No. 22-15485

In the United States Court of Appeals
For the Ninth Circuit

RONALD HITTLE,

Plaintiff-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA, ROBERT DEIS, AND LAURIE MONTES,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of California, Sacramento Division
No. 2:12-cv-00766-TLN-KJN

BRIEF OF AMICI CURIAE SUPPORTING REVERSAL: SIKH COALITION, ASMA UDDIN, JEWISH COALITION FOR RELIGIOUS LIBERTY, AMERICAN HINDU COALITION, AND COALITION FOR JEWISH VALUES

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CORPORATE DISCLOSURE FOR AMICI CURIAE

None of the amici curiae are a corporation, so no disclosure statement (like that required of parties by Rule 26.1) is required.

/s/ Nicholas M. Bruno
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INTEREST OF AMICI CURIAE

This brief is filed on behalf of five organizations who seek to ensure protection of religious rights in the workplace.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. For over two decades, the Sikh Coalition has also led efforts to combat and prevent discrimination against Sikhs in the workplace, including by advocating for religious accommodations and against policies which require Sikhs to choose between their religious beliefs and their career.

The Sikh Coalition is deeply concerned about discrimination by employers against employees who assert their First Amendment right to freely exercise their religion, and how this discrimination disproportionately affects minority communities by failing to provide equal access to employment opportunities. The Sikh Coalition joins this brief in the hope that the Court will continue to protect religious rights in the workplace.

The Jewish Coalition for Religious Liberty is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. As members of a minority faith that adheres to practices that many in the majority may not know or understand, the Jewish Coalition for Religious Liberty has an interest in ensuring that others are prohibited from evaluating the validity of religious objectors' sincerely held beliefs. The Jewish Coalition for Religious Liberty is also interested in ensuring that employees' First Amendment free exercise rights are protected and that religious liberty is given broad protection.

The American Hindu Coalition is a nonpartisan advocacy organization based in Washington, DC, with significant membership chapters in several states, including California. Representing Hindus, Buddhists, Jains, Sikhs, and related members of minority religions that frequently experience workplace discrimination, the American Hindu Coalition files this brief since their religious practices may be unfamiliar to mainstream America. Religious freedom, including the right to live, speak, and act according to one's religious beliefs, peacefully and publicly, is an essential component of the American Hindu Coalition's political platform. The American Hindu Coalition joins this brief in support of the petitioner, Ronald Hittle, and is interested in ensuring that employees are protected in their free exercise of religion, a fundamental right protected by the First Amendment.

The Coalition for Jewish Values (CJV) is the largest Rabbinic Public Policy organization in America. CJV articulates and advances public policy positions based upon traditional Jewish thought, and does so through education, mobilization, and advocacy, including participating in amici curiae briefs in defense of equality and freedom for religious institutions and individuals. Representing over 2,000 traditional Orthodox rabbis, CJV has an interest in protecting religious liberty and practice, including religious practice by employees.

Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Ms. Uddin is a leading advocate for Muslim religious freedom and has worked on religious liberty cases at every level of the federal judiciary from the Supreme Court to federal district courts. She has defended claimants as diverse as Evangelicals, Sikhs, Muslims, Native Americans, Jews, Catholics, and members of the Nation of Islam. She is the author of the recent book WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM (2019).

No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29(a)(4)(E). There is no parent corporation or publicly held corporation that owns 10% or more of stock of any amici curiae. *See* FED. R. APP. P. 26.1(a); 29(a)(4)(A). The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The issues in this case are likely to have a significant impact far beyond the parties in this case or the particular religion and religious practices implicated in this case. Two particular issues warrant attention.

First, Title VII protections are important not only to the employee in this case, but also for members of minority religions. Members of these minority faiths routinely face discrimination in the workplace and often are required to rely on Title VII's protection so that they can exercise their First Amendment free exercise rights.

The importance of adhering to the principle that neither the government nor employers should second-guess an employee's sincere religious beliefs is also essential to members of minority religions. It is long established as a "fixed star in our constitutional constellation" that no one "can prescribe what shall be orthodox in . . . religion . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[I]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [an objector's] conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). The Court should adhere to this well-established principle.

