No. 24-427

In the
# Supreme Court of the United States

RONALD HITTLE,
*Petitioner,*

v.

CITY OF STOCKTON, CALIFORNIA ET AL.,
*Respondents.*

**On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

**The Islam and Religious Freedom Action Team** ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

Amicus is concerned that discrimination in the context of reasonable accommodation requests is disproportionately directed towards adherents of minority faiths. This discrimination includes segregation, the failure to hire, and retaliatory or hostile work environments, all of which undermine the goal of equal access to employment opportunities. The issues at stake in this case relate directly to the

[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amicus certifies that counsel of record for all parties received notice of the intent to file this brief at least ten days before it was due.

right of practitioners of minority faiths in America to avail themselves of employment opportunities on equal terms. Amicus submits this brief in the hope that this Court will protect the religious rights of all Americans in the workplace.

## SUMMARY OF ARGUMENT

Under Title VII of the Civil Rights Act of 1964, employers may not fire their employees because of their religion. 42 U.S.C. § 2000e-2(a)(1). This Court's Title VII jurisprudence has strictly enforced that prohibition, and two principles from that jurisprudence are particularly important here.

First, just as "a coworker's dislike of 'religious practice and expression in the workplace'" cannot justify denying an employee's religious accommodation, it also cannot justify firing that employee. *Groff v. DeJoy*, 600 U.S. 447, 472 (2023).

Second, an employer's purported desire to avoid violating the Establishment Clause does not allow it to discriminate against religiously observant employees. "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022).

The Ninth Circuit undercut both of those core principles. First, it allowed the City to fire Hittle due to "concern about the perception of others." *Hittle v. City of Stockton*, 101 F.4th 1000, 1017 (9th Cir. 2024). Second, it endorsed the City's view that its conduct

was justified by "legitimate constitutional . . . concerns." *Id.* at 1014.

This ruling gives employers a license to discriminate against religious employees, and will be particularly harmful to Muslims. Negative stereotypes about Muslims mean coworkers and the public often have negative perceptions about visibly Muslim employees. For example, before *Groff*, Muslim employees were routinely fired because employers worried that signs of their faith—like a hijab—might make customers uncomfortable. *E.g.*, *Camara v. Epps Air Serv., Inc.*, 292 F.Supp.3d 1314, 1319 (N.D. Ga. 2017), *abrogated by Groff*, 600 U.S. at 466–67, 466 n.13.

Making clear that "public perception" is not a valid reason for discrimination can prevent a return to when employees had to make the "cruel choice of surrendering their religion or their job." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting). This Court should grant Hittle's petition for certiorari and reverse the Ninth Circuit's decision.

## ARGUMENT

### I. A public employer cannot fire an employee because of coworkers' perceptions or discomfort with religion, or to avoid phantom Establishment Clause violations.

Under Title VII, an employer may not "discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). An employer violates Title VII if an employee's religion is a

"motivating factor" of the discharge. 42 U.S.C. § 2000e-2(m). Title VII extends "favored treatment" to religious employees. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

The Title VII jurisprudence of this Court and the circuit courts of appeals reflects that favored treatment. Two principles from that jurisprudence are particularly relevant.

***First***, public perception or other employees' discomfort with religion does not excuse discrimination. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)); *see Groff*, 600 U.S. at 472 (noting "a coworker's dislike of 'religious practice and expression in the workplace'" is irrelevant under Title VII because, "[i]f bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself"); *cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (rejecting, in context of Establishment Clause, concerns "about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort" (alteration in original) (emphasis omitted) (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–780 (1995) (O'Connor, J., concurring in part and concurring in judgment))).

That principle flows from one of the key purposes of not only Title VII, but of all civil rights statutes: protecting minority groups from the irrational or discriminatory perceptions of the majority. *See King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994) (explaining that purpose of Title VII "is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination," and rejecting the view that discrimination can be excused "simply because it may be culturally tolerated outside of the workplace"); *see also Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 528 (4th Cir. 1986) (Wilkinson, J., concurring in part and dissenting in part) (recognizing "[a]ll racial prejudice is the result of subjective, irrational perceptions," and that various civil rights statutes "were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions"), *rev'd*, 481 U.S. 615 (1987); *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999) (explaining that the Americans with Disabilities Act was enacted to combat "discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities" (citation omitted)); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Thus, a coworker's discriminatory perception of a protected groups is properly the *basis* for a Title VII action, not a defense. *See, e.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318–19 (4th Cir. 2008) (reversing district court's grant of summary judgment for defendant in Title VII action where plaintiff

suffered "constant and repetitive abuse founded upon misperceptions" of Muslims, and explaining that Title VII ensures "our constitutional ideals of mutual respect"). That is true not only for claims of religious discrimination, *see id.*, but also for claims of discrimination against other protected classes, *see Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289–92 (3d Cir. 2009) (reversing judgment for defendants on Title VII claim where gender-nonconforming plaintiff experienced hostility from coworkers); *Smith v. City of Salem*, 378 F.3d 566, 571–75 (6th Cir. 2004) (same); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (same). Indeed, before its decision in this case, the Ninth Circuit regularly applied this Court's guidance that coworkers' perceptions and discomfort do not trump Title VII's protections. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) ("[Employers] must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination."); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("[P]roof that employees would grumble about a particular accommodation is not enough to establish undue hardship.").

