No. 23-3265

In the United States Court of Appeals
For the Third Circuit

ALEXANDER SMITH,

Plaintiff-Appellant,

v.

CITY OF ATLANTIC CITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
District of New Jersey
District Court No. 1-19-cv-06865

BRIEF OF AMICI CURIAE SUPPORTING ALEXANDER SMITH: COALITION FOR JEWISH VALUES, AMERICAN HINDU COALITION, AND JEWISH COALITION FOR RELIGIOUS LIBERTY

BECK REDDEN LLP

Nicholas M. Bruno
nbruno@beckredden.com
1221 McKinney, Suite 4500
Houston, Texas 77010-2010
Telephone: (713) 951-3700

Attorney for Amici Curiae: Coalition for Jewish Values, American Hindu Coalition, and Jewish Coalition for Religious Liberty

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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. 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.

Coalition for Jewish Values is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals.

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

Religious liberty issues have a significant impact far beyond the parties in a case. First Amendment protections are not important to only a particular religion or religious practice. These amici wish to highlight two particular issues.

First, religious liberty protections are important not only to the specific employee in this case, but also to all members of religious minority groups. Members of religious minority groups routinely face discrimination in the workplace and often are required to rely on the First Amendment's Free Exercise clause and Title VII to protect their rights.

Second, one of the basic principles of the right to the free exercise of religion is that an employee's sincerely held religious beliefs must not be second-guessed. It is long established as a "fixed star in our constitutional constellation" that no one "can prescribe what shall be orthodox in . . . religion[.]" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "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, 1438 (9th Cir. 1993). The Court should adhere to this well-established principle.

ARGUMENT

Religious liberty protections are critical to members of religious minority groups, whose beliefs and practices are often not familiar to most Americans. Members of these groups depend on the protections of both the First Amendment's Free Exercise clause and Title VII to combat the religious discrimination that they encounter in the workplace. Such protections ensure that Americans do not have to choose between their employment and their free exercise rights.

Relatedly, employers should not be allowed to second-guess the validity of an employee's sincerely held religious belief or practice. Once it is clear that the employee's religious beliefs are sincere, no employer should evaluate the orthodoxy of that belief.

I. Members of religious minority groups depend on both the Free Exercise clause and Title VII to protect them from direct religious discrimination.

Protections for religious liberty in the workplace are invaluable for all Americans—including for members of religious minority groups. Title VII fits hand-in-glove with the Free Exercise clause of the First Amendment, which guarantees 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*, 596 U.S. 767, 778 (2022) (cleaned up). This ensures that "religious observers" are not "exclude[d]" "from otherwise available public benefits." *Id.*

Thus, under the Free Exercise clause, government actors cannot "proceed[] in a manner intolerant of religious beliefs[.]" *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). When a government policy contains individualized exceptions to what otherwise might be deemed a "generally applicable" policy, the policy is subject to more demanding scrutiny than a "neutral and generally applicable" policy that only "incidentally burden[s] religion." *Cf. id.* That is because "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* (quoting *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 884 (1990)).

Members of religious minority groups are especially aware of the rationale for subjecting government policies with individualized exceptions to more demanding scrutiny. "The creation of a formal mechanism for granting exceptions . . . 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude," often at some government actor's "sole discretion." *Id.* at 537(quoting *Smith*, 494 U.S. at 884).

Additionally, Title VII protects religious observers in the workplace. Congress has recognized that full participation in public life for religious observers requires more than merely being free from discriminatory government policies.

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 under Title VII are just as important to members of religious minority groups as they are 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 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*, 8 F.3d at 1436. 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. The 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.

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.*

It is no surprise that such potential for discrimination against members of minority religions exists given that the religious practices needing Title VII accommodation are often not familiar to many Americans. Consider the following activities that often are a part of a Hindu's everyday life:

- Celebrating festivals (including 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? Members of the Jewish faith may, for example, practice these activities:

- Some Jews practice their faith by washing their hands before they eat bread or using their own microwave because they cannot cook in a non-kosher microwave. It is not hard to envision how such employees may need Title VII accommodations in an office kitchen.

- Some Jews practice their faith by fasting on certain days or saying prayers before and after every meal. Again, such religious practices may require Title VII accommodations.

- Other Jewish practices, such as wearing head coverings for both men and married women, not shaving during certain periods of the year, eating outdoors in a hut on sukkot (possibly accommodated by a slightly extended lunch), or leaving early on Fridays to be home before the Sabbath may also require Title VII accommodation.

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 need to rely on Title VII's protections in the workplace. Title VII protects the rights of all individuals to freely exercise religion in all areas of their work, regardless of whether the majority of Americans are familiar with the particular religious practice at issue. Title VII stands as an important line of defense for members of religious minority groups facing direct discrimination so that they are not made to choose between their faith and participation in the workplace.

II. Religious liberty concerns bar second-guessing sincerely held religious beliefs and practices.

Factfinders, in some circumstances, may be required to grapple with the interplay between individuals who use religion insincerely to circumvent important government interests and the principle that the government "can[not] prescribe" for another "what shall be orthodox in . . . religion[.]" *Barnette*, 319 U.S. at 642. But these amici understand that the sincerity of Mr. Smith's beliefs are not contested. *See Smith v. City of Atl. City*, No. 1:19-CV-6865, 2023 WL 8253025, at *8 (D.N.J. Nov. 28, 2023) ("The Parties appear to agree that Plaintiff has established a *prima facie* case of failure to accommodate."). The Court should, therefore, ensure that its decision does not second-guess Mr. Smith's religious beliefs.

