

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EQUAL EMPLOYMENT OPPORTUNITY :

4 COMMISSION, :

5 Petitioner : No. 14-86

6 v. :

7 ABERCROMBIE & FITCH STORES, INC. :

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9 Washington, D.C.

10 Wednesday, February 25, 2015

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:19 a.m.

15 APPEARANCES:

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18 Petitioner.

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20 Respondent.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-86, the Equal Employment
5 Opportunity Commission v. Abercrombie & Fitch Stores.

6 Mr. Gershengorn.

7 ORAL ARGUMENT OF IAN H. GERSHENGORN

8 ON BEHALF OF THE PETITIONER

9 MR. GERSHENGORN: Mr. Chief Justice, and may
10 it please the Court:

11 The Tenth Circuit imposed two requirements
12 on religious accommodation claims that eliminated
13 liability for Respondent's refusal to accommodate
14 Ms. Elauf here: First, that the applicant herself
15 verbally requested the accommodation; and second, that
16 the employer know, rather than just correctly
17 understand, the need for an accommodation.

18 Neither required --

19 JUSTICE SCALIA: I don't understand. What
20 is the difference between knowing and correctly
21 understanding?

22 MR. GERSHENGORN: Your Honor, the
23 testimony -- it -- it's a fair question. The Tenth
24 Circuit perceived a difference. What the testimony was
25 was that Ms. Cooke assumed that the -- that Ms. Elauf

1 needed to wear the headscarf because she was religious,
2 that she figured that the headscarf signified that it
3 was a religious headscarf, and that she figured it was a
4 religious headscarf. What the Tenth Circuit said was
5 that was insufficient; what was needed was actual
6 knowledge.

7 Our position is that when you figure, when
8 you assume, when you -- when it signifies to you that a
9 religious accommodation is needed, that is sufficient
10 notice for an employer to be on notice.

11 JUSTICE KAGAN: Well, suppose --

12 JUSTICE SOTOMAYOR: Does that subjective --
13 I'm sorry. Does that subjective or -- is it even
14 relevant? Meaning -- the issue is whether they failed
15 to hire her because of her religious practice. Whether
16 the person thinks it is is the issue. I mean, that's
17 why they acted.

18 MR. GERSHENGORN: That's right, Your Honor.
19 And we think that's what makes this a particularly
20 straightforward case. What the employer did here was
21 act upon the assumption that Ms. Elauf needed to wear
22 the headscarf for religious reasons, and yet that it
23 later claimed refuge that it didn't have sufficient
24 knowledge or certainty to actually have initiated the
25 accommodation process that Congress wanted in Section

1 2000e-2.

2 JUSTICE KENNEDY: But getting back to
3 Justice Scalia's question, I think there's some
4 substantial force to your argument that the employee
5 doesn't have to mention this first.

6 But why -- why do we -- import the term
7 understand instead of know. In a treatment case, the
8 whole idea is that -- that prohibited action was taken
9 because of religion. It's what you knew. Why -- why
10 are you making it so confusing?

11 MR. GERSHENGORN: Your Honor, I -- with
12 respect to -- it's our position it's the Tenth Circuit
13 that's made it confusing. What the Tenth Circuit has
14 done is said when you know --

15 JUSTICE KENNEDY: Your position -- your
16 statement that you opened with is -- is that he must
17 understand. You stay away from the word "know". And
18 Justice Scalia asked you what -- why you did that, and I
19 can't understand your answer.

20 MR. GERSHENGORN: So the answer, Your Honor,
21 is we think that there is sufficient knowledge, notice,
22 when somebody understands that -- when somebody assumes
23 that a practice is religious and then acts upon it, that
24 that is sufficient.

25 What the Tenth Circuit said was that is not

1 sufficient, that what is needed is something more
2 approaching certainty. If that's not --

3 JUSTICE KAGAN: Well, Mr. Gershengorn, I
4 mean, so that does raise the question if yours is less
5 than certainty, how much less than certainty is it? I
6 mean, suppose I'm an employer, and I say, you know, I
7 don't honestly know, I think. You know, it's two out of
8 three. Is that sufficient?

9 MR. GERSHENGORN: So, Your Honor, I think
10 that if I could explain how these cases come up, I think
11 it will -- the best way to answer your -- it would be
12 the best way to answer your question.

13 The answer is, in a situation like this in
14 which it's an applicant applying for a -- a position,
15 and the employer suspects, thinks, two-thirds, that
16 there's a religious problem -- the -- a religious
17 conflict, the employer has two options. It can assume
18 there is no conflict, in which case they -- they make
19 the hiring decision on the merits. In that case here,
20 Ms. Elauf would have been hired.

21 Alternatively, if the employer feels like
22 there's enough concern to -- about how Ms. Elauf would
23 be able to perform, they can raise -- start a dialogue.
24 That's what -- what Congress intended. What they can't
25 do is what they did here and assume through a stereotype

1 that there was going to be a need for accommodation, and
2 then say, having assumed that, I don't have any
3 obligation to actually try to accommodate that.

4 JUSTICE KAGAN: Is that true even if it's --

5 CHIEF JUSTICE ROBERTS: No. You're
6 promoting --

7 Go ahead.

8 JUSTICE KAGAN: Is that true even if it's
9 under 50 percent? In other words, say that employer
10 says, you know, I really don't know, but I think
11 there's, like, a 50/50 chance or even a 40 percent
12 chance that this person has a religious -- that -- has
13 religious -- that this practice is religious. And I
14 don't really feel like getting into all this
15 accommodation stuff, so I'm not going to hire this
16 person.

17 MR. GERSHENGORN: So I think, Your Honor,
18 that that's what they cannot do. But I do think --

19 JUSTICE KAGAN: So it doesn't really depend
20 on what the percentage chance is.

21 MR. GERSHENGORN: So I think --

22 JUSTICE KAGAN: It could be certain, it
23 could be less than certain, it could be a lot less than
24 certain, as long as the employer says there's some
25 chance, and I'm not going to hire, or promote, or fire,

1 or whatever, because of that chance.

2 MR. GERSHENGORN: So, Your Honor, I -- I
3 would like to try to separate out two different -- two
4 different situations that a -- could arise, only one of
5 which we think arises commonly. One is that the
6 employer has a work rule and is concerned that the
7 applicant before it won't be able to comply in the
8 future with the -- after being hired, with the work
9 rule, because they perceive that the person is
10 religious.

11 I think the dilemma that Your Honor is
12 posing is really a false one there. If the employer
13 really has a very small in -- understanding or thinks
14 there's -- it's very unlikely that the employee would be
15 religious, the right thing for the employer to do is to
16 assume that there's isn't a religious problem, to not
17 engage in the stereotyping and assume that the person
18 could comply as they would with somebody who was wearing
19 a headscarf or something else for not religious reasons.

20 JUSTICE SOTOMAYOR: I'm not sure I
21 understand why you're fighting Justice Kagan's question.

22 Isn't the issue the reason that they acted?
23 They refused to hire someone because they had a
24 1 percent belief that they had a religious -- pardon the
25 pun -- a religious belief that they wouldn't

1 accommodate?

2 MR. GERSHENGORN: So, Your Honor, I don't
3 intend to fight Justice Kagan's hypothetical, and on the
4 facts of this case, I think it's really quite easy. But
5 the reason why I'm trying to separate the two is because
6 I think the situation here is the easy case, and I'll
7 get to why the hard case and why I'm sort of fighting
8 Justice Kagan.

9 JUSTICE SCALIA: You -- you're -- you're
10 confusing me enormously.

11 MR. GERSHENGORN: Okay.

12 JUSTICE SCALIA: Would you tell me what it
13 is you want.

14 MR. GERSHENGORN: I want --

15 JUSTICE SCALIA: You just say he
16 understands. That doesn't do anything for me. What he
17 understands, knows, believes, suspects. What -- what
18 other -- what other verbs do you need?