ARGUMENT

Members of religious minority groups depend on the protections provided by Title VII to combat the religious discrimination that they encounter at the workplace. While Title VII is important to all religious observers, its protections are especially critical to members of minority religious groups.

Nor should employers (or district courts) be allowed to second-guess the validity of an employee's sincerely held religious belief or practice. If the law were to bless such second-guessing, experience has shown that members of minority religious groups—whose beliefs and practices are often not familiar to Americans generally and, thus, often misunderstood—would be forced to choose between their employment and their free exercise rights.

I. Adherents to minority religions depend on Title VII to protect them from direct religious discrimination.

Title VII is a valuable protection for religious liberty in the workplace—including for adherents to minority religious groups who would otherwise face the risk of discrimination in the workplace.

Title VII fits hand-in-glove with the First Amendment's guarantee of the right to freely exercise one's religion. "The Free Exercise Clause of the First Amendment protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson as next friend of O. C. v. Makin*, 142 S. Ct. 1987, 1996 (2022) (internal quotation marks omitted).

"[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* As a practical matter, full participation in public life for religious observers requires more than merely being free from state government policies that infringe on religious freedom. Congress recognized as much and acted to more fully protect religious freedom by enacting statutory protections for religious observers in the private marketplace.

Congress did so through the passage of Title VII in 1964. In 1972, Congress amended Title VII of the Civil Rights Act of 1964. As a result of that amendment, Title VII not only prohibits discrimination by employers on the basis of religion (along with protecting members of other protected classes) but also grants religion special solicitude by mandating that employers alter their ordinary practices to make space for their employees' religious beliefs and practices. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

Experience has taught that such protections are important to adherents of minority religions as they encounter the same stigma and discrimination that members of other protected classes face.

Examples of the direct discrimination faced by members of the minority faiths who are represented by the organizations filing this brief abound. Members of these faiths, for example, face direct discrimination for attending religious events.

Consider this Court's precedent in a case involving "Jerrold S. Heller, who is Jewish, [and was] a used-car salesperson." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436 (9th Cir. 1993). After initially receiving "permission to miss a Friday morning sales meeting" to attend his wife's "conversion ceremony," Heller's employer withdrew permission (and fired him). *Id.* This Court noted that Title VII existed to remedy such cases of religious discrimination even for voluntary religious practices:

> Title VII protects more than the observance of Sabbath or practices specifically mandated by an employee's religion: "[T]he very words of the statute ('*all aspects* of religious observance and practice . . . .') leave little room for such a limited interpretation. . . . [T]o restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, . . . but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion. . . . [S]uch a judicial determination [would] be irreconcilable with the warning issued by the Supreme Court in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953), "[I]t is no business of courts to say . . . what is a religious practice or activity." *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978)[.]

Id. at 1438.

The Court ultimately decided that case under reasonable accommodation grounds. *Id.* at 1438-41 (holding that the employer failed to reasonably accommodate Heller's religious practices). But it also explicitly recognized that Heller suffered direct discrimination because of his Jewish faith: "Heller . . . was discharged because of his refusal to comply with the employment requirements" as a result of "a bona fide religious practice . . . ." *Id.* at 1439.

District courts encounter similar cases of direct religious discrimination against Jews. *See, e.g.*, *Gross v. Hous. Auth. of City of Las Vegas*, No. 2:11-CV-1602 JCM CWH, 2013 WL 431057, at *3 (D. Nev. Feb. 1, 2013) (employee sufficiently pled she was "terminated on the basis of religious discrimination" because "she did not participate in Christmas activities or celebrations because she is Jewish").

