No. 20-1419

United States Court of Appeals for the Seventh Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT

v.

WALMART STORES EAST, L.P., ET AL.,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 18-CV-00804
HON. BARBARA B. CRABB, PRESIDING

BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF EVANGELICALS, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS AMICI CURIAE SUPPORTING REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amicus Curiae General Conference of Seventh-day Adventists

Amicus Curiae National Association of Evangelicals

Amicus Curiae Union of Orthodox Jewish Congregations of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Spero Law LLC

(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

National Association of Evangelicals has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Union of Orthodox Jewish Congregations of America has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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INTEREST OF AMICI[1]

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 22 million members and a longstanding commitment to religious liberty. As this case evidences, the Church and its members frequently confront Title VII religious accommodation issues because a core tenet of their faith is that no work should be performed on the Sabbath, from sundown on Friday to sundown on Saturday. Accordingly, the Seventh-day Adventist Church has extensive nationwide experience in litigating Sabbath accommodation cases on behalf of its members and other people of faith.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious minis-

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person or entity, other than *amici* and their counsel, contributed money intended to fund the preparation or submission of this brief.

tries. NAE believes that the religious practices of employees ought to be accommodated at the workplace.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before the federal courts which have raised issues of importance to the Orthodox Jewish community, including cases involving Title VII's protection for the religious practices of employees.

INTRODUCTION

Title VII prohibits an employer from discriminating against an employee for engaging in a religious practice "unless [the] employer demonstrates that he is unable to reasonably accommodate" "all aspects" of the employee's "religious observance or practice without undue hardship." 42 U.S.C. 2000e(j). Since its enactment in 1972, this protection for religious practice has suffered from repeated judicial efforts to narrow its reach to something less than its text provides. These judge-made barriers have departed from Title VII's text and prevented the provision from fully vindicating the religious liberty of working Americans. Most notably, in *TWA v. Hardison*, 432 U.S. 63 (1977), the Supreme Court said that "undue hardship" simply means something more than a "*de minimis* cost." *Id.* at 84.

Putting aside the unsoundness of that conclusion, most courts after *Hardison* have at least required actual evidence of such hardship. The panel here, however, was content to rely on pure speculation. According to the panel, possible accommodations might have been infeasible "*if* other workers balked"—"*[i]f*" some assistant managers "declined to take extra weekend shifts." Op. 5 (emphases added). But the panel pointed to no evidence, giving a pass to Walmart on the employer's statutory burden to "demonstrate[]" an undue hardship. 42 U.S.C. 2000e(j).

This departure from the statutory text of a vital Title VII protection would alone suffice to raise "a question of exceptional importance." Fed R. App. P. 35(a)(2). But the propriety of rehearing is all the more obvious because the panel's decision deepens an existing circuit split and departs from Seventh Circuit precedent. Rehearing or rehearing *en banc* should be granted.

ARGUMENT

This Court should rehear or grant *en banc* review of the panel's decision for two reasons. First, the panel's decision worsens an existing circuit split by permitting reliance on speculation to establish the undue hardship defense. Substituting speculation for evidence is inconsistent with Title VII's text and history. Second, the panel's decision departs from this Circuit's precedents, which have long required proof of an actual rather than speculative hardship to establish undue hard-

ship. Absent review, the panel's decision will lead to confusion and inconsistent results on this important legal question.

I. The panel's decision exacerbates a circuit split by permitting speculation to establish undue hardship.

The panel's decision joins the wrong side of a preexisting circuit split on whether Title VII permits an employer to demonstrate undue hardship based on speculation about future events. The Fourth, Eighth, Ninth, and Tenth Circuits have held that an employer may not establish hardship through speculative evidence. *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981); *Brown v. Gen. Motors*, 601 F.2d 956, 961 (8th Cir. 1979). Specifically, these circuits have held that an employer may not rely on:

- "speculation" or "conjecture" about possible hardships, *Toledo*, 802 F.2d at 1492; *Brown*, 601 F.2d at 961; *Firestone*, 515 F.3d at 317;
- "merely conceivable or hypothetical hardships," *Toledo*, 892 F.2d at 1492; *Tooley*, 648 F.2d at 1243; or,
- "anticipated . . . hardship," *Brown*, 601 F.2d at 961.