19 MR. GERSHENGORN: So, Your Honor, the test
20 that the courts of appeals have adopted for more than
21 two decades, which is the test that we ask this Court to
22 adopt, is that the employer needs sufficient information
23 from any source about the employee -- about the
24 applicant's religious needs --

25 JUSTICE SCALIA: That --

1 MR. GERSHENGORN: -- to permit the employer
2 to understand the existence of a conflict.

3 JUSTICE SCALIA: To understand --

4 MR. GERSHENGORN: That's the test that the
5 courts of appeals have been --

6 JUSTICE SCALIA: I don't care --

7 MR. GERSHENGORN: -- for two decades.

8 JUSTICE SCALIA: -- what they've used. That
9 doesn't make any sense to me.

10 MR. GERSHENGORN: But, Your Honor, the
11 reason why I think it makes sense in this case is
12 because if it's sufficient knowledge for you to actually
13 act upon it -- remember, if they -- if -- the critical
14 point here for us is if they had not -- if the employer
15 had not assumed that this was religious, had not
16 believed it, they would have hired her. The default
17 rule for "I'm not sure," is hire.

18 JUSTICE GINSBURG: Mr. Gershengorn,
19 didn't --

20 MR. GERSHENGORN: What --

21 JUSTICE GINSBURG: -- she -- the person --
22 the first-line hire, person responsible for hiring,
23 didn't she say to the district manager, I think she's
24 wearing this headscarf for religious reasons, and that's
25 why I'm checking it out with you. The answer she got

1 back was, it doesn't matter whether it's for religious
2 reasons. We don't -- we don't accommodate people who
3 wear headscarfs.

4 MR. GERSHENGORN: That's right, Your Honor.

5 JUSTICE GINSBURG: So -- so it seems that
6 the -- the district manager is -- his point of view is
7 headscarfs are out. This particular woman was wearing
8 one for religious reasons, but it doesn't matter what
9 reason, we don't accommodate headscarfs.

10 MR. GERSHENGORN: I think that's right, Your
11 Honor, and that's exactly what Congress said when it
12 enacted these provisions.

13 JUSTICE SCALIA: No, it didn't.

14 MR. GERSHENGORN: They didn't want to
15 happen --

16 JUSTICE SCALIA: There is no law against
17 such a rule. Any employer can have a rule, We don't
18 allow headscarfs. And until someone applies for a job
19 who, for a religious reason, wants to wear a headscarf
20 and the employer knows that it's for a religious reason
21 or suspects, or believes, or understands, or whatever
22 verbs you want to use, there's been no violation of the
23 law. You can -- you can have that rule.

24 MR. GERSHENGORN: Absolutely, Your Honor.

25 JUSTICE SCALIA: We don't allow our

1 employees to wear headscarfs. Nothing wrong with that
2 rule.

3 MR. GERSHENGORN: That's correct, Your
4 Honor. But once --

5 JUSTICE SCALIA: So the mere fact that
6 this -- this supervisor said that doesn't prove a
7 violation by the employer.

8 MR. GERSHENGORN: Well, I don't agree with
9 that, Your Honor. I think once the -- it's clear that
10 the employee is -- needs an accommodation of that rule,
11 that's exactly what Title VII requires. That's what the
12 Court addressed in Hardison. It was a neutral rule that
13 you had to work on the Sabbath, but what the court
14 said --

15 JUSTICE SCALIA: That's right, but that
16 supervisor did not have that knowledge.

17 MR. GERSHENGORN: Oh, no, Your Honor.
18 That's not correct. The -- and I took from Justice
19 Ginsburg's hypothetical -- question that -- that what we
20 believe to be the case, that Cooke conferred -- conveyed
21 to her supervisor, Johnson, that it was for a religious
22 reason. There's a dispute of the -- in testimony about
23 this, but what Cooke said -- and remember summary
24 judgment has now been granted against us, so the
25 evidence read in our favor -- what Cooke said was, I

1 told Johnson that it was for religious reasons, and
2 Johnson said, if we allow this then someone will paint
3 themselves green and call it a religion. We can't allow
4 it.

5 So the court decides the question on the
6 assumption that the decision-makers knew --

7 CHIEF JUSTICE ROBERTS: Well, your -- your
8 solution that you suggested is that if there's some
9 doubt the employer should begin a dialogue, I think is
10 what you -- but I think that may promote stereotypes to
11 a far greater degree than what you're objecting to.

12 Let's say you have someone of Middle Eastern
13 appearance who shows up for the interview with a beard.
14 And the employer, like Abercrombie & Fitch, they don't
15 like beards. They don't want their models, as they call
16 them, having beards. But he doesn't know if the beard
17 is there for a religious reason or not.

18 So you think it's better to him to sit there
19 and start asking this applicant questions he would not
20 ask anyone else about religion? Why are you wearing a
21 beard? Is there some religious reason for that? It
22 seems that your solution causes more problems.

23 MR. GERSHENGORN: So, Your Honor, I have two
24 responses that I'd like to say. First, I -- I don't
25 think it's right that the solution causes more problems

1 because I don't think that what Congress would have
2 preferred is that the person not get hired than that the
3 dialogue be begun. If those are the two options, I
4 think it's clear Congress wanted an accommodation of the
5 religious practice.

6 But I also think that Your Honor's
7 hypothetical points out quite nicely the -- that it's
8 somewhat -- it's a somewhat artificial situation here.
9 What the employer is saying is, I don't want a beard
10 when the person is on the floor. But that's not a
11 reason not to hire someone who walks in the door with a
12 beard. The New York Yankees, for example, have for
13 decades had a no facial hair policy, but they don't not
14 pursue free agents that wear beards. They assume that
15 those free agents can -- can shave once they get to the
16 Yankees. It's the same --

17 CHIEF JUSTICE ROBERTS: Well, is it
18 reasonable for an employer to say, look, I don't want to
19 buy into some problem with a guy who has a beard. I'm
20 going to say can you shave it? He's going to say no or
21 he's only going to shave twice a week.

22 I mean, isn't he reasonably going to say --
23 let's say, I don't care if it's religious -- a religious
24 reason or not. The guy shows up with a beard. I'm not
25 going to hire him.

1 MR. GERSHENGORN: So, Your Honor, that's the
2 hard question that I think Justice Kagan was asking, and
3 I do think that's a trickier question.

4 If your policy is not I have a work rule
5 that I'm concerned you won't be able to comply with in
6 the future, then I think, for all the reasons I've said
7 thus far, it's all said.

8 If the question is when someone comes to my
9 office with a beard and I just think they're -- it's
10 unkempt, I don't like it, I'm not going to hire them
11 regardless of whether they could comply, I think that's
12 the situation that presents this, is it one-third, is it
13 two-thirds. I think that's a hard question. It's not
14 the one presented here. And, quite candidly, it's not
15 the kinds of cases that we actually see. They much more
16 are the work rule.

17 JUSTICE SCALIA: You could avoid those hard
18 questions, whether it's understand, believe, suspect, by
19 adopting the rule that the court of appeals adopted
20 here; and that is, if you want to sue me for denying you
21 a job for a religious reason, the burden is on you to
22 say, I'm wearing the headscarf for a religious reason,
23 or I'm wearing the beard for a religious reason.
24 That -- that avoids all problems. Once you notify the
25 employer that it's for a religious reason, you got 'em.

1 MR. GERSHENGORN: So, Your Honor --

2 JUSTICE GINSBURG: Did the employer tell
3 her -- did the employer tell her that it had this Look
4 Policy --

5 MR. GERSHENGORN: And so that --

6 JUSTICE GINSBURG: -- that a headscarf would
7 violate? How could she ask for something when she
8 didn't know the employer had such a rule?

9 MR. GERSHENGORN: That's exactly the
10 problem, Justice Ginsburg and Justice Scalia, in
11 response to your question. The reason that's
12 insufficient is that it is simply not the case that
13 Respondent -- as Respondent suggests that the superior
14 knowledge is with the applicant in that situation. The
15 applicant is not on notice of what the work rules are.
16 And, indeed, in this situation, the testimony was
17 uncontroverted that Ms. Elauf did not know there was a
18 Look Policy that prohibited the headscarf. And so --

19 JUSTICE KENNEDY: Well, wait a minute. This
20 is not the place to get into the facts. But I -- I
21 thought her friend told her to wear at least a colored
22 scarf, so the subject came up. So I -- I --

23 MR. GERSHENGORN: But -- but actually,
24 Justice Kennedy, that --

25 JUSTICE KENNEDY: Again, we're -- we're not

1 factfinders here.