Muslims, Hindus, and Sikhs also face religious discrimination. The discrimination is so prevalent that the Equal Employment Opportunity Commission has published special guidance for employers of employees "who are, or are perceived to be, Muslim or Middle Eastern." UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW: RELIGIOUS AND NATIONAL ORIGIN DISCRIMINATION AGAINST THOSE WHO ARE, OR ARE PERCEIVED TO BE, MUSLIM OR MIDDLE EASTERN, OLC Control No. EEOC-NVTA-0000-24 (Feb. 11, 2016), https://tinyurl.com/yc6ce9am. That report notes that employment discrimination against Muslims and Sikhs has increased in recent years:

> Recent tragic events at home and abroad have increased tensions with certain communities, particularly those who are, or are perceived to be, Muslim or Middle Eastern. EEOC urges employers and employees to be mindful of instances of harassment, intimidation, or discrimination in the workplace and to take actions to prevent or correct this behavior.

Id.

The EEOC has warned employers that they "may not make employment decisions-including . . . firing . . . on the basis of national origin or religion under Title VII . . . ." *Id.* Nonetheless, Muslims and Sikhs are often discharged from their employment because of their religion:

> In the initial months after the 9/11 attacks, the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims. As a result, EEOC initiated a specific code to track charges that might be considered backlash to the 9/11 attacks. . . . In the 10 years following the attacks, EEOC received 1,036 charges using the code, out of more than 750,000 charges filed since the attacks. Of the charges filed under the code, discharge (firing) was alleged in 614 charges and harassment in 440 charges. . . . . Since 2001, EEOC has filed or settled a number of lawsuits alleging discrimination on the basis of national origin and religion against the Muslim, Sikh, Arab, Middle Eastern, and South Asian communities.

Id.

As a result of this increase in discrimination against these religious groups, the EEOC's General Counsel began special outreach to (among others) "Jewish, Muslim, Sikh, Buddhist, [and] Hindu" leaders regarding Title VII issues. *Id.*

A case brought by a Muslim employee highlights discrimination begun by an employer's derogatory comments. This employee testified that her employer "approached her about her overgarments"—clothing that she wore because of her religion. *See Davis v. Mothers Work, Inc.*, No. CIV.A. 04-3943, 2005 WL 1863211, at *7 (E.D. Pa. Aug. 4, 2005) ("[S]he was wearing a 'Muslim outfit.'").

Her employer "routinely treated Davis differently than other employees because of her religious attire," including sending her home from work to change out of her religious garments, changing her work schedule, watching "her closer than other employees," and commenting on her garb. *Id.* Ultimately, the employer terminated Davis' employment. *Id.*

Employment is an important—indeed essential—aspect of participation in American society. Title VII ensures that members of minority religions are not made to choose between their faith and participation in the workplace. In each of the examples above, Title VII stood as an important line of defense for members of minority faiths facing direct discrimination.

Title VII protects the right to freely exercise religion for the adherents of any faith. Title VII is important for minority believers, as reflected by these employees' regular reliance on Title VII's protections. Amici urge that, in deciding this case, the Court remain aware of the importance of Title VII in ensuring that members of all faiths—but especially adherents to minority religions—are able to practice their religion by protecting them from having to choose between religion and employment.

II. Courts and employers should not second-guess sincerely held religious beliefs and practices.

The American tradition has long recognized that no one "can prescribe" for another "what shall be orthodox in . . . religion . . . ." *Barnette*, 319 U.S. at 642. That policy has allowed America to serve as a home to adherents of minority faiths—no matter how unusual or unpopular their beliefs or practices may seem to other Americans. By preventing discrimination from being a "motivating factor" in an employment decision, Title VII serves an important role in ensuring that an employer does not second-guess an employee's sincerely-held religious beliefs. *See* 42 U.S.C. § 2000e-2(m).

Government officials, including judges, have repeatedly been warned not to second-guess religious beliefs. This injunction is especially relevant to judges who dispose of Title VII claims without allowing an employee recourse to a jury. Courts have neither the expertise nor the authority to determine whether someone's "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). "[I]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [an objector's] conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. "[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot . . . act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.*

This Court has also noted that employers are bound by the same principle. They cannot choose only to honor religious beliefs that "are mandated or prohibited by a tenet of the religion" because doing so "would frequently require the courts to decide . . . what is a religious practice or activity." *Heller*, 8 F.3d at 1436.

