Docket No. 24-3789

In the

United States Court of Appeals

For the

Ninth Circuit

MARLI BROWN and LACEY SMITH,

Plaintiffs-Appellants,

v.

ALASKA AIRLINES, INC. and
ASSOCIATION OF FLIGHT ATTENDANTS-CWA AFL-CIO,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for Western the District of Washington, No. 2:22-cv-00668-BJR · Honorable Barbara Jacobs Rothstein

AMICI CURIAE BRIEF OF AMERICAN HINDU COALITION, JEWISH COALITION FOR RELIGIOUS LIBERTY, AND ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Dated: October 16, 2024

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INTERESTS OF AMICI CURIAE[1]

This brief is filed on behalf of three organizations who seek to ensure protection of religious rights in the workplace.[2]

The American Hindu Coalition is a nonpartisan advocacy organization based in Washington, DC, with significant membership chapters in several states. 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 supports the appellants in ensuring that employees are protected in

[1] 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*, 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). All parties consented to the filing of this brief.

[2] Counsel for *amici* directs the Constitutional Litigation Clinic at Liberty University School of Law. The clinic allows third-year law students the opportunity to research and write in the area of constitutional litigation, including through the promotion of religious liberties. The clinic participated in the research and drafting of this brief. The clinic seeks to encourage a proper interpretation of Title VII's protection of religious employees, because such interpretation is keenly aligned with the clinic's purpose of—and *amici*'s interest in—advancing the protection of the individual freedoms that the United States Constitution prioritizes.

their free exercise of religion, a fundamental right protected by the First Amendment.

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 courts 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 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.

SUMMARY OF THE ARGUMENT

I. Title VII provides a definition of religion encompassing "all aspects of religious observance and practice, as well as belief." This is consistent with the Supreme Court's broad definition of religion and its repeated stance that courts should not be arbiters of religion. The district court's narrow approach that religious beliefs are not protected if they are not shared by all members of a religion, they are

shared by other religions, or they concern universal human precepts, departs from well-established law.

In maintaining a broad understanding of religion, courts have consistently held that religion under Title VII includes sincerely held beliefs. This is true regardless of whether the beliefs are held by all adherents of the faith. The Supreme Court demonstrated this principle in *United States v. Seeger, Welsh v. United States,* and *Holt v. Hobbs.* The Court in *Holt* stated, "Petitioner's belief is by no means idiosyncratic. But even if it were, the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" 574 U.S. 352, 362 (2015). Courts have rejected narrow definitions of religion and favored a functional approach, as seen in *International Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, and *Thomas v. Review Board,* where beliefs, even if not commonly shared, have received protection under Title VII.

In addition, sincerely held beliefs that parallel the beliefs of other religions similarly enjoy protection under Title VII. The district court's narrow approach—excluding beliefs that are shared by adherents of different religions—undermines this longstanding protection.

II. Not only does the district court's definition of religion go against the weight of precedent, but it also would have serious negative ramifications for people

of all faiths. First, the district court excluded religious beliefs that are not unanimously held by all adherents to a single religion. This exclusion necessarily forces courts to impermissibly examine the contours of a person's faith, which will inevitably lead to greater discrimination against minority faiths. This exclusion will also eliminate Title VII protection for many religious beliefs, because many religions have internal disagreements on doctrine.

Additionally, this definition also excludes beliefs that are held by multiple religions or that constitute "universal human precepts." This exclusion ignores two key realities about religion. First, many religious beliefs are held by multiple religions. Second, universal human precepts have a separate, religious significance to religious people, meaning they are sincerely held religious beliefs. Additionally, some universal human precepts may have their origin in religious belief, and courts should not penalize religious Americans because their beliefs have become widely, even universally, adopted.

ARGUMENT

The district court's definition of religion is two-fold, and both halves are mistaken. On the one hand, a religious practice or belief not shared by all members of a single faith is unprotected for being too narrow. And on the other hand, a religious practice or belief shared by multiple religions or that constitutes a "universal human precept" is "too vague to be considered 'religious' for the purposes

of Title VII." Mem. Op. at 16. This raises a "Goldilocks" problem: a religious practice or belief cannot be too narrow (such that there is disagreement within the religion), nor can it be too broad (such that it is shared by other religions or is a universal human precept). Rather, in the district court's eyes, a religious belief needs to be "just right" to be protected. And what religious beliefs and practices are "just right"?