***Second***, public employers cannot rely on concerns of hypothetical Establishment Clause violations as an excuse to fire religiously observant employees. As this Court explained in *Kennedy*, a government employer's reliance on a hypothetical Establishment Clause violation "hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and [the employer's] own Establishment Clause duties."

*Kennedy*, 597 U.S. at 542. But "there is no conflict between th[ose] constitutional commands . . . . There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause." *Id.* at 543. "An Establishment Clause violation does not automatically follow whenever a public school or other government entity 'fail[s] to censor' private religious speech. Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Id.* at 534–35 (alteration in original) (citation omitted); *cf., e.g.*, *Good News Club*, 533 U.S. at 119 (holding concerns about hypothetical Establishment Clause violation did not justify refusal to allow a religious club to use school facilities); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (finding Establishment Clause concerns do not justify denying eligibility of religious student newspaper for school funding). Ultimately, "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 597 U.S. at 543; *cf. Capitol Square*, 515 U.S. at 768 (plurality opinion) (rejecting argument that government action violates the Establishment Clause "whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement").

In fact, the circuit courts of appeals have long rejected employers' reliance on phantom Establishment Clause violations to justify discrimination. For example, in *Brown v. Polk*

*County*, a county employee was fired in part for participating in religious activities at work. 61 F.3d 650, 654 (8th Cir. 1995). *Brown* held that the county had violated Title VII and refused to credit the county's fear of violating the Establishment Clause as a basis for its discrimination. *Id.* at 659. Foreshadowing *Kennedy*, *Brown* explained that the county's argument "gives a dominance to the [E]stablishment [C]lause that it does not have and that would allow it to trump the free exercise clause," and that "government is charged with making sure that its activities are confined to the ample and well-defined space that separates" those two clauses. *Id.*; *see Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1212 (9th Cir. 1996) (finding ban on religious speech in a government office violates Title VII despite government contention that it prevents the appearance of favoring religion).[2]

This authority reflects courts' tradition of enforcing Title VII's goal of providing "favored treatment" to religious employees. *Abercrombie*, 575 U.S. at 775. But as explained next, the Ninth Circuit's decision below deviates from that tradition, warranting this Court's intervention.

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[2] Though some circuit courts of appeals previously evaluated government action to determine whether a reasonable observer may interpret the action as an endorsement of religion, that approach stemmed directly from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and "this Court long ago abandoned *Lemon* and its endorsement test offshoot," *Kennedy*, 597 U.S. at 534.

## II. The Ninth Circuit's decision below contradicts the two principles discussed above and empowers employers to discriminate.

***First***, under the decision below, a public employer may fire an employee for engaging in religious activity as long as the termination is motivated by "concern about the perception of others" rather than the employer's own "discriminatory animus." *Hittle*, 101 F.4th at 1017. Hittle proffered evidence that his supervisor had derogatorily described him and other Christian employees as a "Christian Coalition," inquired into his "off duty Christian activities," and told him he "should refrain from doing any" Christian activities with other firefighters. *Id.* at 1005 (citations omitted). The Ninth Circuit acknowledged that "Christian Coalition" was used as a pejorative. *Id.* at 1013 (citation omitted). And Ninth Circuit precedent recognizes that derogatory comments are direct evidence of discriminatory animus. *Id.* (quoting *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997)).

Even so, the Ninth Circuit held Hittle's supervisor's remarks were acceptable because the supervisor was not expressing her own concerns but relaying "concerns about other persons' perceptions." *Id.* Indeed, the Ninth Circuit emphasized that point throughout its opinion. *Id.* at 1017 ("There is no genuine issue of material fact that Montes and Deis were motivated by discriminatory animus toward religion, as opposed to concern about the perception of others."); *see id.* at 1018 (suggesting that the "real

issue" driving Hittle's termination was "public perception").