The district court's opinion in this matter contradicts this well-established injunction against judging the validity of an employee's religious practice. The district court distinguished between ***voluntary*** exercise of religion and religious ***requirements***. *Hittle v. City of Stockton*, No. 212CV00766TLNKJN, 2022 WL 616722, at *5 (E.D. Cal. Mar. 2, 2022) ("[H]is religious beliefs did not ***require*** him to attend this event.") (emphasis added). The district court found that testimony that the employee was not required by his religion to take certain actions was "fatal" to his Title VII claims. *Id*.

An employer or a court has no place determining how a religion treats voluntary practices and religious requirements. The district court should have adhered to the statutory text and only determined if an employer "discriminate[d] against[] any individual because of his . . . religion . . . ." 42 U.S.C.A. § 2000e-2(c)(1). Once it was determined that "plaintiff's [religion] was one but-for cause of that decision, that is enough to trigger the law." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020). Adherence to this statutory text would have deterred the district court from opining on religious mandates versus religious practice.

The district court's reasoning is substantively no different from the type of argument the Supreme Court rejected in *Hobby Lobby*. In that case the government argued that "the connection between what the objecting parties must do . . . and the end they find morally wrong . . . is simply too attenuated." *Hobby Lobby*, 573 U.S. at 723. The Supreme Court rejected that argument and refused to "tell the plaintiffs that their beliefs are flawed," describing the inquiry proposed by the government as a "question that the federal courts have no business addressing[.]" *Id.* at 724.

The danger inherent in telling an employee what their religious beliefs entail is that the belief may be misinterpreted. This danger is especially pronounced for members of minority religious groups whose faiths are often unfamiliar to Americans. Accordingly, members of minority religions depend on courts to reject the fallacy that a person's "own interpretation of his or her religion must yield to the government's interpretation" of his faith. *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from the denial of certiorari).

Consider Sikhism. Sikhism is the fifth-largest religion in the world. SIKH COALITION, A BRIEF INTRODUCTION TO THE BELIEFS AND PRACTICES OF THE SIKHS (2008), https://bit.ly/3ioT3Gd. But it is a minority religion in the United States. How many American employers could name its three daily principles? *See id.* ("Work hard and honestly"; "[A]lways share your bounty with the less fortunate"; "[R]emember God in everything you do").

Sikhs display their commitment to their beliefs by wearing the Kakaars (five articles of faith): Kes (uncut hair, which men cover with a turban and women may cover with a scarf or turban); Kanga (small comb usually placed within one's hair); Kachera (soldier shorts traditionally worn as an undergarment), Kirpan (a sword-like instrument), or Kara (bracelet worn on the wrist). *Id.* May Sikhs be terminated from work if their employers—or federal courts—determine that these religious practices are "voluntary"?

These concerns are not merely hypothetical. One need not look far for cases that demonstrate the real-world discrimination against members of minority religions caused by others misunderstanding their religious practices.

Consider the Muslim faith. In *Holt v. Hobbs*, 574 U.S. 352 (2015), the Supreme Court confirmed that judges are not to question the merits of an individual's sincerely held religious beliefs. The district court made an error similar to the one made in the decision below by asserting that "not all Muslims believe that men ***must*** grow beards." *Id.* at 353 (emphasis added). Thus, according to the district court, no significant burden to an inmate's religion would be imposed by forcing him to shave—"his religion would 'credit' him for attempting to follow his religious beliefs." *Id.* Fortunately, the Supreme Court remedied the harm imposed by this erroneous interpretation by holding that the district court "went astray" in opining on the Muslim religion. *Id.* at 862-63.