This definition has no connection to religion as it is understood and experienced by people of faith. The court essentially told many religious Americans that they are mistaken, and that many of the beliefs that they consider central to their religions are not, in fact, religious at all. The result below is not only legally incorrect, but it will also have serious negative ramifications for people of all religions.

I. THE DISTRICT COURT'S DEFINITION OF RELIGION IS INCORRECT UNDER TITLE VII AND WOULD FRUSTRATE THE PURPOSE OF THAT STATUTE, TO PROTECT RELIGIOUS AMERICANS.

The district court's definition of religion is unduly restrictive. Under the court's definition, religious beliefs are not protected if they not shared by all members of a religion, if they are shared by other religions, or if they concern universal human precepts. This definition does not align with the correct understanding of religion generally and under Title VII. Title VII defines religion to include "all aspects of religious observance and practice as well as belief." 42 U.S.C. § 2000e. The district court's overly restrictive interpretation fails to recognize

constitutional and statutory protections guarding against discrimination based on religion.

A. The District Court's Definition of Religion is Unduly Narrow as it Excludes Beliefs Not Universally Shared by All Adherents.

Courts have been cautious about implementing an unduly narrow definition of religion. In *United States v. Seeger*, the Supreme Court defined religion as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." 380 U.S. 163, 176 (1965). The Court broadly defined religion in unambiguously functional terms. While *Seeger* dealt specifically with the Universal Military Training and Service Act, the EEOC adopted this test into Title VII. EEOC Compliance Manual § 12-I.A.1. (2008). It noted that "if religion were construed more narrowly for Title VII purposes, in the context of Section 6(j), then Title VII's proscription of religious discrimination would conflict with the First Amendment's Establishment Clause." EEOC Dec. No. 76-104, 12 Fair Empl. Prac. Cas. (BNA) 1359, at 2 (1976).

Moreover, contrary to the district court's narrow definition, the guarantee of the Free Exercise Clause is "not limited to beliefs which are shared by all of the members of a religious sect." *Holt*, 574 U.S. at 362. Further, in *Laviolette v. Daley*, a decision by the EEOC, the Commission recognized that even if members of a religious group do not all express a particular belief, the belief still warrants

protection. 2000 EEOPUB LEXIS 4858, *3-4, 100 FEOR (LRP) 1311, EEOC (IHS) 01A01748.

1. The District Court's Narrow Definition of Religion is not a Reflection of How Courts have Defined Religion.

While Congress did not define religion when it passed Title VII in 1964, the EEOC's expansive view of religion is like the Court's in *Seeger.* Specifically, EEOC's guidelines on discrimination provide that religion includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." EEOC Compliance Manual § 12-I.A.1. (2008). The Court in *Welsh*, citing *Seeger*, made clear that sincere and meaningful beliefs are not confined to traditional or parochial ideas of religion. *Welsh v. United States*, 398 U.S. 333, 339 (1970). The Court considered whether the beliefs function as a religion and play a role in the individual's life. *Id.*

When reviewing the Court's decisions, there is a notable progression from a narrow definition to a broader definition that includes more minority religions. This broader understanding of the religion extends to organized faiths such as Christianity, Jewish, Islamic, Hindu, and Buddhist groups, as well as to less widely known and even nameless religious groups. Barbara L. Kramer, *Reconciling Religious Rights & Responsibilities*, 30 Loy. U. Chi. L.J. 439, 443–45 (1999). Further, Title VII protects observances and practices such as specific clothing, hair, or grooming styles. For example, in *Bhatia v. Chevron, U.S.A., Inc.*, this Court held that a Sikh employee

whose religion prohibited him from shaving any body hair had established a prima facie case of religious discrimination. 734 F.2d 1382 (9th Cir. 1984).

