No. 02-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PATRICIA HOLMES,

Plaintiff-Appellee

v.

MARION COUNTY OFFICE OF FAMILY AND CHILDREN,

Defendant-Appellant

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

PETITION FOR REHEARING AND REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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RULE 35(B)(1) STATEMENT

Rehearing or rehearing en banc should be granted in this case because the panel opinion conflicts with Supreme Court decisions in two areas. It conflicts with the Supreme Court's recent decision in *Nevada Department of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003), as well as with this Court's decision in *Varner* v. *Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001), in its evaluation of Congress's statutory prohibition of state conduct that is subject to heightened scrutiny. The panel opinion also conflicts with the line of Supreme Court decisions beginning with *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In addition, this case presents a question of exceptional importance because the decision invalidates a provision of a federal statute and could affect the limits of Congress's authority to prohibit state discrimination on the basis of religion.

QUESTION PRESENTED

Whether Congress validly abrogated States' Eleventh Amendment immunity to suits by private parties for claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, of discrimination in employment on the basis of religion.

ARGUMENT

The United States seeks panel rehearing or rehearing en banc on the question whether, in enacting Title VII's ban on religion-based discrimination in employment, Congress acted pursuant to its power under Section 5 of the Fourteenth Amendment and, consequently, validly abrogated States' sovereign immunity. The panel erred in two respects in answering that question in the negative. First, the panel found that Title VII's religious accommodation requirement goes far beyond the protections afforded by the Fourteenth Amendment. In doing so, the panel did not take sufficient account of the Supreme Court's decision in *Nevada Department of Human Resources* v.

Hibbs, 123 S. Ct. 1972 (2003), or this Court's decisions in *Varner* v. *Illinois. State Univ.* (*Varner II*), 226

F.3d 927 (7th Cir. 2000), nor did it even acknowledge the Supreme Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). And second, the panel concluded that there is no legally relevant history of religious discrimination in this country.

I. *Title VII's Religious Accommodation Provision Is Valid Section 5 Legislation Because It Prohibits Little Or No Constitutional Conduct And Essentially Codifies Constitutional Guarantees Of Nondiscrimination And Free Exercise Of Religion*

1. Title VII is a nondiscrimination statute targeting intentional discrimination by employers, including state employers, on the bases of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Religion, like race, color, sex, and national origin, is a classification subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[1] See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89, 92 (1900); cf. *Board of Educ. of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Free Exercise Clause, the Establishment Clause, the Religious Test Clause, 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*, and as this Court has made clear in a line of cases upholding the Equal Pay Act as a valid exercise of Congress's Fourteenth Amendment powers, 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.

[1] Title VII's prohibition of disparate treatment on the basis of religion also codifies the Establishment Clause's prohibition of discrimination among religious sects. See *Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Furthermore, because religious minorities are also frequently racial or ethnic minorities, preventing religious discrimination promotes the historic goal of eliminating racial and ethnic discrimination.

Title VII's prohibition on religion-based discrimination, including its 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), targets unconstitutional conduct by state employers. The panel approved the abrogation of immunity for claims of religious discrimination to the extent those claims were of disparate treatment on the basis of religion, but invalidated the abrogation insofar as it required reasonable accommodation of religious practices. However, these 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.

Once a Title VII plaintiff has presented a *prima facie* case demonstrating that "the employer was made aware of the employee's religious practice and was given an opportunity to accommodate it," *EEOC* v. *UPS*, 94 F.3d 314, 317 n.3 (7th Cir. 1996), the burden shifts to the employer to prove "that it was unable to provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation which was not accepted by the employee." *Id.* at 318. Whereas a State would be required to satisfy the heightened compelling interest/least restrictive alternative scrutiny under the constitution, 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 *UPS*, 94 F.3d at 317 n.3 (finding that religious accommodation cases under Title VII "are somewhat analogous to 'disparate treatment' cases"). As the *Holmes* panel found, 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 proportional means of enforcing constitutional guarantees.[2]

Because Title VII provides a "broad exemption from liability" to employers who can offer essentially a "neutral explanation" for a decision not to provide an accommodation – *i.e.*, anything more than either a *de minimis* cost or a non-pecuniary burden in conducting its business – Congress has effectively targeted employers who intentionally discriminate on the basis of religion.[3] See *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000) (*Varner II*). Like the Equal Pay Act (EPA), which this Court has repeatedly found to be a valid exercise of Congress's Section 5 authority, see *Varner* v. *Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998),

vacated and remanded, 528 U.S. 1110 (2000), reinstated by *Varner II*; *Varner II*, 226 F.3d 927 (7th Cir. 2000); *Cherry* v. *University of Wis.*, 265 F.3d 541 (7th Cir. 2001), "the broad exemption from

[2] Although the panel opinion at one point recognized that Title VII "does not require an accommodation that would cause more than minimal hardship to the employer or other employees," Slip Op. 5, and further recognized that "even a slight burden is 'undue hardship'" under Title VII, Slip Op. 15, the panel also erroneously concluded that "the employer's burden under § 701(j) is identical to that under the ADA, which *Garrett* held to be unsupported by § 5." Slip Op. 15. This conclusion is simply incorrect. Although the Supreme Court has interpreted Title VII to require only accommodations that do not impose "'more than a *de minimis* cost' to the employer," *Ansonia.*, 479 U.S. at 67, the ADA defines "undue hardship" to mean "an action requiring *significant difficulty or expense* incurred by a covered entity." 42 U.S.C. 12111(10)(A) (emphasis added).