The Eighth Circuit's rationale for rejecting the use of speculation to establish undue hardship exemplifies the rationales of these circuits. In *Brown*, the Eighth Circuit rejected the employer's asserted speculative hardship when the employer

claimed that keeping an employee could "'theoretically'" require the hiring of an additional employee. *Id.* at 960. The Eighth Circuit reasoned that "the projected 'theoretical' future effects cannot outweigh the undisputed fact that no monetary costs or *de minim[is]* efficiency problems" had been demonstrated. *Id.* Thus, the court explained that such "hypothetical hardships in a factual vacuum" do not suffice to prove an undue hardship. *Id.*

Besides these circuits, the EEOC has also condemned this sort of speculation, and its interpretation merits "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971). Its compliance handbook explains that "[a]n employer cannot rely on hypothetical hardship when faced with an employee's religious obligation that conflicts with scheduled work, but rather should rely on objective information." EEOC Compliance Manual, Religious Discrimination, Section 12-IV (Jan. 15, 2021), https://www.eeoc.gov/policy/docs/religion.html. The EEOC thus agrees with the majority rule that rejects reliance on speculation.

Here, instead of focusing on whether Walmart had proven it would suffer actual hardship by providing an accommodation to the employee, the panel's undue hardship analysis rested on speculation about whether his employment could create future hardship for Walmart. In a succession of ifs, the panel credited Walmart's speculation about what might occur "if [the employee] became a specialist," "[i]f" "say, four of the seven other assistant managers declined to take extra weekend

shifts," or "if other workers balked" at switching shifts, Op. 5–6, even though Walmart never asked the other assistant managers whether they would be willing to switch shifts, R.47, at 13–14. This hypothesizing is flatly inconsistent with the reasoning of the Fourth, Eighth, Ninth, and Tenth Circuits.

To be sure, the panel's decision mirrored the reasoning of a few circuits that have permitted reliance on speculation. The Fifth Circuit, for example, has said that the "mere possibility of an adverse impact . . . is sufficient to constitute an undue hardship." *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000). The Sixth Circuit has echoed this analysis, holding that speculation about how other employees *could* "be adversely affected" sufficed. *Virts v. Consol. Freightways of Del.*, 285 F.3d 508, 521 (6th Cir. 2002).[2]

Of course, the very existence of this circuit split is reason enough to rehear the case *en banc*. *See* Fed. R. App. P. 35(b)(1)(B). And that is especially true here, for the speculative hardship approach followed by these circuits and the panel is inconsistent with Title VII's text.

As noted, the plain text of Title VII requires an employer to "demonstrate[]" undue hardship. It is well-settled that, especially on a motion for summary judg-

[2] *Virts* was a departure from earlier Sixth Circuit precedent, which required the employer to "present evidence of undue hardship; it cannot rely merely on speculation." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1086 (6th Cir. 1987).

ment, speculation and hypotheticals simply do not demonstrate hardship. *See generally* 10A Wright, Miller, & Kane, *Federal Practice & Procedure* §§ 2727–2727.1 (4th ed. 2021) (addressing the burden to prevail on a motion for summary judgment). For example, in *Edenfield v. Fane*, the Supreme Court held that, to carry its burden on a Free Speech claim, a government must "*demonstrate* that the harms it recites are real." 507 U.S. 761, 770–71 (1993) (emphasis added). Accordingly, in other contexts, mere speculation is not sufficient to carry a party's burden of showing harm.

The same analysis applies with even greater force in the context of Title VII, where the statute's *text* places the burden on the employer to "demonstrate" undue hardship. In 1973, one year after 42 U.S.C. § 2000e(j) was added to the statute, the Supreme Court interpreted the word "demonstrate" as synonymous with the word "show" in the context of Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 807 (1973). The Court later directly used "demonstrate" and "show" interchangeably with respect to this very provision. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986).

Thus, to carry its burden to demonstrate undue hardship, the employer must establish what the Ninth Circuit has called "the *fact* of hardship." *Tooley*, 648 F.2d at 1243–44. This approach is consistent with *Hardison*'s focus on hardships the

employer will actually "bear," 432 U.S. at 84, not "might bear," "may someday bear," or "speculates it might bear."