Throughout the years, as courts have determined whether a belief or practice was protected under Title VII, they have been confronted with situations in which the practice or belief was deemed not to be a religion. The Supreme Court in *Seeger* excluded political, sociological, or economic considerations as religious beliefs. 380 U.S. at 178 (1965). Organizations such as the Ku Klux Klan and the Nazi Party do not enjoy Title VII protection because the goals of these organizations are predominantly social and political, rather than religious. Kramer, *supra*, at 446.

But here, Alaska Airlines' dismissal of Lacey Smith and Marli Brown based on their religiously motivated comments about the Equality Act should be heavily scrutinized. As the Supreme Court in *Seeger* held, political, sociological, or economic beliefs are not protected as religious under Title VII. Smith and Brown's beliefs are not driven by social or political ideology. Rather, Smith's and Brown's beliefs about the Equality Act and the sanctity of safe spaces for women are undoubtedly rooted in their religious convictions. *Infra* note 2. The appellants' comments are more closely aligned with religious precepts, doctrines, and requirements than with social or political ideology, rather than purely political or sociological objections. Courts have consistently ruled that moral or ethical

objections tied to deeply held religious beliefs are protected, even if they touch on societal or political issues, as in *Bhatia v. Chevron.*

2. The Courts Have Not Required Religious Beliefs to be Shared by All Adherents In Order to Qualify for Legal Protection.

The 9th Circuit has held that the key criterion under Title VII is the sincerity of the belief, regardless of whether it aligns with the tenets of any organized faith. *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987). The Supreme Court has echoed this very principle, stating:

> The guarantee of the Free Exercise Clause is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981). The Supreme Court has taken a strong stance on protecting religion, maintaining that religion is personal to the individual. Courts avoid being entangled in theological debates about religion, leaving individuals to practice their faith according to their own understanding. The emphasis is not uniformity among all members of a religion, but on the sincerity of the individual's beliefs. Indeed, "it hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 639 (2018).

In *International Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, the Machinists union and Boeing entered into an agreement that requires bargaining unit employees to pay initiation fees and dues to Machinists. *Int'l Ass'n of Machinists*, 833 F.2d 167. Nichols, a Boeing employee, requested an exemption from becoming a member and paying dues to the Union based on her religious objections. *Id.* While the Bethal Temple—the church Nichols attended—permits members to join or support labor unions, Nichols claimed that her personal study of the Bible led her to oppose unions. *Id.* at 169. This Court held that Nichols had a sincerely held religious belief of opposition to unions protected by Title VII and that the accommodation of those beliefs did not pose an undue burden to the employer. *Id*. at 169. A panel of this Court stated that "an employee who sincerely held religious beliefs opposing unions could be relieved from paying dues under Title VII, even if he or she was not a member of an organized religious group that opposes unions." *Id.* at 169.

As demonstrated above, this Court has recognized that religious beliefs are protected under Title VII, even when they are not shared by all adherents of the faith. Like Nichols, who held a sincere opposition to paying union dues in *International Ass'n of Machinists*, there is no requirement that Smith and Brown's sincere objections to the Equality Act are to be universally shared by all members of their religious group. Though Alaska Airlines encouraged open dialogue on its internal

platform, the company terminated Smith and Brown, labeling their comments as "hateful" and "offensive." This suggests that Alaska Airlines failed to provide the requisite level of protection for sincerely held religious beliefs. Just as this Court upheld Nichols' rights, it should afford Smith and Brown's objections the same protection.

B. The District Court's Definition of Religion is Narrow as it Doesn't Protect Religion that Encompasses Beliefs Common to Multiple Religions.

In finding that Smith and Brown failed to produce evidence linking their termination to their religious beliefs, the district court placed considerable weight on the fact that their views were shared by other religions and even by people with no faith at all. For the court, this fact rendered the belief in question a generic moral principle outside the scope of Title VII's protections.