2 MR. GERSHENGORN: No, I understand. But
3 it's -- it's important, Your Honor, because actually
4 that, in fact, supports our position because what the --
5 what her friend said was, there's no problem with a
6 headscarf, it just shouldn't be black. And so she then
7 wore -- if anything, she was on notice that there was no
8 problem with the headscarf. So I actually think it cuts
9 exactly the other way.

10 And, Justice Ginsburg, to pick up on your
11 point, what makes it particularly inappropriate, I
12 think, to put the burden on the applicant here is that
13 it's the employer who gets to structure the interview.
14 And, in fact, the employer here read some version of the
15 Look Policy, but did not mention the headscarfs.

16 So, actually, this was a situation in which
17 the employer itself could have put Elauf on notice, and
18 then it's a very different situation. If the employer
19 says, we don't allow headscarfs, and then -- and then
20 the employee doesn't say anything, I think that's a very
21 different situation.

22 CHIEF JUSTICE ROBERTS: To get --

23 MR. GERSHENGORN: But --

24 CHIEF JUSTICE ROBERTS: To get back to my
25 beard case, is there -- if it's someone with a Middle

1 Eastern appearance with a beard, you want the employer to
2 begin some kind of a dialogue. If it's somebody who's not
3 Middle Eastern and has a beard, can the employer assume,
4 well, I don't think that's for religious reasons?

5 In other words, he's going to be asking
6 religious questions of some people based on a
7 stereotype, but not others.

8 JUSTICE SOTOMAYOR: Why -- why does he have
9 to ask about religious beliefs?

10 CHIEF JUSTICE ROBERTS: Could you answer my
11 question, please?

12 MR. GERSHENGORN: Sure, Your Honor.
13 Although part of the answer is that I don't think
14 they -- that the employer does. As I've said earlier,
15 the right approach for the employer who really wants to
16 avoid the subject is to assume that the person of Middle
17 Eastern descent, just like the person not of Middle
18 Eastern descent, has a beard for personal preference and
19 would be happy to shave if he got the job in order to
20 comply with the work rules.

21 And that is what is critical for it. That
22 is what Congress wanted to accomplish here.

23 JUSTICE SOTOMAYOR: So why can't the
24 employer just simply say, we have a Look Policy that
25 doesn't permit beards. Can you comply with that policy?

1 MR. GERSHENGORN: Absolutely, Your Honor.

2 That -- those --

3 JUSTICE SOTOMAYOR: That's all they have
4 to -- they don't have to ask about reasons or no
5 reasons. It doesn't really matter why.

6 MR. GERSHENGORN: Right. As I tried --
7 there are two options. One is the one I gave to the
8 Chief Justice, which is you can assume the person
9 doesn't wear it for religious reasons and then hire
10 them; or if you're concerned about it, you can ask a
11 specific question. The EEOC has made clear that that
12 is --

13 CHIEF JUSTICE ROBERTS: The question is
14 supposed -- the question is supposed to be why are you
15 wearing a beard?

16 MR. GERSHENGORN: No. The question is, we
17 have a work rule that prohibits facial hair on the
18 floor, on the force, on the --

19 CHIEF JUSTICE ROBERTS: So that doesn't
20 cover anything that's not immediately apparent --
21 apparent by the appearance. You make -- they can have a
22 code of conduct that presumably would go through several
23 pages, here are all the things we require. Any problem
24 with any of them?

25 MR. GERSHENGORN: So, Your Honor, I actually

1 think that that -- this is a protect -- that their --
2 the employer is at no risk of liability if he asks no
3 questions but makes no assumptions and stereotypes. And
4 that's why I don't think what Your Honor's hypothesizing
5 turns out to be a problem in practice.

6 What is going on is that in the mine-run of
7 cases that the EEOC brings at the depth we see in these
8 cases is you're talking about a work rule. You're
9 talking about you must wear pants at work, and the
10 employer has a religious objection, thinks women should
11 wear skirts. You're talking about a no long hair
12 policy. You're -- you're talking about groom and garb.
13 And the concern is will you be able to comply in the
14 future.

15 The employer doesn't have to run down those
16 questions. The employer can assume there's no religious
17 problem, can avoid the stereotyping. However, if the
18 employer wishes, what the Court said in Ansonia is that
19 a bilateral dialogue is what Title VII is designed to
20 accomplish.

21 And so picking up on Justice Sotomayor's
22 point, you could raise the policy. And this is not a
23 crazy idea. This is what --

24 JUSTICE SCALIA: Could -- could I --

25 MR. GERSHENGORN: -- Respondent did.

1 JUSTICE SCALIA: I understand. Could --
2 could I ask you -- he can ask can you do it? Is -- is
3 that the only religious preference that has to be
4 honored? I can, but, you know, really, I would like not
5 to for a religious reason. I -- I guess I could take off
6 my headscarf or whatnot, but it would be very
7 inappropriate, religiously uncomfortable.

8 Is -- is that a --

9 MR. GERSHENGORN: So, Your Honor --

10 JUSTICE SCALIA: Are -- are you
11 acknowledging that -- that the only accommodation that
12 has to be made is an accommodation for somebody who
13 absolutely for a religious reason cannot do something?

14 MR. GERSHENGORN: No, Your Honor.

15 JUSTICE SCALIA: I didn't think so.

16 MR. GERSHENGORN: But that is not what this
17 case is about. What -- because the question --

18 JUSTICE SCALIA: So you can't ask that.

19 You -- you cannot ask the question --

20 JUSTICE SOTOMAYOR: I'm sorry, I --

21 JUSTICE SCALIA: -- you're telling them to
22 ask, can you do it? Well, yes, I guess I could, but --

23 MR. GERSHENGORN: But that's the exact
24 dialogue that's supposed to happen. What this -- that's
25 what this Court said should happen. That's the

1 bilateral dialogue.

2 What Congress wanted when it passed a
3 reasonable accommodation requirement is precisely for
4 the employer and the employee or the employee not to
5 have to do anything.

6 JUSTICE SCALIA: So she says, yes, I could.
7 And later says, yeah, I could, but -- but, boy, it is
8 really uncomfortable for me to do that for religious
9 reasons. Would she still have a lawsuit?

10 MR. GERSHENGORN: Well, she wouldn't have a
11 lawsuit, but she might be able to --

12 JUSTICE SCALIA: All she said was, yes, I
13 could. She could.

14 MR. GERSHENGORN: Well, if she could, then
15 she was hired. Then when she says, actually, now it's
16 quite uncomfortable, that's a request for an
17 accommodation, and she and the employer need to go into
18 a discussion, just like you would if you said, I need
19 this -- I need this time off to attend a religious
20 conversion ceremony, which was at issue in the Ninth
21 Circuit case in Heller. That's just the back-and-forth
22 of everyday employer-employee relations.

23 JUSTICE ALITO: Well, couldn't the employer
24 say, we have a policy no beards, or whatever, do you
25 have any problem with that? Why do you have to -- why

1 does it have to be phrased, could you do it? Just say,
2 do you have any problem with that?

3 MR. GERSHENGORN: I think that's another way
4 to phrase it.

5 JUSTICE ALITO: Are you willing to do it?

6 MR. GERSHENGORN: It's -- it's a matter -- I
7 think what the -- what -- what Title VII is about, what
8 this Court has recognized and what certainly the EEOC
9 has recognized is the actual accommodation back and
10 forth is quite a flexible process. It's designed to be
11 collaborative. And so there isn't a fixed rule you have
12 to phrase it this way or phrase it that way.

13 I think the point is to initiate the
14 dialogue. And I think had that happened here, then --
15 then we would be talking about a different point in the
16 process about whether there was a reasonable
17 accommodation that could be done and whether it could be
18 done without undue hardship. But that dialogue never
19 happened here, and that is the problem with the case as
20 we see it.