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

liability" in Title VII's religious accommodation provision indicates that it "is intended to address the same kind of 'purposeful [religious] discrimination' * * * prohibited by the Constitution." *Varner II*, 226 F.3d at 934 (citation omitted). Accordingly, Title VII's religious accommodation provision is a "'piece of 'remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment.'" *Id.* at 936.

Section 5 legislation that reaches beyond the scope of Section 1's actual guarantees and prohibitions is valid so long as there is a "congruence and proportionality between the injury to be prevented and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). As the panel recognized, the Supreme Court repeatedly has affirmed that "Congress' § 5 power is not confined to the enactment of legislation that merely parrots 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* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *City of Boerne*, 521 U.S. at 518). Where, as here, statutory protections closely track constitutional guarantees, the statute's prohibition of some conduct that is not itself unconstitutional is easily justified as valid Section 5 legislation because it was designed to target intentional discrimination. See generally, *Hibbs* and *Varner II*, *supra*.

In *Varner II*, this Court reaffirmed its original decision that Congress validly abrogated States' Eleventh Amendment immunity in passing the Equal Pay Act, which "prohibits discrimination in wages based on gender." 226 F.3d at 932. The *Varner II* Court noted that, "[i]n effect, the provisions of the [EPA] establish a rebuttable presumption of sex discrimination such that once an employee has demonstrated that an employer pays members of one sex more than members of the opposite sex, the burden shifts to the employer to offer a gender neutral justification for that wage

differential." *Ibid.* Thus, although the *prima facie* showing under the EPA does not require a showing of discriminatory intent, *ibid.*, the Court concluded that, "by providing a broad exemption from liability under the [EPA] for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women," thereby addressing the kind of discrimination that is prohibited by the Constitution. *Id.* at 934. Because Title VII's religious accommodation requirement similarly targets unconstitutional action by state employers, it can prohibit some constitutional conduct. More recently in *Hibbs*, the Supreme Court found that the family leave provisions of the Family and Medical Leave Act (FMLA) – which impose a uniform standard of leave for all employees rather than just prohibiting gender-based discrimination – readily satisfy the congruence and proportionality test because the legislation targets unconstitutional sex discrimination.

2. In addition to enforcing the Equal Protection Clause's prohibition on religion-based discrimination, 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 400, 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 *Holmes* panel relied on this ruling in concluding 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. 494 U.S. at 884. In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 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. 520, 537 (1993). Thus, where an employer has a system of 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. In concluding that the Free Exercise Clause merely requires that States maintain "neutrality" toward religion in all circumstances, the panel ignored this line of Supreme Court cases. 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.

Thus, the panel's assertion that Title VII's accommodation requirement exceeds the protections afforded by the Fourteenth Amendment is simply incorrect.

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

The panel concluded that Title VII's prohibition of religion-based discrimination,

including its accommodation requirement, is not congruent to the Constitution's protections because "[d]iscrimination by public employers against their employees' religiously inspired practices does not have the same history as discrimination on account of race or sex, and states rarely have resorted to legislation with a veneer of neutrality designed to mask forbidden discrimination." Slip Op. 15.

After this case was argued, but before the panel rendered its decision, the Supreme Court decided *Nevada Department of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003), which 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), and (4) two isolated statements indicating that discrimination in the provision of parental leave in the public sector mirrored that in the private sector. 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 *Holmes* panel concluded that there was no similar evidence of a history of discrimination on the basis of religion. We believe that conclusion is incorrect and ask this Court not to rule without

considering the strong evidence of a history of religious discrimination.[4]

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" – and in many cases "was sanctioned by," *Hibbs*, 123 S. Ct. at 1978 – 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.[5] States also have a long history of exposing school children to only certain religious beliefs.[6] Furthermore, state actors have targeted adherents of specific faiths for unfavorable treatment, both explicitly[7] and through the use of

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[4] At the time this case was briefed and argued before the panel, the last word from the Supreme Court on the subject of what manner of evidence may be considered to establish the congruence and proportionality of prophylactic Section 5 legislation was *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). In *Garrett*, the Court stated very clearly that the only evidence it considered relevant was the evidence before Congress of state employers' discrimination against those with disabilities amounting to constitutional violations. See *id.* at 368-374 (finding the record assembled by Congress to be inadequate because "the great majority of [the] incidents [therein] do not deal with the activities of States"). The United States argued in its brief to the panel that a record demonstrating that Congress considered unconstitutional religious discrimination by state employers when it extended the reach of Title VII to cover state employers in 1972 was unnecessary because the protections of Title VII so closely track those of the Constitution.

