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 *AMICUS CURIAE* DARREN SHEARER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

Darren Shearer is the founder and director of the Theology of Business Institute (TBI), a national organization that helps marketplace Christians explore and apply God's will for business. TBI produces teaching and tools to equip marketplace Christians to disciple their co-workers, companies, industries, and communities through biblical standards in business. Mr. Shearer also authors books, owns a publishing company, and produces a podcast and blog, all with the goal of helping Christians understand the importance of living out biblical principles in the workplace.

Mr. Shearer has dedicated his career to the principle that religion plays an important role in the workplace, and through his work he seeks to make this same truth made known to others. He seeks to empower religious employees to live out their faith in the marketplace. As such, the continued ability of people of all faiths to experience religious freedom at work is of the utmost importance to him.

As someone who knows and daily advocates for the value of marketplace Christianity, Mr. Shearer believes that the Ninth Circuit deeply erred when it allowed the

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, counsel for *amicus curiae* certifies that notice of intention to file this brief was given to opposing counsel at least 10 days before the deadline to file this brief.

City of Stockton to sanction the petitioner for attending a religious leadership conference, and he has a strong interest in seeing this Court correct the Ninth Circuit's error.[2]

SUMMARY OF THE ARGUMENT

Title VII grants distinctly preferential treatment to religious freedom in the workplace by affirmatively obligating employers to accommodate their employees' religious beliefs. In addition to its overall purpose, the lack of a knowledge requirement under Title VII makes it easier to hold employers accountable and therefore offers greater protection for religious beliefs. Title VII permits the punishment of an employer with discriminatory motives even if the employer does not have actual knowledge that the employee requires a religious accommodation.

The law in this country has historically treated religious liberty with high regard because it is among the most sacred of our freedoms. Indeed, the Founders sought to protect religion from majoritarian overreach. As such, American law has generally taken a favorable posture toward religion. This is evidenced by not only the various exemptions afforded to religious institutions but also the general tenor of Free Exercise Clause jurisprudence.

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2. Rena M. Lindevaldsen founded and formerly directed the Constitutional Litigation Clinic at Liberty University School of Law ("the Clinic"). Natalie C. Rhoads currently directs the Clinic. 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 *amicus curiae's* interest in—advancing the protection of the individual freedoms that the United States Constitution prioritizes.

But in the context of the modern corporate workplace, there is systemic pressure to keep religion out of work, like what happened to Mr. Hittle. Title VII prohibits such a result. Title VII recognizes the inherent value that religious liberty brings to the workplace. Religion enhances the workplace by creating a diversity of thought. When employees feel comfortable at work to live out their faith, they are more likely to enjoy their jobs and be more productive.

That freedom cannot be circumvented by an employer asserting Establishment Clause concerns. Nor can it be stifled by actual or hypothetical hostility from third parties. The Establishment Clause was crafted to work with, not against, an individual's freedom of religion. To dismiss the religious animus levied against the petitioner under a concern about violating the Establishment Clause warps the Establishment Clause into a modified heckler's veto that can trump genuine Title VII violations. This Court has never accepted such a position in the past and should not do so now.

ARGUMENT

I. TITLE VII ECHOES THE FIRST PRINCIPLES ENSHIRNIED IN RELIGIOUS LIBERTY JURISPRUDENCE: MERE NEUTRALITY TOWARDS RELIGION IS NOT ENOUGH.

Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer to discriminate against or to discharge any individual "because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). "Title VII does not demand mere neutrality with regard to religious

practices—that they be treated no worse than other practices." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). Instead, it grants them favored treatment, obligating employers not to "'fail to refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.'" *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)). "Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). Religious freedom jurisprudence is marked by preferential treatment for religion, and Title VII is no exception.

A. Title VII's Touchstone is Business Necessity but its Purpose is to Affirmatively Obligate Employers to Protect Religion.

There is no need to protractedly search for the congressional intent behind Title VII. The Act speaks loud and clear on its own. The objective of Congress was to achieve equality in employment opportunities and to remove barriers against protected classes. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971). Title VII seeks to protect religious freedom by raising the bar of protection for religion. Under Title VII, employers are not permitted to simply ignore or dismiss the religious beliefs of an employee. Rather, employers are affirmatively obligated to accommodate religion. As this Court has held, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

Title VII requires that the motive behind an employment opportunity not be based on discrimination against the protected class. To put it another way, an employer cannot use a neutral policy as a pretext to unconstitutionally discriminate based on religious beliefs. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. Thus, Title VII requires more than mere neutrality towards religion.