21 JUSTICE GINSBURG: The --

22 MR. GERSHENGORN: And the --

23 JUSTICE GINSBURG: The Respondent says that
24 you switched theories in midstream, that you started out
25 with a refusal to accommodate theory and then you

1 abandoned that. Is that --

2 MR. GERSHENGORN: That is not correct --

3 JUSTICE GINSBURG: -- not so?

4 MR. GERSHENGORN: -- Justice Ginsburg. From
5 the very beginning, our theory has been that the
6 Respondent violated Title VII by refusing to accommodate
7 Ms. Elauf. That was the theory that was presented in
8 the complaint. It's the theory we got summary judgment
9 and damages on. It's the theory we defended in the
10 court of appeals. And it's the -- it's the theory we
11 have -- we have proceeded under on all of our cases
12 here. There has been no switch. The phrase "religious
13 accommodation" appears 14 times in our --

14 JUSTICE KENNEDY: So that -- that's
15 disparate treatment plus failure to accommodate,
16 correct?

17 MR. GERSHENGORN: So they have seized on the
18 word "disparate treatment."

19 I'd like to -- if I can avoid a yes/no and
20 just explain our position on disparate treatment,
21 Justice Kennedy.

22 The brief -- the phrase used in the brief
23 was that a failure to accommodate is -- is the kind of
24 disparate treatment that Title VII was designed to
25 prevent. We think that is correct and accurate, that

1 what the Congress meant to do was put people who needed
2 an accommodation like Ms. Elauf, a headscarf
3 accommodation, on the same footing as people who did not
4 need to wear a head -- headgear. That is the sense in
5 which we -- this is disparate treatment.

6 However, we recognize that the EEOC and the
7 lower courts have used disparate treatment in another
8 way, which is to say there's a disparate treatment way
9 to prove discrimination, a failure to accommodate
10 theory.

11 We did not and -- and to highlight the
12 difference, a disparate treatment would be you allow all
13 hats, but not religious hats. That's disparate
14 treatment. This is you don't -- you don't allow any
15 hats, but we want to wear a religious hat. That would
16 be a failure to accommodate. We did not, at any point
17 in this case, abandon or change our theory from the
18 failure to accommodate.

19 What the other side has done is assert not
20 only that we did that, but we did it for some motive,
21 because we wished to avoid a 1981a question, a case -- a
22 question which a -- no court has ever adopted their
23 theory and which at no point in this litigation have
24 they ever raised, even though 1981a was the only theory
25 on which we could get damages in the district court. We

1 had a damages trial and 1981a was the only source of
2 damages. They never raised it. Our pretrial brief said
3 we're proceeding under 1981a. The district court's
4 pretrial order listed 1981a. That was the basis of
5 our damages.

6 JUSTICE SOTOMAYOR: I'm sorry. Again, I'm a
7 little confused. I didn't know -- I -- I read your
8 complaint, and it says, "The Respondent refused to hire
9 Ms. Elauf because she wears a hijab and further failed
10 to accommodate her religious belief by making an
11 exception to the Look Policy."

12 I looked at your briefs, I looked at the
13 jury charge; and it seems like the two were always tied.
14 The failure to hire was because they refused to
15 accommodate her.

16 MR. GERSHENGORN: That's correct, Your
17 Honor. And that has been our theory from the very
18 beginning. So the idea that 1981a magically became part
19 of this case when we mentioned the word "disparate
20 treatment" in our opening brief is just not credible.
21 That has been the theory. They -- they -- that's how
22 the damages were done. They never raised it on appeal.
23 They never raised it in the --

24 JUSTICE GINSBURG: Well, suppose they had.
25 Their argument is that you get damages only for

1 intentional.

2 MR. GERSHENGORN: So, Your -- Your Honor, no
3 court has ever addressed that, but our position is --
4 and this is how the courts have uniformly applied it --
5 that this is intentional discrimination under 1981a,
6 although it's not a question that's before this Court.
7 The reason for that is 1981a distinguishes between --
8 and this is -- I'm sorry, Your Honor. It's in the red
9 brief on Page 1a, and it's 42 U.S.C. 1981a(a). It
10 distinguishes between unlawful intentional
11 discrimination, not an employment practice that is
12 unlawful because of its disparate impact. The failure
13 to accommodate claim is neither disparate -- is not a
14 disparate impact claim, and it is intentional
15 discrimination for exactly the reason that Justice
16 Sotomayor has said. It's the intentional refusal to
17 hire because of a religious practice that you could
18 reasonably accommodate. And this is not as the amicus
19 brief -- some of the amicus briefs have suggested, just
20 a disparate impact claim.

21 JUSTICE KENNEDY: I'm -- I'm sorry to be
22 obtuse.

23 MR. GERSHENGORN: Yes.

24 JUSTICE KENNEDY: I don't know why you just
25 don't concede that that's a form of disparate --

1 disparate treatment. Failure to accommodate is a form
2 of disparate treatment. I don't accommodate you because
3 of your religion. Disparate treatment.

4 MR. GERSHENGORN: So, Your Honor, I -- as I
5 tried to suggest --

6 JUSTICE KENNEDY: You know what? I --
7 I'm -- I'm just --

8 MR. GERSHENGORN: -- I think it is a form
9 of --

10 JUSTICE KENNEDY: -- missing something.

11 MR. GERSHENGORN: -- disparate treatment as
12 we've used it in the Act. I just want to distinguish
13 the different theories, because under a disparate
14 treatment approach, there -- there's a -- as the lower
15 courts have used it, you would have to show that it was
16 because of the religious nature of the practice that you
17 didn't accommodate.

18 So, for example, again, that I allow hats
19 for everyone, but not if you have a religious hat. That
20 would be a -- as the lower courts have called -- a
21 conventional disparate treatment claim.

22 If I could reserve the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Dvoretzky.

25 ORAL ARGUMENT OF SHAY DVORETZKY

1 ON BEHALF OF THE RESPONDENT

2 MR. DVORETZKY: Mr. Chief Justice, and may
3 it please the Court;

4 The premise of the EEOC's argument today, as
5 I understand it, is that Abercrombie acted because of
6 the religious basis for Ms. Elauf's headscarf.

7 That is not correct as a factual matter; and
8 the EEOC's theory, in its brief, does not depend on any
9 such assumption. The EEOC's theory in its brief is that
10 anytime an employer suspects a possible conflict or
11 correctly understands such a conflict, at that point it
12 is on notice and must offer a religious accommodation.

13 And so if you imagine a situation, which is
14 not at all --

15 JUSTICE SOTOMAYOR: They don't have to offer
16 a religious accommodation if they have a reasonable
17 basis not to. I mean, you follow the statute. You only
18 have to accommodate if it's not an undue burden.

19 MR. DVORETZKY: That -- that's true, they
20 always have the undue burden defense; but absent an
21 undue burden, they must accommodate and they must depart
22 from a religion-neutral policy based on a mere suspicion
23 of a possible conflict.

24 JUSTICE SOTOMAYOR: No. It's not an un- --
25 we go back to their position.

1 MR. DVORETZKY: Well, I --

2 JUSTICE SOTOMAYOR: It's very simple,
3 because you're mischaracterizing it. Their position is,
4 if you believe that someone -- believe, know -- we're --
5 a lot of adjectives -- that someone will need a
6 religious accommodation, then -- and won't comply with
7 your policy, just ask them, do you have a -- just the
8 way Justice Alito said. You know, we don't permit
9 facial hair on the floor. You have a problem with that?

10 MR. DVORETZKY: Justice Sotomayor, as -- as
11 an initial matter, their theory in their brief does not
12 depend on any sort of assumption about whether the
13 applicant would later be able to comply with the work
14 rule or not.

15 Under the theory expressed in their brief,
16 even if an employer like Abercrombie had a policy in
17 which the Look Policy applied at the interview, you are
18 being assessed at the interview based on your compliance
19 with our dress --

20 JUSTICE ALITO: Do you think that the -- do
21 you think that the employee has to say, I am dressed the
22 way I am for a religious reason?

