognized* Sure-Ondara’s retaliation claim if she had been unwilling to compromise and overtly accused the hospital of religious discrimination, rather than demonstrating a willingness to compromise. But because Sure-Ondara was willing to compromise (i.e. willing to work on her Sabbath as needed), according to the district court she did not adequately “communicate her opposition to a practice that she believes, in good faith, is unlawful.” Order 7 (citation omitted). In other words, it was her very willingness to engage in the “bilateral cooperation” called for by *Ansonia* and implicit in the statutory scheme that doomed her retaliation claim.

If allowed to stand, the district court’s interpretation of Title VII’s retaliation provision would discourage employees from negotiating with their employers. It would instead signal to employees that they should remain silent about their need for an accommodation—the only way, under the district court’s view, to protect themselves from retaliatory firing or refusal to hire. But that, of course, would gut Title VII’s accommodation provision.

3. The district court’s opinion also contradicts that provision’s history and purposes. Although it does not deal directly with Title VII’s “opposition” clause, the history of Title VII’s religious accommodation provision shows that Congress could not possibly have understood the opposition clause to be as limited as the district court thought.

As originally enacted, the Civil Rights Act of 1964 placed religion alongside color, national origin, sex, and race as prohibited grounds for employment discrimination. 42 U.S.C. § 2000e-2(a)(1). But soon thereafter, it became apparent that most courts were ignoring the prohibition on religious discrimination.

Two decisions in particular caught Congress's eye.⁶ In *Dewey v. Reynolds Metals Co.*, Mr. Dewey, a member of the Faith Reformed Church, had refused for religious reasons to work on Sundays. 429 F.2d 324, 329 (6th Cir. 1970). The Sixth Circuit held that his subsequent firing did not violate Title VII, *id.* at 328–29, and the Supreme Court affirmed by an equally divided court, 402 U.S. 689 (1971). Shortly thereafter, in *Riley v. Bendix Corp.*, a district court rejected a similar Title VII claim by a Seventh-day Adventist, Mr. Riley, who had refused to work from sundown on Friday until sundown on Saturday. *Riley v. Bendix Corp.*, 330 F. Supp. 583, 584 (M.D. Fla. 1971). The court reasoned that Riley had been “discharged solely because of his refusal to work the hours assigned to him and not as a result of any religious discrimination.” *Id.* at 584, 591. The court thus ignored the fact that his “refusal to work the hours assigned to him” was the result of his religious belief.

Responding to these and other decisions, Senator Jennings Randolph proposed an amendment to Title VII. Engle, *supra* note 6, at

⁶ See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362–63, 368 (1997); see also 118 Cong. Rec. 706–31 (1972).

368. Randolph, a Seventh-Day Baptist, expressed concern for religious minorities who had Sabbaths on days other than Sunday—specifically Orthodox Jews, Seventh-day Adventists, and Seventh-Day Baptists. 118 Cong. Rec. 705–06 (1972) (statement of Senator Jennings Randolph). But he also sought to protect anyone seeking to honor a religious Sabbath, “whether the day would fall on Friday, or Saturday, or Sunday.” *Id.* at 705. He noted that employers had either refused to hire, or fired, those with such religious commitments, which he said had led to “pressures” on employees to choose between their employment and their faith, and thence to “a dwindling of the membership of some of the religious organizations.” *Id.*

Senator Randolph also declared that the Civil Rights Act was broadly “intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments.” *Id.* He expected that his proposed amendment would protect religious minorities’ “religious freedom, and hopefully their opportunity to earn a livelihood within the American system.” *Id.* at 706.

To ensure that the Act achieved those objectives, Randolph proposed an amendment to Title VII, providing that “[t]he term ‘religion’

includes all aspects of religious observance and practice, as well as belief.” *Id.* at 705. Contrary to *Dewey* and *Riley*, this provision made clear that a private employer’s refusal to accommodate an employee’s religiously motivated practice—such as foregoing work on a Sabbath—constituted discrimination based on religion.⁷ Randolph’s amendment passed unanimously, without amendment. *Id.* at 731.

This legislative history richly demonstrates that Congress’s intent in 1972 was to ensure that a failure to provide a religious accommodation would be treated as a type of religious discrimination.⁸ The text also

⁷ Randolph’s proposal also included an exception for situations in which “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.” 118 Cong. Rec. 705. (emphasis added). Where an employer could carry its burden of “demonstrat[ing]” a hardship, she would not be liable for religious discrimination. But otherwise, an employer would be required to accommodate religiously motivated practices as well as beliefs.

⁸ Indeed, as the EEOC explains in more detail (at 19–21), a case from this court, *Ollis v. Hearthstone Homes, Inc.*, shows that when an employee is complaining of religious discrimination, the employee will frequently attempt to use an accommodation to end the discrimination. 495 F.3d 570, 573–74, 576 (8th Cir. 2007). This, again, shows that seeking an accommodation is a core part of preventing religious discrimination in employment.

reveals this intent: Congress didn't add a whole new provision to Title VII but rather incorporated the religious accommodation language in the definition of religion itself. 42 U.S.C. § 2000e(j).