The point relevant to this Court is that the Muslim faith can (and will) be misinterpreted if others erroneously try to tell Muslim employees what their faith entails. Devout Muslims engage in practices different than other Americans: praying five times a day at set times (Salat), attending congregational worship weekly on Fridays (Jum'ah), and annually observing two days of festivity (Eid). COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AN EMPLOYER'S GUIDE TO ISLAMIC RELIGIOUS PRACTICES (2017), https://bit.ly/2ZfzwjS. Potential for other misconception exists.

Due in part to these unique practices, Muslim employees are particularly vulnerable to workplace discrimination. Though only comprising 1.1% of the American population, Muslim employees submitted 19.6% of all EEOC complaints, and 26% of EEOC lawsuits were brought on behalf of Muslim employees. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, WASH. POST (June 21, 2016), https://wapo.st/2OdcJin (data from 2009 to 2015).

Adherents to the Jewish faith face similar misunderstandings of their faith. Consider a minority-within-a minority: the Orthodox denomination. While about 6.7 million Jewish people live in the United States, only about 10% of that population (about 670,000) belong to the Orthodox denomination. LUIS LUGO, A PORTRAIT OF JEWISH AMERICANS: FINDINGS FROM A PEW RESEARCH CENTER SURVEY OF U.S. JEWS 10, 25 (Oct. 1, 2013), https://tinyurl.com/fz9mczz6.

Orthodox Jews adhere to religious practices that are unfamiliar to most Americans—even to Jews belonging to other denominations. Some practices might appear trivial or insubstantial to a religious outsider, although they are essential to Orthodox Jews. This unfamiliarity of Americans with that faith has led to Jews being deprived of the right to freely exercise their religion when outsiders try to interpret the applicable religious tenants.

Consider the case of *Ben-Levi v. Brown*, in which a prison refused to let Jewish prisoners study the bible in the same manner as other inmates. 136 S. Ct. at 933 (Alito, J., dissenting from the denial of certiorari).

The district court found that the prison's denial was intended to protect "the purity of the doctrinal message and teaching" of Judaism, which, according to the prison, "requires a quorum or the presence of a qualified teacher for worship or religious study." *Id.* (internal quotation marks and citations omitted). The prison was mistaken. No such requirement exists. Unfortunately, this frolic into Jewish theology led the prison to prevent a Jewish prisoner from exercising his right to practice his religion. Deprivation of the inmate's ability to freely exercise his religion could have been avoided if this impermissible theological inquiry never happened in the first place. This error will recur if employees' religious beliefs are second-guessed.

Even more commonly known Jewish practices are often misunderstood by Americans. Consider a case previously decided by this Court—*Ashelman v. Wawrzaszek*—in which a prison attempted to offer Orthodox Jews "vegetarian" and "nonpork" meals instead of meals certified kosher. 111 F.3d 674, 675 (9th Cir. 1997), as amended (Apr. 25, 1997). The prison claimed that its plan was permissible because "the religious diet requirement for most inmates is met by the vegetarian or pork-free diet." *Id.* at 676.

The prison was wrong. By the time the case made its way to this Court, there was "no question that . . . one of the central tenets of Orthodox Judaism is a kosher diet." *Id.* at 675. Even in a case involving a practice more familiar to Americans generally, outsiders to the faith failed to interpret the practice correctly.

Title VII only requires courts to determine if an employer "discriminate[d] against[] any individual because of his . . . religion . . . ." 42 U.S.C.A. § 2000e-2(c)(1). Courts and employers should not be encouraged to second-guess an employee's religious beliefs. Adherence to this principle is especially important to adherents of minority religious groups whose faith is often unfamiliar to American employers—and to federal courts.

This Court should confirm that such a line of questioning, including any attempt to distinguish between mandatory and voluntary religious practices, is one that "federal courts have no business addressing." *Cf. Hobby Lobby*, 573 U.S. at 724.

CONCLUSION

Title VII's protections are important for adherents to minority religions who routinely face workplace discrimination for their faith. Additionally, it is important that courts do not impermissibly wade into theological debates by second-guessing an employee's religious beliefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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9th Cir. Case Number(s) 22-15485

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Signature */s/ Nicholas M. Bruno* **Date** September 7, 2022