23 MR. DVORETZKY: Not necessarily. However,
24 the employer's knowledge has to be traced to the
25 employee in some way. In the typical case, that is

1 going to come directly from the employee because of the
2 individualized and personal nature of religion --

3 JUSTICE ALITO: All right. Let's say
4 four -- four people show up for a job interview at
5 Abercrombie.

6 And half -- this is going to sound like a
7 joke, but, you know, it's not.

8 (Laughter.)

9 JUSTICE ALITO: So the first is a Sikh man
10 wearing a turban, the second is a Hasidic man wearing a
11 hat, the third is a Muslim woman wearing a niqab, the
12 fourth is a Catholic nun in a habit.

13 Now, do you think the employer has to --
14 that those people have to say, we just want to tell you,
15 we're dressed this way for a religious reason. We're
16 not just trying to make a fashion statement.

17 MR. DVORETZKY: First of all, Your Honor,
18 one aspect of your hypothetical is not a joke; and that
19 is, that many of these interviews at Abercrombie are, in
20 fact, group interviews. And I think --

21 JUSTICE GINSBURG: Are the what? Group?

22 MR. DVORETZKY: Group -- group interviews
23 where there are mul- -- multiple applicants at a time.

24 And so I think the reality is, it's a lot
25 more difficult than the government imagines to start

1 having these individualized dialogues.

2 But going to your point about those sorts
3 of religious outfits, one can certainly imagine cases
4 in which it is more obvious than others that a
5 particular -- a particular garb is likely worn for
6 religious purposes.

7 However, I would direct the Court, if I
8 could, to Joint Appendix 130 and 131, which contain
9 pictures of the sort of headscarf that Ms. Elauf was
10 actually wearing in this case.

11 Those sorts of situations where it's far
12 more ambiguous whether a -- whether a particular outward
13 symbol is religious in nature or not will be far more
14 common.

15 JUSTICE ALITO: Well, that can be the case,
16 but I want to know the answer to the question whether
17 the employee has to say, I'm wearing this for a
18 religious reason, or whether you're willing to admit
19 that there are at least some circumstances in which the
20 employer is charged with that knowledge based on what
21 the employer observes.

22 MR. DVORETZKY: No, Your Honor. I think
23 there are some circumstances in which it is certainly
24 more likely than others, but the question before the
25 Court is to devise a rule that's going to apply across

1 the board.

2 JUSTICE BREYER: Actually, I didn't think
3 that was the question. I thought the question presented
4 was that the Tenth Circuit had said, Employer, unless
5 you know from the woman who is applying, from the
6 applicant, unless you receive direct, explicit notice
7 that what she wants to wear is based on religion and she
8 wants an accommodation, unless you receive direct,
9 explicit notice from her, you're home free to do what
10 you want.

11 Now, in their question presented, they say,
12 in the last few words in describing it, we think that's
13 wrong.

14 Now, I agree that we have to say whether
15 that's wrong and, if it is wrong, it would be helpful to
16 say what they have to do. So the SG says, here is what
17 it is. If the employer correctly infers, correctly
18 understands, and I would add "or correctly believes"
19 that a practice is religious and an accommodation is
20 necessary, that's it. Then he has to accommodate unless
21 he has one of the excuses under the statute, et cetera.

22 Okay. What's wrong with that?

23 MR. DVORETZKY: Justice Breyer, I think
24 what you've just described is a rule for all cases and
25 it's one that is entirely unadministrable for courts,

1 employers, and applicants alike.

2 JUSTICE BREYER: It is -- it is
3 unadministrable to say that if the employer believes,
4 thinks, this woman is religious and needs an
5 accommodation and he's right, well, do something unless
6 you have an excuse.

7 What -- why is that unadministrable?

8 MR. DVORETZKY: Your Honor, I believe that's
9 unadministrable because the EEOC does not explain what
10 level of certainty is required for a belief versus
11 suspecting --

12 JUSTICE BREYER: Oh no, you have to prove.
13 This -- this is correct. You have to prove he has a
14 belief. Now, we probably in 250,000 Federal cases a
15 year, of those, say, 80,000 that go to trial. Proving
16 that somebody has a belief or other is probably at issue
17 in 90 percent of them. Now, I'm making that up, that
18 number, but nonetheless, I don't think it's uncommon in
19 the law that you have to prove that somebody believes
20 something. So we say, the standard of proving belief is
21 like in any other case.

22 MR. DVORETZKY: I don't think this is like
23 any other case, because you're dealing with -- you're
24 dealing with something -- religious belief, which is
25 inherently personal to the individual. And to charge

1 employers with -- to charge employers with Title VII
2 liability and require them to come to an understanding
3 of whether a particular practice is religious or not --

4 JUSTICE SOTOMAYOR: This is -- this is such
5 --

6 JUSTICE KAGAN: Now, Mr. Dvoretzky, suppose
7 an employer just doesn't want to hire any Jews, and
8 somebody walks in and his name is Noah Goldberg, and he
9 looks kind of Jewish and the employer doesn't know he's
10 Jewish. No absolute certainty and certainly
11 Mr. Goldberg doesn't say anything about being Jewish,
12 but the employer just operates on an assumption that
13 he's Jewish, so no, he doesn't get the job. Is that a
14 violation?

15 MR. DVORETZKY: That is a disparate
16 treatment violation of Title VII. But the employer --

17 JUSTICE KAGAN: That has got to be against
18 the law, right? It doesn't matter whether the employer
19 --

20 (Laughter.)

21 JUSTICE KAGAN: It doesn't matter whether
22 the employer knows it to an absolute certainty, right?

23 MR. DVORETZKY: Absolutely, because in that
24 situation, because what's relevant is the employer's
25 intent. If the employer intends to discriminate on the

1 basis of religion, then that's a Title VII violation.
2 What's going on here, however, is that the employer
3 seeks to apply a religion-neutral dress code. Religion,
4 according to Johnson --

5 JUSTICE GINSBURG: Except in Title VII, you
6 would be right if all that Title VII did was prevent
7 religious discrimination, but it makes a religious
8 practice, a refusal to accommodate a religious practice
9 is itself a violation of Title VII.

10 So we have -- it's -- and that was done
11 deliberately, was it not, so that religious practices
12 would have to be accommodated.

13 MR. DVORETZKY: Yes, Your Honor, and two
14 points in response to that, if I may. One, we're not
15 contending that religious practices don't have to be
16 accommodated. What we are contending as an initial
17 matter is that an employer does not intentionally
18 discriminate on the basis of a religious practice by
19 enforcing a religion-neutral dress code that would have
20 been have been enforced --

21 JUSTICE KAGAN: But the thing about my
22 question was, is that what this statute does is to say
23 that if you are, in fact, wearing a headscarf for
24 religious reasons, that your neutral policy really
25 doesn't matter, it only matters if you -- if there's an

1 undue burden and you really can't make an accommodation,
2 but except for that, it really doesn't matter. You just
3 have to hire me, even if I'm wearing a headscarf. And
4 so the fact that you don't know that I'm wearing a
5 headscarf for religious reasons, that you only kind of
6 assume that, because most people do wear headscarves for
7 religious reasons, it shouldn't make any more difference
8 than in the hypothetical that I gave.

9 MR. DVORETZKY: Your Honor, on -- on that
10 logic, it also would make no difference if the employer
11 had absolutely no idea that the headscarf was worn for
12 religious reasons, because it would still be a religious
13 headscarf and a religious practice. Not even the EEOC
14 is claiming that there's a duty to accommodate in that
15 situation. And so the question before the Court is, at
16 what level of knowledge does the employer have to have
17 before the duty to accommodate is triggered. For 40
18 years, the EEOC's own guidance has put the burden to
19 initiate the conversation on the employee because only
20 the employee knows.

21 JUSTICE GINSBURG: That's if the employee
22 knows the rule. But here the employee had no reason to
23 think that there was anything offensive about her dress.
24 How can she say, by the way, I have a religious reason
25 for wearing this headscarf, when from everything, from

1 all appearances, the employer doesn't care. It's okay
2 to wear a headscarf. Then the employer has not given
3 her notice of this Look Policy, so how is she supposed
4 to in -- in -- intrude the question, that as far as all
5 appearances go, it's fine, that she's wearing a
6 headscarf. There's no Look Policy that the employee
7 knows that's violated.