Here, the panel emphasized that "the burden of accommodation is supposed to fall on the employer, not on other workers." Op. 6. That misses the point. Because the panel relied only on speculation, it could not have known whether there *was* any "burden of accommodation." The burden of *proof*—of showing an undue hardship—falls on the employer.

In sum, the speculative hardship approach followed by the panel and some circuits practically eviscerates Title VII's religious accommodations protections by making the employer's required burden a matter of creative hypotheticals instead of facts. As one commentator has noted, if undue hardships include hypothetical hardships, Title VII would "virtually never require accommodation." Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 622 (2000). This circuit split warrants *en banc* consideration of this case, and the panel's decision should be reversed to ensure that Title VII's protections remain effective in this Circuit.

II. The panel's decision is inconsistent with this Circuit's precedent.

Not only does the panel's decision depart from the text and protections that Title VII was enacted to preserve, it also departs from this Court's precedent. Prior

to the panel's decision, Seventh Circuit precedent had consistently recognized that employers must *prove* that accommodations like shift switches and transfers would amount to an undue hardship. These precedents cannot be squared with the panel's view that speculation about shift switches or other hypothetical issues suffices to show undue hardship.

In *Adeyeye v. Heartland Sweeteners, LLC*, for instance, this Court held that "Title VII requires *proof* not of minor inconveniences but of hardship"—"and 'undue' hardship at that." 721 F.3d 444, 455 (7th Cir. 2013) (emphasis added). The Court rejected an employer's undue hardship defense when the employer had a "ready supply of substitutes" who could have worked in place of an employee that sought to take time off to observe burial processes required by his religion. *Id.* This Court thus rejected the employer's argument that *Hardison*'s "*de minimis* cost" language meant that "*any* inconvenience or disruption, no matter how small, excuses [the employer's] failure to accommodate." *Id.* at 455–56.

The panel's decision here relied on *Porter v. City of Chicago* and *Baz v. Walters* to support its conclusion that hypothetical shifts switches constitute undue hardship. Op. 6. In neither *Porter* nor *Baz*, however, did the Court endorse the view that speculative hardships from voluntary shift switches or personnel transfers constitute undue hardship. Instead, both cases reflect this Circuit's requirement of *proving* hardship.

In *Porter*, the Court held that a shift switch would have caused the employer to experience undue hardship because "no one volunteered" after the employer had sent out a "request for volunteers to switch days-off" with the employee. 700 F.3d 944, 949, 952 (7th Cir. 2012). This meant that the shift switch was not a speculative hardship but an actual hardship, as shown by actual evidence that no other employee was willing to switch with the plaintiff.

Likewise, in *Baz*, this Court held that a mandatory personnel transfer to accommodate one employee would have caused undue hardship because the shift would have "*require[d]* a shuffling process involving as many as seven hospitals" across state lines. 782 F.2d 701, 707 (7th Cir. 1986) (emphasis added). This transfer of the employee and other employees across state lines would have caused the employer to suffer from an actual hardship, not a speculative or merely possible hardship.

Here, by contrast, Walmart's asserted hardship was not an actual hardship but merely speculation about a potential hardship. Walmart did not seek volunteers for a shift switch. R.47, at 13–14. Instead, Walmart speculated without checking for volunteers and concluded that a shift switch could possibly cause hardship. R.47, at 14. That is not enough under Circuit precedent to carry its burden.

In sum, by departing from the text of Title VII, the better reading of the religious accommodation provision adopted in other circuits, and this Circuit's prece-

dent, the panel's decision would eviscerate Title VII's religious accommodation protections in this Circuit.

CONCLUSION

For the reasons stated here and in Appellant's petition, this Court should grant the petition for rehearing or rehearing *en banc*.

Respectfully submitted,

s/ *Christopher Mills*

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MAY 24, 2021

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2,269 words.

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Dated: May 24, 2021

/s *Christopher Mills*
Christopher Mills

CERTIFICATE OF SERVICE

I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

Dated: May 24, 2021

s/ *Christopher Mills*
Christopher Mills