This alone settles the retaliation provision's scope: No one disputes that Congress intended to create a retaliation cause of action when an employee raises an issue of religious discrimination. And accommodation claims are merely a type of religious discrimination claim. *See Abercrombie*, 135 U.S. at 2033–34. Thus, a request for a religious accommodation is every bit as much a protected activity as a request that an employee not be fired because she professes a particular faith.

As explained above, the district court's contrary interpretation would permit employers to overcome the religious accommodation requirement simply by terminating any employee who merely requests an accommodation. That approach would place people of faith at a substantial disadvantage in their efforts to “earn a livelihood through the American system”—the central purpose of the accommodation provision.

For this reason, too, the district court's decision should be reversed.

II. Ms. Sure-Ondara’s situation is illustrative of the challenges faced by Adventist health-care workers, and her conduct reflects full dedication to Adventist beliefs.

In addition to incorrectly interpreting Title VII, the district court’s decision appears to have been based in part on a misunderstanding of Adventist beliefs. This may have led the district court to not fully appreciate the sincerity of Ms. Sure-Ondara’s position. But contrary to the district court’s apparent view, given the unique health-care context in which her claim arises, her statements and actions were entirely consistent with Adventist beliefs.

1. As the church’s very name implies, Sabbath observance is a fundamental belief of the Seventh-day Adventist Church. For practicing and observant Adventists, the Sabbath is a symbol of redemption in Christ, a sign of sanctification, a token of allegiance to God, and a foretaste of an eternal future in God’s kingdom. It stands as a memorial of Creation. It is near the center of what it means to be a Seventh-day Adventist. *See, e.g., Seventh-day Adventist Church Yearbook* 8 (2017).

Sabbath observance also generally calls for Adventists to abstain from secular work—as the Bible puts it, “Six days shall you labor and do all your work.” Exodus 20:9. And Adventists have long suffered in the

workplace for this belief, refusing to work on their Sabbath and being terminated because of it. Indeed, much of Title VII accommodation case law is the result of Seventh-day Adventists taking a stand on Sabbath work. *See, e.g., Sturgill v. UPS*, 512 F.3d 1024 (8th Cir. 2008); *Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011); *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013); *Crider v. Univ. of Tenn.*, 492 F. App'x 609 (6th Cir. 2012); *Jones v. UPS*, 307 F. App'x 864 (5th Cir. 2009).

At the same time, the relief of human suffering and care for the sick are also long-standing values of the Adventist Church, values that go back to the ministry of Jesus Christ. Indeed, much of Jesus' ministry was spent serving those who were sick. *See, e.g., Mark 1:40–42; Luke 4:38–40.* And the importance of caring for the sick was emphasized by one of the founders of the Adventist church, Ellen G. White, whom Adventists view as having had the gift of prophecy. Through a vision on Christmas Day, 1865, she learned that “[o]ur people should have an institution of their own, under their own control, for the benefit of the diseased and suffering among us who wish to have health and strength that they may

glorify God in their bodies and spirits, which are His.”⁹ She announced that revelation at the church’s General Conference in May 1866, and the first Seventh-day Adventist health facility, which later became the world-famous Battle Creek Sanitarium, was established later that year.¹⁰

Given the integral role of hospitals and healthcare in the church’s history and teachings, the church and its members have often had to grapple with Sabbath observance in caring for the sick. In so doing they take their cue from Jesus Christ who, when criticized for healing on Saturday, responded, “It is lawful to do good on the Sabbath.” Matt. 12:12. Through this example, Adventists have long understood that alleviating suffering neither breaks nor abolishes the Sabbath.

However, Adventist hospitals and healthcare workers balance this biblical good of healing with Sabbath observance by not doing *unnecessary* work that day. Thus, in Adventist hospitals, elective procedures and other non-essential work is deferred to non-Sabbath hours. Similarly, Adventist healthcare workers like Ms. Sure-Ondara

⁹ Ellen G. White, 1 Testimonies for the Church 492 (1868).

¹⁰ Dunbar W. Smith, *Why a Seventh-day Adventist Medical Work? (Part II)*, Ministry (March 1964).

often seek to avoid any work on the Sabbath, but with the understanding that if Sabbath work cannot be avoided (for instance, because another worker cannot be found), it is in no way contrary to the doctrine of Sabbath observance to do the necessary work that day.

2. This case thus illustrates Adventists' dual commitment to Sabbath observance and caring for the sick, and the situation it presents is not atypical in the healthcare field. During their careers, most Adventist healthcare workers will face a legitimate need for Sabbath work. Thus, in that unique setting, it is not uncommon for such workers to first ask for a complete Sabbath accommodation and yet understand that, if such an accommodation is not granted, the employee will still be willing to work if the employer requires it.