8 MR. DVORETZKY: Justice Ginsburg, I
9 respectfully disagree with that characterization of what
10 went on here. Ms. Elauf knew enough about Abercrombie
11 to understand that it had a dress code. Knew enough
12 about Abercrombie to un -- to ask in advance.

13 JUSTICE GINSBURG: Did she testify that she
14 knew they had a dress code? I was not aware of that.

15 MR. DVORETZKY: She -- she testified that
16 she knew that she would have to wear Abercrombie style
17 clothes, that's Joint Appendix 23. She knew that
18 Abercrombie did not sell headscarves.

19 JUSTICE GINSBURG: But she did. In fact,
20 she came in with an Abercrombie type shirt, right?

21 MR. DVORETZKY: She did. But she also knew
22 that Abercrombie did not sell headscarves. That's at
23 Joint Appendix 37-38.

24 JUSTICE SOTOMAYOR: But she asked a friend,
25 who worked for Abercrombie whether the -- whether the

1 headscarf was a problem, and the friend said, no, if
2 it's not black, it should be okay. And in fact, three
3 of the four managers said it was okay to wear scarves,
4 so --

5 MR. DVORETZKY: It -- but --

6 JUSTICE SOTOMAYOR: -- why would she suspect
7 that if she is qualified and has the personality they're
8 looking for, and is dressed appropriately, that this
9 company would fail to hire her because they refused to
10 accommodate her religious belief.

11 MR. DVORETZKY: Justice Sotomayor, she asked
12 a friend who in turn asked another Abercrombie employee,
13 who was not involved in the hiring process. And even
14 the advice that was --

15 JUSTICE SOTOMAYOR: No, I think it was a
16 store manager.

17 MR. DVORETZKY: But a store manager who was
18 not involved in this hiring process. She had an
19 opportunity before Ms. Cooke, who interviewed her, to
20 ask any questions about the Look Policy, after Ms. Cooke
21 described the Look Policy at the interview. So --

22 JUSTICE GINSBURG: She did not mention the
23 headscarf?

24 MR. DVORETZKY: Did not mention the
25 headscarf. These Abercrombie interviews, in addition to

1 being group interviews, are scripted interviews in which
2 --

3 JUSTICE SOTOMAYOR: Show me where in the
4 script. Because I remember reading this, and she, in
5 fact, said we don't discuss the Look Policy at the
6 interview.

7 MR. DVORETZKY: If you look at Joint
8 Appendix 33 and Joint Appendix 100 to 101, that's
9 Cooke's testimony, that she read a summary of the Look
10 Policy and gave Ms. Elauf the opportunity to ask any
11 questions. Now --

12 JUSTICE GINSBURG: Okay, but there was no
13 mention of a headscarf in what she read.

14 MR. DVORETZKY: It did not specifically
15 mention the headscarf. However, it described the Look
16 Policy in general. Ms. Elauf knew before, it was a
17 matter of common sense that Abercrombie requires their
18 employees to wear clothes that look like Abercrombie
19 style.

20 JUSTICE ALITO: So let's say that somebody
21 comes in for an interview and this person is -- has the
22 look, if you wanted to, you know, draw the person who
23 has the look, this is the person who has the look, looks
24 just like this mythical preppy or --

25 (Laughter.)

1 JUSTICE ALITO: -- somebody who came off the
2 beach in California. Only one problem, the person is
3 wearing a black blouse, which is against the Abercrombie
4 rules. Now, would Abercrombie fire that -- or would not
5 hire that person on the assumption that this person
6 likes black so much this person is going to wear black
7 every single day?

8 MR. DVORETZKY: I don't think Abercrombie
9 needs to make that assumption about what the person will
10 do later in order to make a judgment based on the
11 person's appearance at the interview. If I walked into
12 an Abercrombie interview wearing a suit, presumably
13 Abercrombie could tell me when you come to work, please
14 don't wear the suit, please wear our clothes. But it
15 would also be equally rational for Abercrombie to say,
16 you know, if this person is coming in wearing a suit,
17 that's not compatible with our style. And likewise for
18 the headscarf. Johnson's testimony, which the EEOC
19 didn't challenge, is that he would have taken the same
20 action for somebody who came into an interview wearing a
21 headscarf, a baseball cap, a helmet or another religious
22 symbol.

23 JUSTICE GINSBURG: Or a yarmulke. He said
24 specifically, somebody come in, applies for a job, wears
25 a yarmulke , no questions asked, that violates our policy.

1 That was his testimony.

2 MR. DVORETZKY: That's right, and what that
3 shows is that religion is not the basis for the action
4 here, rather, Abercrombie at most was completely
5 indifferent to --

6 CHIEF JUSTICE ROBERTS: No, but that doesn't
7 work in a case like this. It's not a question, are you
8 treating everybody the same. You have an obligation to
9 accommodate people with particular religious practice or
10 beliefs, so to keep constantly saying, oh, we would have
11 treated somebody with a baseball cap the same way
12 doesn't seem to me is very responsive.

13 MR. DVORETZKY: Mr. Chief Justice, for
14 purposes of an intentional discrimination claim, it does
15 matter that you would treat everybody the same, and
16 that's the theory the EEOC is pursuing here.

17 CHIEF JUSTICE ROBERTS: No, no, no, but as I
18 understand it, it's intentional discrimination because
19 you failed to accommodate.

20 MR. DVORETZKY: And I would submit that that
21 is an incomprehensible understanding of what intentional
22 discrimination means. Intentional discrimination --

23 JUSTICE BREYER: Again, how we get into all
24 that, if you want to add something to it, it seems we're
25 in a kind of minutia. What's wrong with saying if he

1 correctly believes that she's religious and needs
2 accommodation, fine, that's the end of it. You're in
3 the statute and prove an excuse. Correct belief can
4 arise in a thousand contexts. Did he correctly believe
5 that the drug that was being sold, that white powder,
6 was heroin? Did the manager whom you're trying to fire
7 and is saying you did, did he correctly believe that, in
8 fact -- or didn't pay enough for college graduates? Did
9 he correctly believe that this applicant graduated from
10 Princeton? Did he -- that's Abercrombie -- did he
11 correctly believe that -- that he had authority under
12 the -- under the delegation of agency, to sign a check?

13 I mean, look, there are thousands of things.
14 What's -- why is it our job here to say what the right
15 way of proving correct belief is? I mean, I think, we
16 can say it's something wrong. You don't have to
17 formulate your correct belief just because she told you.
18 I mean, you can argue that one. That's the only way to
19 prove it and I'm open to that argument, I'd like to hear
20 it.

21 But once we're beyond that, if I'm right
22 that that isn't the only way you can prove correct
23 belief, why do we have to say?

24 MR. DVORETZKY: Because, Your Honor, in this
25 particular context, having a standard like correct

1 belief or suspecting a possible conflict will inevitably
2 lead employers --

3 JUSTICE BREYER: I'm with you with
4 "suspect."

5 MR. DVORETZKY: That is -- suspect --

6 JUSTICE BREYER: I'm with you only where
7 they correctly believe that, dah, dah, dah, or
8 understand dah, dah, dah, or no. Those three things
9 seem good enough to me.

10 Now, I've repeated this three times, but I
11 want to hear the answer why they're not good enough.

12 MR. DVORETZKY: The -- the reason they're
13 not -- Justice Breyer, the reason that they're not good
14 enough is that there is no way that the employer can
15 know about a religious practice unless it either --
16 unless it is -- that information is traceable to the
17 employee. And having that kind of a correct belief
18 standard will inevitably lead employers to stereotype,
19 because a fact-finder might later find that they short
20 --

21 JUSTICE SOTOMAYOR: Well, isn't that --
22 isn't that what Ms. Cooke says she did? She said she
23 saw her in a scarf and that she assumed that it was worn
24 because of religious beliefs, so she acted on a
25 stereotype that some, I guess, if you wear a black

1 scarf, it's because of a religious belief.