1. The absence of a knowledge requirement under Title VII indicates that religion should be afforded preferential treatment.

Title VII is a unique antidiscrimination statute because it does not impose a knowledge requirement on the government. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 773. In contrast, the Americans with Disabilities Act "defines discrimination to include an employer's failure to make 'reasonable accommodations to the known physical or mental limitations' of an applicant." *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A)). While Title VII is not concerned with the actor's knowledge, it does prohibit discriminatory motives. *Id.* This Court rejected the argument that an applicant must first show that an employer has "actual knowledge" of the need for an accommodation. *Id.* at 772. "Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." *Id.* Thus, an employer who seeks to avoid providing an accommodation may violate Title VII even if they only had a suspicion that such accommodation would be necessary. *Id.* at 773.

Through this holding, this Court realigned the spotlight of Title VII to shine brightly on the religious freedom protections of the applicant, just as Congress intended. Congress meant what it said—or, rather, what it did not say. "We construe Title VII's silence as exactly that: silence. Its disparate treatment provision prohibits actions taken with the motive of avoiding the need for accommodating a religious practice." *Id.* at 774. The lack of a knowledge requirement is significant because it holds the employer to a higher standard. By not requiring that the employer have actual knowledge, Title VII doubles down by punishing even a partial discriminatory motive. Just as the lack of a knowledge requirement makes Title VII unique, so does its preferential treatment afforded to religious freedom.

2. Title VII's all-encompassing definition of religion indicates that broad protections of religious freedom should be the standard.

If Congress intended Title VII to be narrowly applied, then it would have used narrow language in the statute. Instead, Congress painted with a broad brush. Title VII defines religion to "include[] *all* aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). This broad definition is consistent with religious liberty jurisprudence, as "[t]here can be no assumption that today's majority is 'right' and [minority religious groups] . . . are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others

is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 224–25 (1972).

B. Religious Freedom Protections Deserve More than the Bare Minimum of Mere Neutrality.

Treating religion with "neutrality" places those who subscribe to minority religions at particular risk because their only course of protection is through the political process. The "protections" afforded by the political process are often, unfortunately, whatever the majority believes to be right. This is not the kind of sham protection that the First Amendment was intended to provide. Why should such precious liberties be left to a changing political landscape? The First Amendment is intended to ensure that this nation's first liberties are protected.

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Indeed, "[o]ur constitutional commitment to religious freedom and acceptance of religious pluralism is one of our greatest achievements. . . . Almost 200 years

after the First Amendment was drafted, tolerance and respect for all religions still set us apart . . . and draws to our shores refugees from religious persecution from around the world." *Goldman v. Weinberger*, 475 U.S. 503, 523 (1986) (Brennan, J., dissenting). This is why "[a]t a minimum, [the First Amendment] prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 21 (2020) (Gorsuch, J., concurring) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). Indeed, Justice Scalia, when questioning how this Court in *McCreary County v. American Civil Liberties Union* could have claimed that the First Amendment both required neutrality toward religion and prohibited favoring religion, said the following:

> Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. . . . Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century.

545 U.S. 844, 889 (2005) (Scalia, J., dissenting). There is no historical or Constitutional support for the idea that religious liberty protections can be distilled down to mere neutrality. "The essence of all that has been said and written on the subject is that only those interests

of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

This Court affirmed as much in *Kennedy* when it discarded the *Lemon* test, with its emphasis on neutrality or endorsement, and adopted the history and tradition test, with its emphasis on coercion. *Kennedy*, 597 U.S. at 535. Rejecting the school district's argument that the Establishment Clause compelled it to sanction Coach Kennedy's prayers and thereby avoid the appearance of endorsement, this Court said the following:

> In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it.

Id. at 540–41 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014)). This rejection of neutrality in the Establishment Clause context goes hand-in-hand with the standard under Title VII.