In other words, according to the Ninth Circuit, an employer can fire an employee as long as that action is intended to mitigate or prevent the discomfort of customers or coworkers, even if that discomfort is rooted in bias against religion. In adopting that reasoning, the Ninth Circuit splits with courts that protect members of minority faiths from their coworkers' hostile perceptions, *see, e.g.*, *Sunbelt Rentals*, 521 F.3d at 318, and harkens back to an era when discomfort with protected classes of minorities was too readily accepted as an excuse for discrimination, *see EEOC v. Sambo's of Ga., Inc.*, 530 F.Supp. 86, 88–89 (N.D. Ga. 1981) (excusing termination of Sikh employee who maintained religious beard on grounds that beard risked potential for "[a]dverse customer reaction[s]"), *abrogated by Groff*, 600 U.S. at 472.

***Second***, the Ninth Circuit's reasoning improperly accepted the City's concerns about potential Establishment Clause violations. In noting that the City informed Hittle that it was not "permitted to further religious activities" or "favor one religion over another," the Ninth Circuit described those remarks as reflecting a "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." *Hittle*, 101 F.4th at 1013 (citation omitted). But that is no "legitimate concern": avoiding hypothetical Establishment Clause violations does not excuse punishing employees for

engaging in religious activity. *See Kennedy*, 597 U.S. at 543.

The Ninth Circuit's reasoning therefore violates two core principles from this Court's Title VII jurisprudence outlined above. *See supra* Part I. By doing so, the Ninth Circuit undermines Title VII's goal of extending "favored treatment" to religious employees, *Abercrombie*, 575 U.S. at 775, and it exposes religious employees to the whims of majority misperceptions. As explained next, that exposure carries particularly dangerous risks for members of minority faiths.

## III. Allowing religious discrimination based on public perception or other employees' discomfort with religion will particularly harm those of minority faiths, including Muslims.

Muslim Americans are one of the most discriminated against minorities in the United States—and much of that discrimination stems from misperceptions and lack of understanding. Surveys show that around forty to fifty percent of Americans do not personally know a Muslim American. *See Survey Examines Perceptions of Muslim Americans*, New America (Nov. 1, 2018), https://tinyurl.com/MuslimPerceptions (hereinafter New America Survey) (finding 2 in 5 respondents did not personally know a Muslim American); Shibley Telhami, *Prejudice Toward Muslims is Highest Among All Religious and Ethnic Groups*, Brookings Inst. (Aug. 27, 2024), https://tinyurl.com/MuslimPrejudice (noting 54% of respondents did not know any Muslim people).

Despite hardly knowing their Muslim peers, Americans view Muslims less favorably than nearly all other minority groups, including Asians, Blacks, Hispanics, gays and lesbians, evangelical Christians, and Jews. *See* John Sides & Dalia Mogahed, *Muslims in America: Public Perceptions in the Trump Era*, Democracy Fund Voter Study Group (June 2018), https://tinyurl.com/MuslimsVoterStudy; *see also Feeling Toward Religious Groups*, Pew Rsch. Ctr. (July 23, 2019), https://tinyurl.com/PewReligiousSurvey (finding Muslims viewed less warmly than adherents of all other major religions).

These unfavorable views have led a substantial number of Americans to harbor hostile feelings towards Muslims: almost twenty percent of Americans would deny Muslims who are American citizens the right to vote, *see* Sides & Mogahed, *supra*, and one in three Americans are uncomfortable when they see Muslim Americans wearing a veil or Islamic attire, would be concerned if a mosque was built in their neighborhood, and believe that Muslims should be subject to extra screening at airports, *see* New America Survey, *supra*. Forty-one percent of Americans think that Muslims are more likely than others to encourage violence, fifty percent believe that Islam is not a part of mainstream American society, and forty-four percent believe there is a natural conflict between Islam and democracy. *See How the U.S. General Public Views Muslims and Islam*, Pew Rsch. Ctr. (July 26, 2017), https://tinyurl.com/PewRschMuslimSurvey.

Muslim-Americans' experiences reflect these hostile perceptions. In the year before one survey, nearly half of Muslim Americans reported being treated with suspicion, singled out by airport security or other law enforcement, called an offensive name, or physically threatened or attacked. *See id.* That number rose to sixty-four percent for Muslims whose clothing or appearance is distinctly Islamic. *See id.* Seventy-five percent of Muslim Americans believe there is "a lot" of discrimination against Muslims in America, and fifty percent report that, in recent years, being Muslim in America has become harder. *See id.*

Unfortunately, despite Title VII's protections, those experiences carry over into the workplace, and the misperceptions of Muslims can cause employers and coworkers to discriminate against them. For example, in *Guessous v. Fairview Property Investments, LLC*, a Muslim woman was fired by her supervisor who believed all Muslims are "'crooks' and untrustworthy." 828 F.3d 208, 211 (4th Cir. 2016). And in *Sunbelt Rentals*, a Muslim employee brought suit after coworkers used religiously charged epithets and often called him names such as "Taliban" and "towel head." 521 F.3d at 311 (citation omitted); *see Alzuraqi v. Grp. 1 Auto., Inc.*, 921 F.Supp.2d 648, 660 (N.D. Tex. 2013) (noting plaintiff was called "'towelhead'; 'raghead'; 'rock thrower'; 'sand nigger'; 'terrorist'; 'fucking Palestinian'; and 'fucking Muslim'"). Indeed, although only 1% of Americans are Muslims, Muslims submitted 19.6% of all EEOC complaints from 2009 to 2015. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, Wash. Post (June 21, 2016, 4:39 PM), https://tinyurl.com/44sx78ra.