Once religious sincerity is accepted, judges should not second guess an adherent's understanding of his faith. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton*, 593 U.S. at 532 (quoting *Thomas v. Review Bd. Of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)). Adherence to that tradition that the government cannot determine "what shall be orthodox in . . . religion," *Barnette*, 319 U.S. at 642, allows America to serve as a home to many faiths.

The dangers inherent in dictating to an employee what his religious beliefs entail 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).

Questioning the orthodoxy of a person's religious practice takes several forms. Some district courts have undertaken efforts to determine the validity of religious beliefs by distinguishing 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). Religious liberty protections demand that courts reject any method utilized to second-guess the validity of religious practices, especially those that are unfamiliar to Americans.

Consider Sikhism. Although it is the fifth-largest religion in the world, it is a minority religion in the United States. THE SIKH COALITION, A BRIEF INTRODUCTION TO THE BELIEFS AND PRACTICES OF THE SIKHS (2008), https://bit.ly/3ioT3Gd.

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.* Sikhs' free exercise rights may be restricted, for example, by an official dress code that has a collateral effect of preventing the employee from wearing the Sikh turban or *Kara* or *Kirpan*, mandatory for the employee's religion.

The Muslim faith also has distinct religious practices unfamiliar to many Americans, like 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.

The religious practices of adherents to these minority faiths would be sincerely impaired if employers—or courts—were permitted to determine whether they were merely "voluntary" and warranted protection.

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 requirements of Muslim religion. *Id.* at 862-63.

Adherents to Judaism also face similar misunderstandings about their faith. Even commonly-known Jewish practices are often misunderstood. Consider *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. Again, the prison was wrong. By the time the case made its way to the Ninth Circuit, there was "no question that . . . one of the central tenets of Orthodox Judaism is a kosher diet." *Id.* at 675. Again, outsiders to the faith failed to interpret the practice correctly.

In *Ben-Levi v. Brown* 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. Again, outsiders to the faith failed to interpret the practice of a minority religion correctly.

Hypotheticals posed by well-meaning judges also demonstrate the dangers of frolics into theology. For example, during a fairly recent oral argument, a judge used the act of turning "on a light switch every day" as an example of an activity that was unlikely to constitute a substantial burden on religious exercise. *See* Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 2015 WL 3852811 (5th Cir. Apr. 7, 2015), available at goo.gl/L50Gt1 (last visited Mar. 16, 2024).

This hypothetical concerned adherence to Orthodox Judaism. To an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of a prohibition found in Exodus 35:3.

Consider another example of Jewish religious practice—the concept of a Mitzvah Kiyumis, where one gets credit for performing the commandment but is not obligated to perform that command.

Tzitzis, the fringes many Jews wear, are a common example. A person only has to have Tzitzis if the person wears a four-cornered garment, but many Jews have a custom to wear such a garment specifically to obligate themselves to wear Tzitzis. A dress code that did not allow an employee to wear anything but a uniform may impede a person's religious freedom even though wearing Tzitzis is not fully obligatory.

The point relevant to this Court is that minority religions can (and will) be misinterpreted if employers or the government erroneously try to tell adherents what their faith entails. Title VII only requires courts to determine if an employer "discriminate[d] against[] any individual because of his . . . religion," not to determine the tenets of that religion 42 U.S.C.A. § 2000e-2(c)(1). The First Amendment, likewise, bars any attempt to second-guess religious practices, a question that "federal courts have no business addressing." *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014)

Courts and employers should not second-guess an employee's religious beliefs. This is especially important to members of religious minority groups whose faith practices are often unfamiliar to American employers—and to courts.

CONCLUSION

Religious liberty protections are important for members of religious minority groups who routinely face workplace discrimination for their faith.

Respectfully submitted,

BECK REDDEN LLP

By: */s/ Nicholas M. Bruno*
Nicholas M. Bruno
nbruno@beckredden.com
1221 McKinney, Suite 4500
Houston, Texas 77010-2010
Telephone: (713) 951-3700
Facsimile: (713) 951-3720

Attorney for Amici Curiae: Coalition for Jewish Values, American Hindu Coalition, and Jewish Coalition for Religious Liberty

CERTIFICATE OF COMPLIANCE

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit. I certify that this brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) because it contains 3,499 words, which is less than one-half the maximum length of 13,000 words authorized for a party's principal brief, excluding the items exempted by FED. R. APP. P. 32(f). I further certify that this brief's type size and typeface comply with FED. R. APP. P. 32(a)(5) and (6), respectively, be-cause it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font. I certify that the text of the electronic brief is identical to the text in the paper copies to be filed with the Court. Finally, I certify that a virus check was performed on the PDF file of this brief with CrowdStrike Falcon malware scan and that no virus was found.

Dated: April 10, 2024

/s/ Nicholas M. Bruno
Nicholas M. Bruno

CERTIFICATE OF SERVICE

I certify that on April 10, 2024, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 10, 2024

/s/ Nicholas M. Bruno
Nicholas M. Bruno