In *Groff*, this Court repudiated the idea that Title VII only requires a *de minimis* cost, and it articulated a standard that emphasis "substantial increased costs in relation to the conduct of [the employer's] particular business." *Groff v. DeJoy*, 600 U.S. 447, 468, 470 (2023). The infamous *de minimis* cost standard came from one line in *Trans World Airlines, Inc. v. Hardison*, but that line came from a paragraph that mentioned the "unequal treatment of employees on the basis of their religion" and called the employee's Sabbath a "privilege." 432 U.S. 63, 84–85 (1977). That "language reflect[ed] concern not about over-encumbering employers or disrupting seniority systems but about avoiding preferential treatment of religion," which shows that the *Hardison* Court may have been attempting to implicitly abide by a neutrality standard in the Title VII context. Natalie C. Rhoads, Groff v. Dejoy *and Title VII's "Undue Hardship" Standard*, 18 Liberty U. L. Rev. 533, 550 (2023). When this Court overruled the neutrality or endorsement test in *Kennedy*, it made perfect sense that the lackadaisical standard in *Hardison* needed to be abandoned, too. Indeed, in the same way that non-endorsement is no longer the benchmark in a constitutional context, neither is it necessary or sufficient under Title VII. "Just like the government need not avoid acknowledging religion in the public square in a manner sensitive to an historical understanding of the Establishment Clause, employers may not suppress religion to create a neutrality that is no less discriminatory than it is a sham." *Id.* at 555 (footnote omitted) (citing *Kennedy*, 597 U.S. at 535–36).

1. The United States historically treated religious liberty differently from other liberties.

This country has a rich history of protecting and preserving a favored view of religious freedom. From statutory exceptions to religious exemptions, religion has received and should continue to receive favored treatment, because "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality." *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting). Not only has religion been given favored treatment, but it has been favored *intentionally*. "[W]hen the government relieves churches from the obligations to pay property taxes, when it allows students to absent themselves from public school to take religious classes, when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice. . . ." *Id.* at 891. These religious exemptions are just a few examples of how the law treats religion uniquely.

The first Congress passed resolutions asking President Washington to issue a Thanksgiving Day proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favors of Almighty God." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). This Court has acknowledged that "religion has been closely identified with our history and government." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963). Additionally, this Court has

recognized that "[t]he history of man is inseparable from the history of religion." *Engle v. Vitale*, 370 U.S. 421, 434 (1962). The government was and is tasked with the duty to affirmatively protect religion, not to idly stand by and allow religious beliefs to suffer discrimination. Inaction in the face of assaults on religious freedom in the workplace is effectively siding *against* religion.

2. Title VII protects the value of practicing diverse religions in the workplace.

The protections that Title VII affords employees in the workplace reflect the larger principle that the workplace is improved by a diversity of religious beliefs. This is no less true simply because an employee works for the government. When the government protects and preserves the right of citizens to express their religious beliefs freely, the workplace becomes a better environment for all. If people feel safe and encouraged to live out their faith in the workplace, they are more likely to enjoy their work and thus perform better as employees. It is not the job of the government to decide what viewpoints or religions are currently acceptable in the workplace. Rather, it is the job of the government to protect unpopular beliefs to ensure that religious freedom is preserved for all. If the government only safeguards beliefs that align with a general moral consensus, it fails to protect religious freedom in the truest sense. Religious liberty was never intended to be subject to the political process. Indeed, this Court has said the following:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We

> make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Zorach v. Clauson, 343 U.S. 306, 313–14 (1952). Accordingly, Title VII is worded to show no favoritism toward any specific set of beliefs; it allows for the flourishing of every religion. This means that for an employer to allow religion to flourish, it must, of course, not be *hostile* toward religion. Citizens should not have to stifle their religious beliefs simply because they work for the government. Furthermore, the Establishment Clause is not violated when the government protects religion as "[t]here is nothing unconstitutional in a State's favoring religion generally. . . ." *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring). However, the government does violate the Free Exercise Clause when it hides behind "neutrality" to foster hostility toward religion.