For example, the court opined that "it is not evident from the record that Brown's concern for sexual predators gaining access to women-only spaces is grounded in religious belief at all, let alone Brown's Christian beliefs specifically . . . It simply defies credulity to claim that concern for the vulnerable is anything other than a universal human precept." Mem. Op. at 18. The court found it significant that Brown "was unable to point to any specific passage in the Bible, teaching of her religious leaders, or other religion-specific source for this principle, saying little more than '[a]ll I know is the conviction that I had in my heart to stand

up for vulnerable people as I—it was just so strong in my heart to do.'" *Id*. The court concluded that Brown lacked "specific religious grounding" for her belief, rendering it "a generic moral code expressing concern for the vulnerable" that was "simply too vague to be considered 'religious' for purposes of Title VII protections." *Id.*

Similarly, the district court dismissed as irrelevant Alaska Airlines' determination that the plaintiffs' belief in two sexes amounted to bigotry. That belief, said the court, "is not uniquely or even particularly a Christian viewpoint." *Id.* After all, observed the court, the plaintiffs' expert testified that the belief that "sex is binary and that there is a difference between men and women is a foundational belief of all three Abrahamic religions-Judaism, Christianity, and Islam." *Id.* In the court's view, this "cast[s] doubt on Plaintiffs' claim that Brown's comment was disparaged for its Christian character." *Id.* Since the belief that there are only two sexes "is neither unique to, nor a particular tenet of, Christianity specifically," the court concluded that Alaska Airlines did not discriminate against the plaintiffs by firing them for expressing that belief. *Id.*

The district court's line of reasoning fundamentally gets religion wrong. First, even if Brown could not, when put on the spot, point to a specific Bible verse urging compassion for the vulnerable, this is not a basis for denying that this is a religious value. First, virtues such as compassion for the vulnerable are dispositions of the soul cultivated over years in the believer's heart through the teachings and practice

of Christianity. They are grounded not only in verses of scripture and treatises of church authorities, but also in tradition handed down by the community of believers through generations. Such "habits of the heart" are religious in nature even if the believer is unable to call up, as if from a database, chapter and verse citations from which such teachings derive. A religious adherent may have heard that a certain idea or practice is an important part of their faith from their parents, teachers, and clergy a thousand times from the earliest days of their childhood, and yet not be able to cite the source of that obligation.

Moreover, as James Wilson, the founding father and associate Supreme Court Justice, observed, moral laws:

> may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner, they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.

James Wilson, *Lectures on Law* (1790), *reprinted in* 1 *The Collected Works Of James Wilson* 470 (Kermit L. Hall & Mark David Hall, eds., 2007).

That is, the mere fact that moral virtues are perceived in the heart, and the mere fact that they are shared by people across faiths, does not deprive them of their religious character: Indeed, the believer understands their very intuitiveness and universality to be evidence of their transcendent veracity and divine origin. This was

the view of Moses Maimonides, a 12th century Torah scholar and very respected authority in Judaism. He wrote:

> [T]he bad things to which the philosophers referred when they said that someone who does not desire them is more virtuous than someone who does desire them and restrains himself—*these are the things generally accepted by all the people as bad*, such as murder, theft, robbery, fraud, harming an innocent man, repaying a benefactor with evil, degrading parents, and things like these.

Moses Maimonides, "*Eight Chapters*', *in Ethical Writings of Maimonides* 79–80 (Raymond Weiss & Charles Butterworth eds., 1991) (emphasis added).

Likewise, speaking of the divine prohibition against things like murder and theft, and the divine command to establish justice, Maimonides said: "Even though we have received all of these commands from Moses . . . *they are concepts which intellect itself tends to accept*." Moses Maimonides, *Mishneh Torah, Kings and Wars* 9 (Rabbi Eliyahu ed., 2000) (emphasis added). The Torah contains 613 commandments known as mitzvot. Those commandments are divided between laws which can be understood by reason alone and those that cannot. Neither of these categories is more religiously important than the other. *The Logic of the Mitzvot*, Chabad.org, https://www.chabad.org/parshah/article_cdo/aid/2797/jewish/The-Logic-of-the-Mitzvot.htm.