[5] See *Hale* v. *Everett*, 53 N.H. 9 (N.H. 1868), 1868 WL 2291, at *90 (discussing history of laws against practices such as "idolatry" and blasphemy, which were punishable in colonial times as capital offenses); *Maryland* v. *West*, 9 Md. App. 270 (Md. Ct. Spec. App. 1970) (striking down Maryland's anti-blasphemy law).

[6] See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962) (official prayer in public schools); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (teaching of evolution in public schools).

[7] See, *e.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon law banning (continued...)

stereotyping.[8]

In the context of government employment, citizens have faced a variety of de jure restrictions on the free exercise of their religions.[9] 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 thirteen states at one time or 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.[10]

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[7](...continued)
private school education, a law that is widely understood to have been motivated by anti-Catholic bias); *In re Adoption of E*, 59 N.J. 36 (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).

[8] See, *e.g.*, *Minnesota* 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. *Texas*, 913 S.W.2d 468 (Tex. Crim. App. 1995) (en banc) (state prosecutor excluded jurors who adhered to Pentecostal religion).

[9] 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.

[10] See *Zellers* v. *Huff*, 55 N.M. 501 (N.M. 1951); *Cooper* v. *Eugene Sch. Dist.*, 301 Or. 358, 372 (Or. 1986) (collecting cases); see also *Finot* v. *Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189 (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).

Contrary to the panel's conclusion, 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. Clearly, religious discrimination was not an "afterthought[]." Slip Op. 16. In particular, Congress learned that religion-based employment discrimination was experienced by all sects,[11] but was particularly prevalent against Jews and Catholics, and to a lesser extent against Protestants.[12] Testimony indicated that such discrimination was found across a wide range of industries,[13] and that, even when members of certain religions were hired, they found they could not be promoted above a certain level.[14] Congress also heard that even companies that held substantial contracts with the federal

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

[12] *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 California, 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, National Community Relations Advisory 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.").

[13] *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 General Subcommittee on Labor of the House Committee on Education & Labor*, 88th Cong., 1st Sess. 117 (1963) (Statement of Murray A. Gordon, on Behalf of American Jewish Congress) (stating that "many basic industries in the United States are almost exclusively non-Jewish").

[14] *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).

government – and who were therefore under a contractual obligation not to discriminate – continued to discriminate on the basis of religion.[15] Witnesses also testified that, when employers submitted job postings to employment agencies, the postings frequently contained explicit or coded instructions that members of certain faiths were not welcome to apply.[16] 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.[17] 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.[18] Moreover, hearings held

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[15] *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, Executive Director, 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.").

[16] *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).

[17] *EEO Hearings* at 316 (Statement of John Buggs, Executive Secretary, Commission on Human Relations, Los Angeles County) (discussing difficulty of collecting data on religious discrimination in employment); *id.* at 573 (Statement of Will Maslow, Executive Director & General Counsel, American Jewish Congress) ("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; Duckat, Walter, "Should He Become An Engineer," Congress Weekly, July 12, 1958 at 12-14.

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

by the United States Commission on Civil Rights in 1979 and 1983 indicated that religious discrimination in employment continued to be a problem.[19]

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.[20] As was the case with the FMLA 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 standard regarding hard-to-detect religious discrimination in employment.

All of this evidence demonstrates a history of "real discrimination." Slip Op. 15. Unlike the Religious Freedom Restoration Act, which was struck down in *City of Boerne* v. *Flores* because it was "not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion," 521 U.S. 507, 534-535 (1997), Title VII targets hard-to-detect but nevertheless unconstitutional burdens on the free exercise of religion. The Supreme Court in *Hibbs* made clear that, when Congress targets state conduct subject to heightened scrutiny, 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 strict scrutiny under the Fourteenth Amendment, and in light of this country's history of religious discrimination, Title VII is an appropriate means of "address[ing] established patterns of stereotypical thinking without requiring proof of discriminatory intent." Slip Op. 15. See *Church of*

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

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

Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520, 534 (1993).

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 pervasive discrimination on the basis of religion. As the panel opinion in the instant case noted, "hostility to Catholicism was common in many states during the nineteenth century." Slip Op. 17. 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 the panel discounted the relevance of the history of anti-Catholic discrimination because "that period was

behind us long before the enactment of Title VII," Slip. Op. 17, the hearings leading to the enactment of Title VII refute that conclusion, see *supra* nn.12, 14-16, and there is no basis for believing that Catholics – or members of any particular sect – 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 is hard to detect on a case-by-case basis" and justified Congress's decision to establish a uniform standard for family leave. See 123 S. Ct. 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

This Court should grant rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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