Mr. Hittle faced discrimination not because he generally lived out his beliefs but because he lived out beliefs that his employer did not like. Title VII does not give employers the discretion to decide what religious expression is or is not acceptable for the workplace. The employer must bend toward religious freedom, not the other way around. As it stands today, there are many hostile structural limitations that religious people of all faiths face in the workplace. For example, the Corporate Equality Index is a report that is published by the Human Rights Campaign Foundation to rate American businesses

on their treatment of their LGBTQ+ employees. Human Rights Campaign Found., *Corporate Equality Index 2023–24*, Hum. Rts. Campaign (Oct. 2024), https://www.hrc.org/resources/corporate-equality-index. Businesses are awarded points based on how well they fulfill non-discrimination policies towards LGBTQ+ employees. While the Corporate Equality Index does not rate the public sector, it is illustrative of the current acceptable beliefs in the workplace. Of course, not every religion will have tenants consistent with what the Corporate Equality Index promotes. However, this current system rewards employees and businesses who subscribe to certain sets of beliefs but simultaneously discriminate against beliefs that are not as socially acceptable. This is a double standard. These structural limitations create a general corporate pressure against expressing religion in the workplace, but this is entirely contrary to what Title VII was enacted to do. In this case, allowing Mr. Hittle's employer to sanction him for attending a widely accepted Christian leadership conference simply reinforces the idea that an employer has the discretion to dictate where an employee must source his ethical code. Title VII does not grant an employer such authority in the workplace. Such a result would be strikingly similar to the school district's constitutional error in *Kennedy*: the government had a "mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination." *Kennedy*, 597 U.S. at 543–44.

II. TITLE VII'S MANDATE TO PROTECT EMPLOYEE'S RELIGIOUS PRACTICES DOES NOT BOW TO HYPOTHETICAL ESTABLISHMENT CLAUSE CONCERNS.

Not only does Title VII prescribe an affirmative duty on employers to protect employee's religious beliefs, but that duty does not falter simply because an employer raises hypothetical concerns. An employee's right to practice his religious beliefs is not secondary to an employer's adherence to the Establishment Clause. Nor may an employer overcorrect by punishing an employee for his religious beliefs when his conduct has not created a genuine Establishment Clause concern.

Mr. Hittle's supervisor, Monte, displayed hostility towards Christianity in her interactions with him. Those interactions included repeatedly referring to a "Christian clique, . . . rais[ing] her voice when accusing him of taking part in a Christian Coalition," and repeatedly telling him that he "should not be doing this" in reference to his religious practices. *Hittle v. City of Stockton*, 76 F.4th 877, 883 (9th Cir. 2023). The Ninth Circuit dismissed this religious animus by interpreting it as merely "show[ing] concerns for other persons' perceptions." *Id.* at 888. Even assuming the Ninth Circuit's interpretation was accurate, these statements and this behavior still exhibit impermissible animus towards religion. This interpretation merely permits employers to substitute their own animus for the animus of others under the guise of concern. Concern over an observer's perception may have merit under the *Lemon* test, which gave more weight to the viewpoint of an objective observer, but that test and

its rationale have been abandoned. *Kennedy*, 597 U.S. at 534–35. However, this Court replaced the *Lemon* test with the history and tradition test, which certainly does not sanction discrimination in the workplace to accommodate the hostility of other employees. *Id.* at 535–36.

A. Establishment Clause Concerns Do Not Inherently Trump an Employee's Religious Freedoms Under Title VII.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Employers have tried with varying success to use this clause to justify denying religious accommodations and preventing their employees from freely practicing their religious beliefs. But this Court has cautioned against analyzing the Establishment Clause as "warring [against the Free Exercise Clause,] where one Clause is always sure to prevail over the others." *Kennedy*, 597 U.S. at 533. Instead, the Establishment Clause and an individual's freedom of religion are meant to be "complementary." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). This is because the Free Exercise and Establishment Clauses express a single truth that the Founders believed to be fundamental: "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). The Establishment Clause was crafted to work harmoniously with the Free Exercise Clause, and statutes like Title VII, which come alongside the guarantees of the First Amendment to similarly protect religion in the workplace.