Even a commandment that can be explained by reason "is an act of submission to the divine will, an act that recognizes that our finite minds cannot fathom the axioms that are the basis of our reality and must ultimately accept them on faith from

their divine conceiver." *Id*. The notion that the supra-rational commands are somehow holier than the rational commands is alien to Judaism. The difference between seemingly rational and seemingly supra-rational commandments is: "which of these two elements dominates." The commandment that cannot be explained by reason alone "emphasizes the supra-rationality of our commitment to G-d," while the seemingly rational commandment "stresses the function of the mitzvot as educators and enlighteners of human life." *Id.*

Islamic scholars agree. Abu Ishaq al-Shatibi, a seminal Spanish jurist who helped shape Islamic jurisprudence, wrote: "The sum of the essential aims of the law are five, and they are: preservation of religion, life, progeny, wealth, and the intellect. And the sages said: *they are taken into consideration in every religion.*" Abu Ishaq Al-Shatibi, 2 *Reconciliation Of The Fundamentals Of Islamic Law* 2 (1997) (emphasis added). Of these essential values, Abu Hamid al-Ghazali wrote: "It is impossible that any religion or any legal system which aims for the good of the people would fail to prohibit the neglect of these five values." Abu Hamid al-Ghazali, *On Legal Theory of Muslim Jurisprudence* (2012); *see also* Izz al-Din ibn Abdus-Salam, *Qawa'id Al-Ahkam Fi Masalih al-Anam*, Makatbul Kulliyat al-Azhariyya, 5–6 (1991) ("Most of the goods of this world and its harms are known by reason, and that is most of the divine law, since it is not hidden from the reasonable person, antecedent to the advent of divine law, that it is praiseworthy and good to secure

pure benefit, and to ward off pure harm, from the life of the human being and others.").

It is clear, then, that the court erred by failing to grasp that a religious believer's intuitive moral dispositions and commands are profoundly and essentially religious, even when those dispositions and commands are experienced by people of other faiths or even by non-believers, and even if the believer might struggle to produce specific citations to scripture for them. Far from constituting "a generic moral code" that is "simply too vague to be considered 'religious' for purposes of Title VII protections," the moral intuition for which Smith and Brown were fired sounds in the most profound, the most "noble and exalted," religious experience.

II. THE DISTRICT COURT'S DEFINITION OF RELIGION WILL NEGATIVELY IMPACT PEOPLE FROM ALL FAITH BACKGROUNDS

Furthermore, the district court's legally incorrect definition of religion under Title VII will also have serious negative ramifications on people of all faith backgrounds. Foundational to the notion of freedom itself in America is the freedom of religion. The Constitution gives special status and protection to religion because we have long recognized the special role that religion has played in American history, life, and culture. Not only does the Constitution preserve the religious liberties of all Americans, but Congress, recognizing the necessity of religious freedom, extended the protection of these liberties into the employment context through Title VII of the

Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* Title VII protects all Americans against discrimination by their employers for their religious practice and beliefs.[3] However, while protecting the religious liberties of all Americans is central to the notion of freedom itself, the district court's definition of religion places those liberties, and thus the freedom itself, in jeopardy.

A. Excluding Religious Practices and Beliefs That Are Not Unanimously Held by All Adherents to a Single Faith Severely Limits the Freedom of Religion for Members of All Faiths.

The district court's exclusion of religious practices and beliefs that are not unanimously held by all adherents to a single faith greatly impairs the liberties of all religions in two ways. First, this exclusion forces courts to weigh-in on a wide variety of doctrinal issues. Likewise, in making these determinations, the beliefs of religious minority groups are likely to be misinterpreted and likewise excluded from Title VII protection. *See infra* Section II.A.1.

Furthermore, this definition eliminates Title VII protection for most religious practices and beliefs. For most religions, both traditional and non-traditional, many doctrines are subject to some level of internal disagreement. As a result, under the

[3] While these protections are often thought of as applying to "traditional" religions—such as Christianity, Judaism, Islam, Hinduism, etc.—neither the First Amendment nor Title VII place any limits on what beliefs a person can hold. Indeed, "all forms and aspects of religion, however eccentric, are protected . . . ." *Cooper v. General Dynamics, Convair Aerospace Div., Ft. Worth Operation*, 533 F.2d 163, 168 (5th Cir. 1976) (emphasis added).

definition issued by the lower court, most sincerely held religious beliefs are not "valid" under Title VII. This will open people of all faiths to widespread discrimination in the workplace. *See infra* Section II.A.2.