2 MR. DVORETZKY: Your Honor, I don't believe
3 that she acted on that stereotype. I believe that
4 Johnson instructed her not to hire Ms. Elauf because she
5 was not compliant with the Look Policy.

6 JUSTICE SOTOMAYOR: No, he hired her because
7 -- didn't hire her because, under the Look Policy, he
8 believed you could not accommodate that religious
9 belief.

10 MR. DVORETZKY: I think the --

11 JUSTICE SOTOMAYOR: Or that religious
12 practice.

13 MR. DVORETZKY: I think the reason that he
14 didn't hire her, Joint Appendix 134, is that she simply
15 was not compliant with the Look Policy.

16 JUSTICE BREYER: Okay. So -- so the
17 traceable -- now you've got me sort of interested in
18 this -- it seems to me, when you mean traceable to the
19 woman, I mean, you mean it loosely, I guess.

20 MR. DVORETZKY: Well, I --

21 JUSTICE BREYER: It's pretty hard to think
22 of a case where it wouldn't be. I mean, I guess I could
23 imagine a case that he found out about this woman from
24 an FBI agent who was making it up. But, I mean, that
25 just seems very, very unlikely.

1 MR. DVORETZKY: The case that the government
2 gives as an example is one in which an employer learned
3 of an applicant's religious practice from the
4 employer's -- from the applicant's reference who was --
5 the applicant's --

6 JUSTICE BREYER: And the applicant's
7 reference didn't know the applicant?

8 MR. DVORETZKY: The applicant's reference
9 did know the applicant?

10 JUSTICE BREYER: Okay. There it is,
11 traceable to the --

12 MR. DVORETZKY: And so that is traceable to
13 the -- to the applicant. But the problem with -- the
14 problem would be --

15 JUSTICE SOTOMAYOR: What's the difference in
16 your -- I mean, I'm a little -- I'm still very confused.
17 You don't think that there could ever be discrimination
18 based on a general neutral policy, because what does it
19 matter if she told him that this was because of
20 religious belief? If he's only firing her or not hiring
21 her because of the Look Policy, then he hasn't
22 discriminated.

23 MR. DVORETZKY: No, Your Honor. If she had
24 told him, this is for religious belief and I need an
25 accommodation from the Look Policy, at that point, under

1 the statute, there would be a duty to accommodate. But
2 the question here is do we want to put --

3 JUSTICE SOTOMAYOR: I am so totally
4 confused. So he hears it from Ms. Cooke and that's not
5 enough?

6 MR. DVORETZKY: That's right. Because
7 Ms. Cooke herself testified that she did not know that
8 Ms. Elauf wore the headscarf for religious reasons.
9 What we want to avoid is a rule that leads employers, in
10 order to avoid liability, to start stereotyping about
11 whether they think, guess or suspect that somebody is
12 doing something for religious reasons.

13 JUSTICE GINSBURG: We've already gone
14 through this. All I have to do is say, This is what our
15 Look Policy is, do you have any problem with it? As
16 Justice Alito pointed out a while back, don't have to
17 probe anything about religion. I thought Ms. -- what is
18 his name, Johnson -- when he said, I would do the same
19 thing with a man who came in with a yarmulke . So the man
20 who came in with the yarmulke got the same treatment.
21 Sorry, I was, I was -- Ms. Cooke, I would want to hire
22 you, but I can't. That was the answer that he gave. So
23 there's no difference between the headscarf or yarmulke
24 or a Sikh turban in Mr. Johnson's view.

25 MR. DVORETZKY: That -- that's right. And

1 to answer your question about why the employer can't
2 just disclose the policy, that isn't a solution, because
3 that is asking employers to treat applicants differently
4 based on stereotypes or assumption about whether
5 something is likely a religious practice.

6 JUSTICE GINSBURG: If it's going to be a
7 requirement for the job, then doesn't the employer have
8 an obligation to tell the employee what the job
9 requirements are?

10 MR. DVORETZKY: No, Your Honor, not under
11 Title VII. Title VII is not a Civil Service statute
12 that requires applicants or employees who violate
13 workplace rules to be given a chance to explain
14 themselves and told all of the requirements before
15 adverse action is taken against them.

16 JUSTICE ALITO: This is what I don't
17 understand about your position with respect to this
18 particular case. As I understand it, Abercrombie does
19 not have a policy that the -- that an interviewee must
20 comply with the Look Policy; is that correct?

21 MR. DVORETZKY: The Look Policy itself does
22 not apply at the interview. It seems that Mr. --

23 JUSTICE ALITO: So what -- on -- there would
24 be no reason for not hiring the individual involved here
25 unless you assumed that she was going to wear a scarf

1 every day. Just because she wore a headscarf on that
2 one day, wouldn't mean that she necessarily was going to
3 wear it everyday. Every day she might. Maybe she's
4 just having a bad hair day so she comes in with a
5 headscarf, but she doesn't have any religious reason for
6 doing it. Would you reject her for that? No. The
7 reason that she was rejected was because you assumed she
8 was going to do this every day and the only reason why
9 she would do it every day is because she had a religious
10 reason.

11 MR. DVORETZKY: Justice Alito, that has not
12 been the EEOC's theory of this case. And if it had
13 been, there would have been ways that they could have
14 tried to prove that. They could have questioned Johnson
15 specifically about that. What would he have done if
16 somebody had come in wearing a ball cap? They could
17 have tried to get comparative evidence about what would
18 happened when people came in wearing nonreligious head
19 wear. And so the EEOC's theory, which it had every
20 opportunity to prove, has not been that Johnson --

21 JUSTICE GINSBURG: Why would they ask
22 anything about nonreligious? Title VII doesn't require
23 accommodating baseball caps, but it does require
24 accommodating to religious practices. So the employer
25 is not -- as I said before, it's not just, I can't

1 discriminate on the basis of religion, but if there's a
2 religious practice, I must accommodate it as a discrete
3 requirement.

4 MR. DVORETZKY: The -- the premise of
5 Justice Alito's question, as I understood it, is that
6 Abercrombie only didn't hire this person because the
7 headscarf was religious. And what I'm suggesting is,
8 Abercrombie might well not have hired anybody who walked
9 in wearing any head cover covering. And so if the EEOC
10 had wanted to prove the role that assumptions about
11 religion supposedly --

12 JUSTICE GINSBURG: So why would that be so
13 when you just said they don't require people at the
14 interview stage to conform to the Look Policy?

15 MR. DVORETZKY: On its face, the Look Policy
16 itself does not require that. But Johnson, the
17 decision maker here, in effect was judging people based
18 on --

19 JUSTICE SCALIA: You were about to tell us
20 what the EEOC's theory of the case was. I was eager to
21 hear that. Could you tell us what you think their
22 theory of the case was?

23 MR. DVORETZKY: I think their theory of the
24 case was that there was a duty to accommodate a
25 religious practice anytime an employer has a correct

1 understanding or a suspicion of that practice. It has
2 not -- the theory has not been that Abercrombie acted
3 based on assumptions about Ms. Elauf's religion. And I
4 think one way in which we know that is, let's assume
5 that the Look Policy did apply at the interview. Under
6 the EEOC's theory, if an interviewer suspected that the
7 applicant -- or correctly understood, as Justice Breyer
8 prefers -- correctly understood that the applicant wore
9 the headscarf for religious purposes, at that point,
10 there would be a duty to accommodate.

11 Regardless of whether Abercrombie did or did
12 not make any assumptions about future compliance, if the
13 Look Policy applied at the interview, there would be a
14 duty to accommodate upon that correct understanding at
15 the interview.

16 The problem with that rule is that
17 employers, in order to protect themselves in the future
18 from having a jury find that they must have correctly
19 understood that a particular --

20 JUSTICE SOTOMAYOR: So what's the difference
21 between that and having no --

22 JUSTICE SCALIA: I don't understand what you
23 were about to say. Would you finish your thought?

24 MR. DVORETZKY: The only way that employers
25 can protect themselves under the EEOC's approach is by

1 training their managers to stereotype about possible
2 religious beliefs because a judge or jury might later
3 find that Abercrombie or an employer correctly
4 understood, or must have correctly understood, under an
5 objective test which they don't disclaim in their amici
6 briefs.