These principles do not permit employers to take an anti-religious stance. Nor do they permit employers to disfavor one religious belief under the guise of "neutrality." *See* discussion *supra* Section I.B. This is because an individual's freedom to exercise his religion cannot be overcome by Establishment Clause concerns. *Kennedy*, 597 U.S. at 507. In *Kennedy*, this Court reversed the Ninth Circuit's holding that the Establishment Clause "trumps a teacher's right to" express his religious views, because it was founded on a "mistaken understanding of the Establishment Clause." *Id.* at 536. Yet only a year after this Court's correction in *Kennedy*, the Ninth Circuit once again employed that flawed understanding of the Establishment Clause by suggesting that an employer's Establishment Clause concerns trump the religious rights of employees under Title VII.

This line of reasoning turns the Establishment Clause into a weapon against an employee's religious exercise, permitting an employer to continuously censor conduct with which it disagrees because that conduct might offend someone else's sensibilities. But that position, when taken to its logical end, would countermand the very purpose of Title VII by permitting an employer to prioritize appearances over accommodation. Whether or not the danger of "endorsement" actually existed, an employer would still be free to censor religious activity as it pleased by merely citing Establishment Clause concerns. But the "Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Id.* at 514.

B. There is No Genuine Concern of an Establishment Clause Violation Simply Because of the Perception of Others.

Vague references to "constitutional prohibitions" are not enough to convert Monte's religious animus into actual actionable concerns. "In no world may a government[al] entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 597 U.S. at 543. Nor does the argument accepted by the Ninth Circuit—that the statements reflected others' actual or potential perceptions—serve as justification for an employer to forgo providing the protections mandated by Title VII. The Establishment Clause does not require us to stifle religious freedoms to hypothesize about or respond to the perception of others.

There are two perceptions that Monte was responding to: the perception of the high-ranking Fire Department manager and others after Mr. Hittle attended the Summit. Neither provide a reason to trump Mr. Hittle's Title VII right.

1. Others' hostility toward religion does not create an Establishment Clause concern.

The religious animus against Mr. Hittle began in 2010 after Monte received an "anonymous" letter sent by a high-ranking Fire Department manager that called Mr. Hittle a "corrupt, racist, lying, religious fanatic who should not be allowed to continue as the Fire Chief of Stockton." *Hittle*, 76 F.4th at 881. Only one month later, Monte called Mr. Hittle into her office, referred to a rumored "Christian Coalition," and inquired about and discouraged his private

religious practices. *Id.* She would do this on at least two other recorded instances. *Id.* Rather than interpret these inappropriate comments and questions about a protected area of Mr. Hittle's life as inappropriate animus, the Ninth Circuit stated that Monte was merely responding to the perception of others. *Id.* at 883. But perpetuating others' negative opinions and using those perceptions as one of the bases for adverse employment action is succumbing to a heckler's veto.

A heckler's veto occurs when a speaker is prohibited from speaking about an "unpopular cause . . . [because of] mutterings and unrest . . . [from] an unsympathetic audience." *Feiner v. New York*, 340 U.S. 315, 331 (1951). In the context of the Establishment Clause, "a group's religious activity can be proscribed on the basis of what the . . . members of the audience might misperceive." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). The Ninth Circuit suggested that the city was not acting with animus because Monte was merely parroting the hostility of others. But it was impermissible for her to give credence to the animus of others. This Court has repeatedly refused "to employ Establishment Clause jurisprudence using a modified heckler's veto" in this way. *Good News Club*, 533 U.S. at 119. This is because the very purpose of the Free Exercise and Establishment Clauses is to "guarantee the freedom to worship as one chooses." *Zorach*, 343 U.S. at 313–14.

Further, there can be no serious argument that permitting Mr. Hittle to exercise his religion as he desired would coerce others to do the same. This Court has emphasized that religious coercion was "among the foremost hallmarks of religious establishments

the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537. Thus, a governmental entity, including public employers, "may not coerce anyone to attend church." *Id.* It should go without saying that permitting a religious employee to attend a church conference does not coerce others to do the same. The Establishment Clause "does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

Nor does a heckler's veto free an employer from its duty to protect religious beliefs in the context of Title VII accommodations. "[A] a coworker's dislike of religious practice and expression in the workplace . . . is not cognizable to factor into the undue hardship inquiry." *Groff*, 600 U.S. at 472. "If bias or hostility to a religious practice or a religious accommodation provided a defense . . . Title VII would be at war with itself." *Id.* In addition, such an approach would be "giving effect to religious hostility," bringing Title VII out of line with corresponding constitutional doctrines. *Id.*