Because coworker and customer discomfort is so frequently used as an excuse for discrimination, the U.S. Equal Employment Opportunity Commission ("EEOC") has issued specific guidance on it. For example, the EEOC advises that "[m]ere subjective offense or disagreement" and "general disgruntlement, resentment, or jealousy of coworkers" will not rise to the level of undue hardship justifying the rejection of an employee's request for accommodation. EEOC, Compliance Manual on Religious Discrimination §§ 12-IV.C.6(a), 12-IV.B.4 (2021), https://tinyurl.com/ReligiousGuidance. Illustrating the persistent problems faced by Muslim employees, the EEOC has specifically advised that refusing to hire someone because of a concern that customers or coworkers may be uncomfortable with their hijab is illegal. *Id.* § 12-IV.C.4(a).

While this guidance should be uncontroversial both as a matter of case law and public policy, the Ninth Circuit ignored it. Instead, the Ninth Circuit adopted a rule that shelters employers who fire employees based on public perception. The Ninth Circuit's decision risks sending religious employees back to an era when religious discrimination was regularly permitted.

Indeed, when public perception excuses employer discrimination, workplace discrimination flourishes. *Cf. Groff*, 600 U.S. at 465 (noting that the de minimis test, which allowed public perception to be used as a reason to deny religious accommodations, made it "harder for members of minority faiths to enter the job market"). For example, in *Camara*, a business owner concerned about "negative stereotypes and

perceptions about Muslims" fired a Muslim worker who wore a hijab. 292 F.Supp.3d at 1319. The court allowed her firing under the pre-*Groff* de minimis standard because her employer "was concerned about what his customers might think"—rather than his own religious animus. *Id.* at 1332. Though *Groff* abrogated *Camara*, *see* 600 U.S. at 466–67, 466 n.13, the Ninth Circuit's decision here echoes *Camara*'s reasoning.

Likewise, in *Webb v. City of Philadelphia*, a Muslim police officer was suspended for wearing a hijab. 562 F.3d 256, 258 (3d Cir. 2009). The court found no Title VII violation because the officer's uniform was essential to promote "a sense of authority and competence to other officers inside the Department, as well as to the general public." *Id.* at 261 (citation omitted). Presumably, the department believed fellow officers and the public would not view a Muslim woman wearing a hijab as competent. Again, the discrimination against her was excused because it came from public and coworker perception, not the police department's own bias.

Nor is it only Muslims who are harmed when courts defer to public perceptions about adherents of minority faiths. *See Sambo's of Ga.*, 530 F.Supp. at 88. Indeed, even beyond the religious context, members of minority-protected classes have historically suffered when courts defer to public perceptions. *See, e.g.*, *Shahar v. Bowers*, 114 F.3d 1097, 1108–09 (11th Cir. 1997) (accepting government employer's argument that, in order to accommodate "public perception" and "cohesion within the office,"

employer could rescind job offer after learning that plaintiff was a lesbian married to a woman).

Concerns about hypothetical Establishment Clause violations have also long been used as a shield for discrimination. For example, in *United States v. Board of Education for School District of Philadelphia*, the Third Circuit upheld a state statute prohibiting religious garb in public schools because of the importance of preserving "religious neutrality."[3] 911 F.2d 882, 893 (3d Cir. 1990); *see Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (finding Establishment Clause concerns validated employer not allowing an employee to display a Bible in his cubicle); *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990) (finding concerns about endorsing religion validated school district prohibiting a teacher from reading the Bible silently in view of students).

[3] In *Kennedy*, this Court cast doubt on the Third Circuit's decision in *School District of Philadelphia* by rejecting reasoning under which "a school could fire a Muslim teacher for wearing a headscarf in the classroom." 597 U.S. at 531.

## CONCLUSION

*Hittle* returns the Ninth Circuit and its nearly sixty million citizens to the pre-*Groff* and pre-*Kennedy* standards for religious discrimination. Under *Hittle*, the workplace rights of adherents of minority faiths will turn on the whims of public perception. And public employers evaluating religious accommodations will routinely be permitted to hide behind phantom Establishment Clause violations. Accordingly, to ensure that its Title VII jurisprudence is enforced, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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