7 JUSTICE KAGAN: But you're essentially
8 saying that the problem with the rule is that it
9 requires Abercrombie to engage in what might be thought
10 of as an awkward conversation, to ask some questions.
11 Now, people can disagree about whether one can ask those
12 questions in a way that's awkward at all, but you're
13 saying we should structure the whole legal system to
14 make sure that there is no possibility of that awkward
15 conversation ever taking place. But the alternative to
16 that rule is a rule where Abercrombie just gets to say,
17 we're going to stereotype people and prevent them from
18 getting jobs. We'll never have the awkward conversation
19 because we're just going to cut these people out and
20 make sure that they never become Abercrombie employees.

21 Now, between those two options, the option
22 of using a stereotype to make sure that somebody never
23 gets a job and using a stereotype to have an awkward
24 conversation, which does this statute seem to think is
25 the worst problem?

1 MR. DVORETZKY: Justice Kagan, the problem
2 is not having awkward conversations. The problem is
3 that the EEOC's rule would lead employers to treat
4 people differently based on their religion, which is
5 precisely the opposite of what Title VII wants. The --

6 JUSTICE GINSBURG: They -- Title VII
7 requires them to treat people who have religious
8 practice differently. They don't have to accommodate a
9 baseball cap. They do have to accommodate a yarmulke.

10 MR. DVORETZKY: But Title VII requires that
11 only after -- as the EEOC has said for 40 years -- only
12 after the employee or applicant places religion on the
13 table. Title VII does not want employers to be making
14 those judgments before the employee raises the issue.
15 And the concern that the EEOC raises here, that we're
16 going to have applicants who are completely in the dark
17 about work policies, has not been borne out by any --

18 JUSTICE BREYER: Okay. I got you. Is this
19 right? I've got, I think, your argument. Your argument
20 is it may sound odd to want a special rule as to when
21 you have belief or so forth, but for administrative
22 reasons, we have to have it. There are millions of
23 people who are practicing one religion or another where
24 you get a clue of that from their name or maybe their
25 dress or whatever it is. And whenever we have such a

1 person applying, if she doesn't say anything or he
2 doesn't say anything, and we don't hire them or we don't
3 do it, we're going to get sued. And we don't want all
4 those lawsuits. And it isn't that big a burden to say
5 to the person who wants the accommodation, tell us.

6 We get into some administrative rule about
7 how to elicit it from her without that simple rule, tell
8 us, we're going to be in a real administrative rat mess
9 getting sued left right and center. Have I got the
10 essence of your argument?

11 MR. DVORETZKY: That's right.

12 JUSTICE BREYER: Okay.

13 MR. DVORETZKY: And even asking the
14 neutral-sounding sort of question, can you comply with
15 the work rule, even that, is treating applicants
16 differently based on --

17 JUSTICE BREYER: Well, that isn't the end of
18 the world, perhaps. But you would say, look, we -- we
19 have thousands of managers and -- and goodness knows
20 they're going to get -- start getting resentful and dah,
21 dah, dah, dah. I mean, I just want to be sure I've got
22 the argument.

23 MR. DVORETZKY: That -- that is essence of
24 it. But part of the reason that I think this is very
25 significant is that under the EEOC's own regulations, if

1 the applicant -- if the employer asks the
2 neutral-sounding question and then chooses not to hire
3 the person for a religion -- for a reason completely
4 unrelated to religion, the EEOC will infer that there
5 was discrimination --

6 JUSTICE SOTOMAYOR: Frankly, this is such an
7 unusual case because it's very rare that you have an
8 interviewer like Ms. Cooke who's honest. And the only
9 reason there was a suit here was because she was honest
10 and came in and told someone else. But if this young --
11 this young woman wasn't about to sue until she heard
12 this information. Most people don't presume they're not
13 hired because of some religious practice. But if you
14 have a policy that conflicts with your religious
15 practice, and the person knows you're going to wear a
16 yarmulke, then you might get sued.

17 MR. DVORETZKY: Your Honor, I think many, if
18 not almost all Title VII cases do originate without any
19 sort of admission by the employer about what the reason
20 was for not hiring the individual. And I think that the
21 rule that places a burden on employers to stereotype and
22 to raise these sorts of issues is one that will
23 undermine the purposes of Title VII.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Gershengorn, you have five minutes left.

1 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

2 ON BEHALF OF THE PETITIONER

3 MR. GERSHENGORN: Thank you, Mr. Chief
4 Justice:

5 I'd like to make just two quick factual
6 points to clear up what I see to be some confusion in
7 the record.

8 First of all, there was some discussion
9 about whether, in fact, you needed to comply with the
10 Look Policy. I point the Court to 94(a), which the --
11 which the district court says -- 94(a) of the Petition
12 Appendix -- the policy applies to all store employees,
13 but applicants are not required to be in compliance at
14 the time of the interview.

15 There was some question about whether Cooke
16 knew or didn't know about the headscarf. It is crystal
17 clear that she did not know. The district court said it
18 is undisputed -- I'm sorry, that Elauf did or did not
19 know -- it is undisputed -- this is at 97(a) of the
20 court's opinion -- it is undisputed that Cooke did not
21 tell her that Abercrombie would not permit models to
22 wear headscarves or to wear black clothing.

23 The Look Policy script, should the Court
24 wish to look at it, is Plaintiff's Exhibit 4 in the
25 trial. It quotes what the Look Policy is. I will

1 caution that it is not in the summary judgment record,
2 it was admitted in the damages trial. But the Look
3 Policy is there and consistent with all of the
4 testimony, it does not mention headscarves.

5 JUSTICE BREYER: Do you want to say a word
6 about what I called his administrative argument?

7 MR. GERSHENGORN: So, Your Honor, I would.
8 I think the administrative argument actually cuts in our
9 sense -- in our favor in a couple of ways. First of
10 all, the suggestion that there are practical problems
11 isn't plausible. This has been the rule for two
12 decades. The Ninth Circuit, the Third Circuit, the
13 Seventh Circuit, everybody is applying the same test.
14 It's the Tenth Circuit that for the first time has
15 imposed these two new requirements.

16 Second, I don't think it's unadministrable
17 for exactly the reasons we talked about in my first time
18 up here. An employer can structure an interview to make
19 sure that critical rules are followed, and the employer,
20 if it wants, can make no assumptions about religion.

21 Justice Sotomayor, if I could pick up on
22 your point. I think what's important about this case
23 and why we think it's important, is precisely that it is
24 unusual. What is unusual is that the applicant found
25 out why she was not hired, and that is what's strange.

1 Most of the time, the person just never finds out that
2 no accommodation was made, that the employer assumed the
3 accommodation was -- would be needed and just never
4 told. And it's precisely why we --

5 JUSTICE SCALIA: That doesn't prevent a
6 lawsuit, of course. I mean --

7 MR. GERSHENGORN: It doesn't, Your Honor,
8 but --

9 JUSTICE SCALIA: She can sue and then find
10 out in the -- in the course of discovery, right?

11 MR. GERSHENGORN: They certainly could, but
12 --

13 JUSTICE SCALIA: And it happens often,
14 doesn't it?

15 MR. GERSHENGORN: No, Your Honor, I'm not
16 sure that it does. And I think this is what makes this
17 a very important case. It's because most applicants --
18 unlike employees, who are in a position to go back and
19 forth with their employer and understand the work rules,
20 applicants are at a serious informational disadvantage.
21 They don't know the work rules. And in this case, it is
22 undisputed that she did not.

23 And if I could just close then, picking up
24 on something Justice Kagan was pointing at, that the
25 background rule in Title VII is that belief is

1 sufficient. But what makes this case, we think,
2 particularly strong, is that this is belief plus an
3 assumption that -- where they acted on that belief and
4 they assumed that she would need an accommodation from
5 the work rule. That is certainly sufficient and the
6 Tenth Circuit was wrong to conclude otherwise.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:18 a.m., the case in the
11 above-entitled matter was submitted.)

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