2. The use of public funds does not inherently violate the Establishment Clause.

Furthermore, neither the fact that Mr. Hittle went to a leadership event with religious ties using a city vehicle nor the fact that he attended the event during the city's time provides a reason to punish him. He attended the Global Leadership Summit ("the Summit") during the city's time to fulfill the requirements of his job. His supervisor ordered him to find and attend a training program and indicated that his continued employment might depend

on an increase in his leadership skills. Mr. Hittle was unable to find non-religiously affiliated leadership training programs within the city's budget. But even if he had been able to find such a program, it is incoherent to argue that he must forego a "religious" training for a "secular" one.

To start, "secular" training, while not grounding itself in the teaching of an organized religious group, is nonetheless infused with principles and teachings in the same way that "religious" training is. The only difference is the source of those principles. Further, while the Summit provides certain leadership training through a Christian lens, it develops the same leadership values as secular training. The Summit offers Professional Development Credits and Continuing Education Credits, and it is recognized by the "Montana Nurses Association, an accredited approver with distinction by the American Nurses Credentialing Center's Commission on Accreditation." *Continuing Education Earn Credit at the Summit*, Global Leadership Network, https://globalleadership.org/summit/education (last visited Nov. 11, 2024). Mr. Hittle took advantage of these professional development services because he attended more than just lectures from religious leaders; he also listened to "several business oriented non-religious speakers." *Hittle*, 76 F.4th at 883. In doing so, he completed the same training hours that similar non-religiously affiliated credit programs would have required. He just completed them through a program that shared his core principles and values.

But more importantly, neither the Constitution nor Title VII permit the city to penalize a religious employee for choosing a "religious" activity over a similar "secular" one. *Everson*, 330 U.S. at 18 ("T[he First] Amendment

requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."). As noted by this Court in *Kennedy*, the true test to determine whether an employee's permitted conduct triggers an Establishment Clause violation turns on "historical practices and understandings." *Town of Greece*, 572 U.S. at 576. It is undeniable that the historical understanding of the Establishment Clause, indeed one of its original purposes, was to forbid the government's "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668. But this Court has never gone so far as to interpret this proscription as barring public funds from *ever* going to entities with religious ties. *See, e.g.*, *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017) (requiring that a religious nonprofit be allowed to apply for state funding to repave playgrounds). Furthermore, here, public funds were not even furnished directly to a religious entity. Hittle did not use public funds to pay for the tickets to attend the Summit; they were a gift. *Hittle*, 76 F.4th at 882. The only apparent concern was that he and those who attended with him went "on city time using a city vehicle . . . [and were] paid their regular compensation during their attendance." *Id.* at 883.

At best, in making her statements and ultimately terminating Hittle, Monte was inventing a hypothetical concern that the public would see Hittle's on-duty attendance at the Summit as an endorsement of religion. A response to phantom concerns over the appearance of the use of public funds is also insufficient to justify

adverse employment action against Hittle, because such justifications for interfering with religious rights "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). This concern is, yet again, nothing more than a heckler's veto and an improper understanding of the Establishment Clause.

Further, as this Court noted in *Trinity Lutheran*, a governmental entity singles out religion for disfavor when it excludes an entity from a general program simply because of its religious ties. *Trinity Lutheran*, 582 U.S. at 450. Excluding Hittle from going to *this* particular training program to fulfill his work obligations is "an odious exclusion" of Christianity made under the guise of neutrality. *Id.* at 467.

CONCLUSION

The enactment of Title VII was an acknowledgment of the indispensable value of religious freedom in the workplace. Religious liberty is special and should therefore be afforded special treatment. An integral part of that special treatment is the affirmative duty that Title VII has imposed on employers to accommodate employees' religious beliefs. By responding to the hostility of others and firing Hittle for attending a religious leadership training program, the city of Stockton has failed to meet its duty. Additionally, the Establishment Clause does not trump an employee's constitutionally guaranteed freedom of religion. Nor was it created to serve as a modified heckler's veto or allow employers to initiate adverse employment action merely because of a negative perception of religion that other employees hold.

Therefore, to continue its robust protection of religious employees, this Court should grant Hittle's petition.

Respectfully submitted,

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