1. Excluding religious practices and beliefs that are not unanimously held by all adherents of a single faith will force courts to weigh-in on doctrinal issues, which will lead to greater discrimination against religious minorities.

As the district court itself acknowledged, "Courts are frequently cautioned not to scrutinize the contours of a plaintiff's purported religious belief." Mem. Op. at 16. Indeed, such scrutiny goes against the very foundation of the religious freedoms found in the First Amendment. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-madison-memorial-and-remonstrance-against-religious-assessments-1785 ("Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence"). And likewise, the Supreme Court has unequivocally and repeatedly disapproved of such examinations, holding that "federal courts have no business addressing" whether a *particular religious belief* is reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *accord Int'l Church of the*

Foursquare Gospel v. San Leandro, 673 F.3d 1059, 1069 (9th Cir. 2011) ("[W]hile a court can arbiter the sincerity of an individual's religious beliefs, *courts should not inquire into the truth or falsity of stated religious beliefs*." (emphasis added)).

While this prohibition often arises in the context of First Amendment claims, it extends to Title VII claims as well. Courts simply lack the experience and authority to determine whether a person's "religious beliefs are mistaken or insubstantial." *Burwell*, 573 U.S. at 725. Furthermore, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. *Courts are not arbiters of scriptural interpretation*." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981) (emphasis added).

Despite this weight of precedent, the district court's definition of religion, when taken to its logical end, requires courts to examine an individual's sincerely held religious beliefs and weigh-in on issues of religious doctrine. This particular prong of the court's definition excludes a practice or belief that is not shared by all or even most members of a particular faith. It follows, then, that to determine whether a particular doctrine is widely held, a court must dissect and scrutinize an individual's sincerely held religious beliefs and determine its place within their faith.

Beyond being legally incorrect, this definition is inherently dangerous. When a court or a private employer interprets an employee's religious beliefs, there is a

high risk of misinterpretation. This is especially true when that employee is a member of a minority religious group, whose beliefs might be unfamiliar to a large portion of the population. Misinterpretations of an individual's faith will lead to her beliefs being excluded from Title VII protection, allowing employers to freely discriminate against her.

Muslims are one religious minority group that would be negatively impacted by this precedent. If a court attempts to tell a Muslim what his faith entails, it is in danger of misconstruing the tenets of the Muslim faith. For example, Muslims pray five times a day at set times; attend weekly, midday worship services on Fridays; annually observe a two-day festival; and have special standards of appearance for men and women. *See* Council on American-Islamic Relations, An Employer's Guide To Islamic Religious Practices (2017), https://www.cairma.org/wp-content/uploads/2017/05/Employer-Handbook-12-page-CAIR-MA.pdf. These practices often conflict with the traditional American workday and thus are ripe for misinterpretation by a court unfamiliar with the Muslim faith. For example, Muslim prayers can cause disruptions to a Muslim's work schedule and pre-scheduled work events, their worship and festival attendance can interfere with their work schedule and cause them to miss work, and their requirements for dress and grooming may interfere with their employer's dress code. *See id.*

Hindus are similar in this regard. Hinduism is also a minority faith in America, making up only 0.7% the population. *Religious Landscape Study*, Pew Rsch. Center, https://www.pewresearch.org/religious-landscape-study/database/#religions (last visited Sept. 24, 2024). They, too, have specific prayer and worship practices that are unfamiliar to the general population, and thus ripe for misinterpretation.

This concern for misinterpretation is not hypothetical. Muslims only make up 0.9% of the U.S. population, *see* Pew Rsch. Center, *supra*, but they account for 25% of all the religious discrimination claims filed. Council On American-Islamic Relations, *supra*, at 9; Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, Wash. Post (June 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/21/the-eeoc-religious-accommodation-claims-and-muslims/. Minority faiths like Islam already suffer disproportional discrimination, and a discriminatory legal standard will exacerbate this fact.

Islam is not the only religion that has been misinterpreted. Consider the case of *Ben Levi v. Brown*, in which a prison refused to let Jewish prisoners study scripture in the same manner as other inmates. 577 U.S. 1169, 1173 (2016) (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 quotations omitted) (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.

