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

CORRECTED BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC: ASMA UDDIN, JEWISH COALITION FOR RELIGIOUS LIBERTY, AMERICAN HINDU COALITION, COALITION FOR JEWISH VALUES, ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, AND COALITION OF VIRTUE

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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
Nicholas M. Bruno
Attorney of Record for Amici Curiae

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of amici seeking to ensure employees are protected in their free exercise of religion 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, D.C., 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 because 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 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 2,500 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. She 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 Christian Evangelicals, Sikhs, Muslims, Native Americans, Jews, Catholics, and members of the Nation of Islam. She is the author of recent books WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM (2019) and THE POLITICS OF VULNERABILITY (2021).

The Islam and Religious Freedom Action Team of the Religious Freedom Institute serves as a Muslim voice for religious freedom grounded in the traditions of Islam. To this end, the IRF engages in research and education, and advocates for the right of everyone to believe, speak, and live in accord with their faith.

The Coalition of Virtue's mission is to promote virtue in society, grounded in divine guidance as embodied in the Islamic tradition, in cooperation with those who share our moral vision. COV envisions an America where families have a say in their children's education, equal opportunities are available to all, and the highest good is championed.

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, their members, or their 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).

SUMMARY OF ARGUMENT

These amici previously briefed why this case is likely to have a significant impact far beyond the particular religion and religious practices implicated in this case. The panel's opinion raises additional concerns that warrant rehearing en banc.

First, Title VII protections are important not only to the employee in this case, but also to all members of religious minority groups. These persons 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 justification for the discriminatory comments made by this employer is disconcerting. The opinion described the employer's questioning of Hittle about an alleged "Christian coalition" as a "reasonable inquir[y] based on allegations of misconduct." Op. at 22, 26. It provides the roadmap for employers to justify similar impermissible inquiries into the practices of members of religious minority groups.

Second, one of the basic principles of the right to the free exercise of religion is that an employee's sincerely religious beliefs must not be second-guessed. "It 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); *see also Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436 (9th Cir. 1993). The Court should adhere to this well-established principle.

ARGUMENT

Title VII's protections are critical to members of religious minority groups, whose beliefs and practices are often not familiar to Americans. Members of religious minority groups depend on Title VII's protections to combat the religious discrimination that they encounter in the workplace. Members of minority religious groups depend on this protection so that they do not have to choose between their employment and their free exercise rights.

The panel's opinion provides a roadmap for employers to discriminate against members of religious minority groups by giving employers a free pass for using "pejorative terms" as long as the employer claims it has "concerns about other persons' perceptions." Op. at 22-23. That roadmap should be firmly rejected. Employers should not be allowed to second-guess the validity of an employee's sincerely held religious belief or practice, regardless of "other persons' perceptions."

I. Members of religious minority groups 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 members of religious minority groups. 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) (cleaned up).

"[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.

One such protection is Title VII, which Congress passed in 1964 and then amended in 1972. 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 E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

Experience has taught that such protections are important to members of religious minority groups just as they are important to members of other protected classes because members of religious minority groups encounter the same type of stigma and discrimination.

Examples of the direct discrimination faced by members of the religious minority groups who are represented by the amicus filing this brief abound. They, for example, face direct discrimination for merely attending religious events.

Consider 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.* at 1437. 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 (alterations in original).

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 wrongfully 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, including those in this Circuit, have encountered 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").

Other religious minorities also face religious discrimination in the workplace. For example, 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 religious garb. *Id.* Ultimately, the employer terminated Davis' employment. *Id.*

Discrimination against certain religious minority groups 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." U.S. EEOC, *What You Should Know: Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern*, (Feb. 11, 2016), https://tinyurl.com/yc6ce9am. The EEOC 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.

Furthermore, as acknowledged by the EEOC, 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.

Id.

As a result of the 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.*

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.* That injunction contrasts with this opinion—finding no viable Title VII claim, despite acknowledging that the "gravamen" of the decision to terminate Hittle was based on his religion. Op. at 29-30 ("[T]he gravamen of Largent's Report and the notice terminating Hittle was the religious nature of the leadership event, [but] a nexus to a protected characteristic is not enough to preclude summary judgment for the employer.").

So, what would happen if the Panel's decision were allowed to stand and an employer decides to terminate an employee, who is a member of a religious minority group, primarily because of the employee's religion? Could the employer's actions be justified "as reasonable inquiries based on allegations of misconduct that [the employer] had concededly received from others in language comparable to what they used"? *Id*. at 26. If being part of a "Christian coalition," *Id*. at 22, can be recast as a third-party's complaint and turned into "misconduct," *Id*. at 26, what about "wearing a Muslim outfit"? *Davis*, 2005 WL 1863211, at *7.

What about an employer who is concerned about public perceptions of a minority religion? Could such an employer's discriminatory "approach[] about [a Muslim woman's] overgarments," *id*., be justified as mere "concern[] about other persons' perceptions"? Op. at 22-23.

What about an employer's "perceptions" of an employee who is Hindu? Consider the following activities that often are a part of a Hindu's everyday life:

- Celebrating festivals that include temple worship during the work week;
- Praying before a meal;
- Fasting or not eating certain foods during certain festival periods;
- Shaving one's head for certain worship practices;
- Eating only vegetarian meals; and
- Handwashing before a meal.