For these reasons, affirmance of the district court's decision would leave Adventist healthcare workers especially vulnerable. Suddenly the mere act of asking for the Sabbath off exposes them to the whim of hostile supervisors who would be able, not only to deny their request, but to fire them for simply making it.

Moreover, because of the unique circumstances presented in healthcare, the district court's requirement that the employee "believe"

the employer's denial is unlawful is especially problematic. In many settings, after talking to the healthcare employer, the employee may well agree that her taking off every Saturday would not be feasible from the employer's standpoint. So an employee might well *not* believe the employer is acting unlawfully by refusing to grant an accommodation—after the necessary “bilateral cooperation” has occurred. And in a non-healthcare setting, this scenario would not likely result in a claim of discrimination because the employee would simply resign and move on to a job where an accommodation either is not needed or can be provided.

But in healthcare, a faithful Adventist employee, after coming to understand the employer's position (often as a result of a request for a complete accommodation), will often decide to work. Such an employee may come to understand that, in that unique setting, and given the employer's particular needs and constraints, being required to work is neither an unlawful employment practice nor a violation of the Fourth Commandment. Yet, under the district court's reasoning, initiating this type of reasonable, bilateral discussion is not protected from retaliation.

Moreover, under the district court's reasoning, new employees like Ms. Sure-Ondara are at a particular disadvantage. Having no experience

with their employer or its operations, they are not in a good position to know what an employer reasonably can and cannot do to accommodate their religious needs. Still, once they have been scheduled to work on the Sabbath, it is at least reasonable for them to believe that this *could* be an unlawful employment practice and to start a non-adversarial discussion about an accommodation—including a request for complete accommodation of their desire not to work on the Sabbath.

What is *not* reasonable—or consistent with the law—is the district court’s view that every request for an accommodation must start with an overt accusation that the employer is in violation of Title VII. While some employees choose to start such conversations with their employers that way, as matter of basic human relations it is often not the best strategy. And it should not be judicially required.

CONCLUSION

Besides contradicting Title VII's text, the district court's ruling would undercut the rights of all Adventist and other religious employees to seek workplace accommodations: if, as the district court held, an employer could fire an employee merely for seeking an accommodation, such a rule would chill employees' rights and severely undermine Title VII's religious accommodation protection. For all these reasons, the district court should be reversed.

Respectfully submitted,

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ADDENDUM: INTERESTS OF PARTICULAR *AMICI*

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 156,000 congregations with more than 20.3 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 6,300 congregations with more than 1.2 million members. **The Mid-America Union Conference of Seventh-day Adventists** is the constituent member of the North American Division that oversees the church's ministry throughout most of the states covered by the Eighth Circuit, including Minnesota.

Observance of the Sabbath is a central tenet of the Seventh-day Adventist Church. The Adventist Church has a strong interest in seeing that its members—including Emily Sure-Ondara—and all individuals of faith are protected from workplace discrimination.

The Minnesota Catholic Conference is the public policy voice of the Catholic Church in Minnesota, representing six dioceses. The Conference supports the ministry of Minnesota's Catholic bishops by

working with political and community leaders to shape legislation that serves human dignity and the common good.

The Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors, with student chapters at approximately ninety public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the religious liberty of all Americans is protected, regardless of the current popularity of their particular religious beliefs and conduct. Religious individuals' ability to pursue their livelihoods without forfeiting their religious beliefs and conduct, and without being discriminated against based on those religious beliefs and conduct, lies at the heart of religious liberty.

The American Jewish Committee (AJC) was founded in 1906 to protect the human rights of American Jews and all Americans. It has long supported legislation and laws to end religious discrimination in employment. The decision below threatens to make federal legislation to that end a dead letter as a practical matter. To urge this Court to correct a misguided decision below, AJC has joined with other groups to file this brief.

The Union of Orthodox Jewish Congregations of America (Orthodox Union or OU) is the nation's largest Orthodox Jewish synagogue organization, representing nearly a thousand congregations across the United States. The Orthodox Union, through its OU Advocacy Center, has participated in many cases that raise issues of critical importance to the Orthodox Jewish community. This case is enormously important to that community, given orthodox Jewish beliefs about the Sabbath.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 1.5 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. **The ACLU of Minnesota** is a state affiliate of the national ACLU. For nearly a century, the ACLU has been at the forefront of efforts to combat discrimination and to safeguard the fundamental right to religious freedom.

CERTIFICATE OF COMPLIANCE

I certify that 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 this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook, size 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,441 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii). Pursuant to Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

/s/ Gene C. Schaerr

Attorney for Amici

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will notify all parties.

/s/ Gene C. Schaerr

Attorney for Amici