Even more widely 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 certified kosher meals. 111 F.3d 674, 675 (9th Cir. 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. Errors like these will certainly recur if employees' religious beliefs are second-guessed.

2. Most religious doctrines are subject to internal dispute, meaning most religious practices and beliefs are not protected under the District Court's definition.

Religious minority groups and minority sects are not the only ones who are negatively impacted by this definition. Rather, this definition will limit the religious liberties of all Americans who practice religion, because many religious doctrines are subject to some level of internal dispute. Indeed, the Supreme Court has found that "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and *the judicial process is singularly ill equipped to resolve such differences* . . . ." *Thomas*, 450 U.S. at 715 (emphasis added).

Consider Judaism, a religion of many live debates and controversies. If only uniformly held views were protected, then nearly nothing would be protected. For example, many Jews observe a ritual called Kaparot. Some interpret this ritual as requiring the ceremonial use and slaughter of chickens, while others believe it can be fulfilled by charitable giving. *See The Kaparot Ceremony*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/989585/ jewish/Kaparot (Last visited Sept. 25, 2024). Another tenet of Judaism subject to internal disagreement is the prohibition on shaving one's face. Some Jewish people believe that this prohibition only extends to blades, making at least some electric razors permissible, while others disagree and believe that both electric razors and blades are prohibited; in between these two poles are a wide variety of diverse opinions. *See, e.g.*, Rabbi

Moshe Heinemann, *Electric Shavers*, Kashrus Kurrents (Spring 2012), https://www.stark.org/articles/kashrus-kurrents/563/electric-shavers/. Lastly and perhaps most well-known is the Sabbath. There, too, different groups within Judaism disagree on how the Sabbath should be observed.

The same disputes arise in every religion, and despite these opposing views, there is no reason to doubt that all adherents hold their beliefs sincerely. The idea that a belief is not worthy of protection because not everyone agrees with it simply defies credulity. Nor does it mean that a particular adherent is not a "true" member of that religion. Courts have affirmed these practices—despite the internal disagreements—because "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas*, 573 U.S. at 715–16; *see, e.g.*, *Litzman v. New York City Police Department*, No. 12 CIV. 4681 HB, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (unpublished opinion); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002); *Cooper*, 533 F.2d 163; *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993).

B. Excluding "Universal Human Precepts" and Beliefs That Are Held by Multiple Religions Allows for Widespread Discrimination Against a Multitude of Different Religious Practices and Beliefs.

The court's exclusion of beliefs shared by multiple religions and "universal human precepts" ignores two key realities about religion. First, many religions (particularly Abrahamic religions) share similar beliefs and practices and are thus

open for discrimination under this definition. Second, while some of these "universal human precepts" have been adopted into culture at large, religious people adhere to them as commandments from God, making them sincerely held religious beliefs.

1. Many religious beliefs are held by multiple religions and thus will be excluded from protection under the district court's interpretation.

The district court's definition ignores the fact that many religious beliefs are held by multiple religions and thus are not protected. Specifically, the court cast doubt on the claim of religious discrimination against plaintiffs' beliefs on gender because "[t]he view that sex is binary and that there is a difference between men and women is a foundational belief of all three Abrahamic religions—Judaism, Christianity, and Islam." Mem. Op. at 17 (internal quotations omitted). The court further explained that the fact that these beliefs are widely held "cast[s] doubt on Plaintiffs' claim that Brown's comment was disparaged for its Christian character." *Id.* Another way of phrasing it is this: "The defendant's actions discriminate against *multiple* religions (including yours) and so they do not discriminate against your religion." Not only is this line of thinking contrary to precedent, *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (describing how a COVID restriction that potentially violated everyone's free exercise rights was discriminatory against Orthodox Jews), but it also undermines the very purpose of Title VII by eliminating protection for sincerely held religious beliefs.

This result is troubling for members of all faiths, and particularly members of Abrahamic religions. As the name suggests, Abrahamic religions share a common origin in the historical figure Abraham; they also share beliefs and practices that would lose protection under this definition of religion. For example, all three faiths practice circumcision, both Judaism and Islam may require men to wear beards, and both Christianity and Judaism use wine for sacramental purposes. Additionally, and perhaps most importantly, all three practice some form of prayer.