Or what about employees who practice Judaism? Such employees may choose to pray together during the normal course of their life, especially at certain times of the day. Members of the Jewish faith may choose to gather together, for example, for these activities:

- Some Jews practice their faith by blowing a Shofar (rams horn) during the month before Rosh HaShanah (new years) each morning but after daylight at the end of prayers. Such employees may go to work early and pray in the office together.
- Some Jews bring the four species (four plants mentioned in the Torah) to the office during the holiday of Sukkos. Perhaps this may be visually curious but would not produce more than a rustling noise.

Would an employer's discrimination against such an employee be justified based on its concern about "others' perceptions" of a faith-based "coalition"? Op. at 22-23, 26.

Title VII protects the rights of all individuals to freely exercise religion in all their work. Employment is an important—indeed essential—aspect of life in American society. Title VII is, therefore, particularly important for members of religious minority groups, as reflected by their regular reliance on Title VII's protections in the workplace. In each of the cited cases above, Title VII stood as an important line of defense for members of religious minority groups facing direct discrimination. Title VII ensures that members of religious minority groups are not made to choose between their faith and participation in the workplace.

Amici urge the Court to rehear this case en banc to ensure that the protections of Title VII remain available to members of all faiths—and especially to members of religious minority groups. Otherwise, allowing "concern[] about other persons' perceptions" to justify an adverse employment action, the "gravamen" of which is of a "religious nature," will substantially hinder the protections of Title VII. Op. at 22-23, 29-30.

II. Title VII violations cannot be justified by second-guessing sincere religious beliefs and practices or by concern about favoritism toward religion.

Both the district court's opinion and this court's opinion—in different ways—run afoul of the principle that the government "can[not] prescribe" for another "what shall be orthodox in . . . religion[.]" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). That tradition allows America to serve as a home to many faiths. By preventing discrimination from being a "motivating factor" in employment decisions, Title VII serves an important role in ensuring that an employer does not second-guess an employee's sincere religious beliefs. *See* 42 U.S.C. § 2000e-2(m).

Government officials have repeatedly been warned not to second-guess religious beliefs. This admonition is especially relevant to judges who dispose of Title VII claims without allowing an employee recourse to a jury.

The panel did not correct the district court's opinion contradiction of this well-established admonition 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. 2:12-CV-00766-TLN-KJN, 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). It found that testimony that the employee's religion did not require him to take certain actions was "fatal" to his Title VII claims. *Id.*

But neither an employer nor a court has a place in determining how a religion treats voluntary practices and religious requirements. The district court should have adhered to the statutory text and only determined if Hittle's employer "discriminate[d] against[] [him] 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., Ga.*, 140 S. Ct. 1731, 1739 (2020).

One of the dangers inherent in telling an employee what their religious beliefs entail is that the employee's 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 religious minority groups 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—the fifth-largest religion in the world. THE 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"; "Always share your bounty with the less fortunate"; "Remember 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 employment if their employers—or courts—determine that these religious practices are merely "voluntary"?

The Muslim faith also has distinct religious practices unfamiliar to many Americans. Not surprisingly, Muslim employees are particularly vulnerable to workplace discrimination, as evidenced by the fact that they are involved in a disproportionate share of EEOC litigation. Devout Muslims engage in practices that are foreign to many Americans: praying five times a day at set times (Salat), attending congregational worship weekly on Fridays (Jum'ah), and annually observing festivities (Eid). COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AN EMPLOYER'S GUIDE TO ISLAMIC RELIGIOUS PRACTICES 5 (2017), https://bit.ly/2ZfzwjS.

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. That district court erred 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.

Adherents to Judaism face similar misunderstandings about their faith. Consider a minority-within-a minority: the Orthodox denomination. 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 omitted). But the prison was mistaken. No such requirement exists. 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. Unfortunately, this error will persist if employees' religious beliefs continue to be 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.

The point relevant to this Court is that minority religions can (and will) be misinterpreted if others erroneously try to tell employees who adhere to such religions what their faith entails. 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 second-guess an employee's religious beliefs. This is especially important to members of religious minority groups whose faith may be unfamiliar to American employers—and courts.

The panel's opinion, rather than correcting the district court, compounded the error by allowing an employer to discriminate against an employee based on the well-worn view that Establishment Clause concerns allow restrictions on religious liberty rights. The panel excused the employer's actions against Hittle as a purportedly "legitimate" concern about not favoring religion: "[T]hey reflect [the employer's] legitimate concern that the City could violate constitutional prohibitions and face liability if it is seen to engage in favoritism with certain employees because they happen to be members of a particular religion." Op. at 23.

This type of reasoning has been squarely rejected by the Supreme Court. A government unit recently tried to excuse its discriminatory conduct based on its "belie[f]" that acting otherwise "could violate the Establishment Clause." *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583, 1593 (2022). The Court rejected that excuse. *Id.*

The same reasoning applies to employers. An employer should not be allowed to shield itself from a Title VII violation by claiming that the Establishment Clause allows violations of religious liberty rights.

Adhering to this well-established principle is important to members of religious minority groups. Treating an employee differently out of a "concern" about other people's "perception" is precisely how discrimination against religious minorities is traditionally expressed. Op. at 30. One need look no further than the Bible's recounting of Haman's remarks against a "certain people." *See* Esther 3:8.

This Court should hold that an employer cannot justify violating Title VII out of alleged "concern" that behaving otherwise would be seen as favoring religion.

Similarly, the Court should remove all doubt about the impropriety of the district court's efforts to question an employee's sincerely held religious beliefs, including any attempt to distinguish between mandatory and voluntary religious practices, which 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 members of religious minority groups who routinely face workplace discrimination for their faith. The Court should grant Appellant's Petition for Rehearing En Banc.

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 18, 2023