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. :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, February 25, 2015

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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:

16   IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,

17   Department of Justice, Washington, D.C.; on behalf of

18   Petitioner.

19   SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of

20   Respondent.

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1   C O N T E N T S

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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 --

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 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
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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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