It is inconceivable that these practices and others should receive less protection simply because they are shared by multiple religions. However, under the district court's definition, that is exactly what will happen. An employer can—without legal consequence—harass his Jewish employee for discussing the use of wine in religious ceremonies, because the fact that Christians also drink wine for religious reasons might make it difficult for a court to determine that it is a Jewish belief. Likewise, if a Muslim is fired for wearing a beard, he has no legal remedy, because both Jewish people and Muslims wear beards for religious reasons, diluting that practice in the eyes of a court. An employer can freely fire a Christian for praying during the workday, because many religions practice prayer, "casting doubt on [the] claim that [the employee's prayer] was disparaged for its Christian character." Mem. Op. at 17.

2. The District Court's designation of common religious beliefs as "universal human precepts" disregards the faith-driven motivations behind them for religious persons.

Furthermore, the district court's definition disregards the faith-based motivations behind these "universal human precepts." There are many religious beliefs that the court would likely conclude are universal human precepts, because they have been adopted in wider circles. Some obvious examples include caring for the poor and needy, honesty, seeking justice, charitable giving, and a concern for the vulnerable. These might be seen as universal human precepts today, but many religious adherents believe that they have their origin in divine law. And those adherents believe that they are required to engage in those behaviors because God commanded it, separate and apart from the present existence of a universal human precept.

Many religions hold to the belief that human morality and universal human precepts are imbued onto humanity by God. *See, e.g.*, *Al-Qur'an* 7:33; *Romans* 2:15; *Exodus* 20:1–17; *Hindu Dharma*, part 4, chapter 3, https://www.kamakoti.org/hindudharma/part4/chap4.htm. Not only that, but most religions specifically command everyone to act in accordance with moral principles. *See, e.g.*, *Al-Qur'an* 2:177; *Romans* 2:6–8; *Isaiah* 1:17; *Hindu Dharma*, *supra*. As a result, because religious people are commanded by God to engage in behaviors which have since become universal human precepts, such precepts constitute

"sincere and meaningful belief[s] which occup[y] in the life of [their] possessor a place parallel to that filled by . . . God . . . ." *Seeger*, 380 U.S. at 176.

As sincere religious beliefs, these precepts should be protected with the full force of Title VII. Both statutory law and the Constitution give special status to religion, because we have long recognized the special role that religion plays in American history and American life. That role cannot be diminished simply because those ideas or practices become widely held. Doing so would have a perverse effect, undermining the protections for religion simply because religion played and continues to play such a consequential role in American life.

In the case at hand, the court considered the plaintiffs' concern for the vulnerable to be a universal human precept because it was "a generic moral code." In reaching this conclusion, the district court noted that the plaintiff "was unable to was unable to point to any specific passage in the Bible, teaching of her religious leaders, or other religion-specific source for this principle . . . ." Mem. Op. at 16. However, the Supreme Court expressly forbade such behavior: "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas*, 450 U.S. at 715. In fact, while concern for the vulnerable is certainly something that is broadly shared among both religious and nonreligious people, it is still a distinctly

religious belief and must be treated as such.[4] Title VII protects ordinary sincere believers, not merely theologians. An individual need not cite chapter and verse to articulate a belief worthy of protection.

CONCLUSION

Therefore, to continue robustly protecting the rights of religious employees as required under Title VII, this Court should reverse the district court's ruling.

Dated: October 16, 2024

Respectfully submitted,

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[4] Contrary to what the district court found, standing up for the vulnerable is also a distinctly Christian belief, despite Ms. Brown's inability to articulate its basis. The Bible is filled with commands to stand up for the weak and care for the least of these. *See, e.g.*, *Proverbs* 31:8–9 ("Open your mouth for the mute, for the rights of all who are destitute. Open your mouth, judge righteously, defend the rights of the poor and needy."); *Isaiah* 25:4 ("Learn to do good; seek justice, correct oppression; bring justice to the fatherless, plead the widow's cause."); *James* 1:27 ("Religion that is pure and undefiled before God the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.").

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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