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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Robertson Center for Constitutional Law is an academic center within the Regent University School of Law. Established in 2020, the Center pairs scholarship and advocacy to advance the first principles in constitutional law, including religious liberty and the rule of law. The Center regularly represents organizations from various faith traditions that support religious freedom and rights of conscience. Accordingly, the Center is interested in ensuring that religious Americans of all faiths receive the full protection afforded by the Constitution and Title VII.[1]

SUMMARY OF ARGUMENT

Respondents have gone to great lengths attempting to show that Chief Hittle was dismissed for neutral and nondiscriminatory reasons. But the words and actions of his supervisors and the purportedly neutral investigator show they were motivated by anti-religious bias that tainted the entire process. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 624–25 (2018) (warning against applying neutral rules against religious groups and individuals in a non-neutral manner); *see also Fulton v. City of*

[1]Under Rule 37.2, *amicus* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Philadelphia, 593 U.S. 522, 533 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."). This Court should not allow religious animus masquerading as "concerns" and "perceptions" to trump Title VII. Indeed, as this Court has held, even a slight suspicion that animosity toward religion or its practices may have motivated government action should cause government officials to "pause and reflect on their own duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

The Ninth Circuit held discriminatory remarks do not violate Title VII when they are repeated by management to "show[] concerns about other persons' perceptions." *Hittle v. City of Stockton*, 76 F.4th 877, 888 (9th Cir. 2023); *see also Hittle v. City of Stockton*, 101 F.4th 1000, 1018 (9th Cir. 2024) [hereinafter cited to Appendix]. But there is no place in Title VII for such a heckler's veto. In fact, this Court's First Amendment and Title VII cases reject that argument.

In *Kennedy v. Bremerton School District*, the Court rejected the claim that endorsement concerns under the Establishment Clause allowed a school district to prevent a football coach's on-field, post-game prayer. 597 U.S. 507, 534–37 (2022). Further, in a recent Title VII case about religious accommodations, *Groff v. DeJoy*, this Court confirmed that coworkers' dislike or hostility toward religion is "'off the table' for consideration" of whether there is an "undue hardship" to the employer in accommodating a religious practice. 600 U.S. 447, 472 (2023). The common thread running through

these cases is that neither the Constitution nor Title VII permit a heckler's veto that proscribes religious practice based on "perceptions" or "discomfort." *See Kennedy*, 597 U.S. at 534 (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001)). That principle applies here.

This Court should grant the petition for a writ of certiorari to correct and prevent the misapplication of Title VII to practices considered by critics to be too religious.

ARGUMENT

The Ninth Circuit held that discriminatory remarks do not violate Title VII when they are parroted by management out of concern for others' perceptions. *See Hittle,* App. 35a ("When discriminatory remarks are merely quoting third parties and the real issue is public perception or other forms of misconduct (such as engaging in an activity that does not benefit the employer), there is no genuine issue of material fact that the employer was discriminatory."). That understanding of Title VII conflicts with this Court's First Amendment decisions, its Title VII decisions, and one of the key purposes of Title VII itself—to enable religious employees to exercise their faith without fear of losing their jobs.

Chief Hittle was subjected to an inquiry regarding his religious practice that was neither neutral nor respectful. *See Masterpiece*, 584 U.S. at 634. After being instructed by his supervisor to attend (presumably at city expense) some type of public sector leadership training, Chief Hittle

reviewed several training programs, all of which were outside California or too expensive. Unable to find a suitable program, Chief Hittle was eventually given four tickets to the Global Leadership Summit at Willow Creek (the Summit), free of charge. App. 11a. He decided to attend.

After he and three of his coworkers attended the Summit in a city vehicle and on city time, Chief Hittle was disciplined for—as his supervisor Robert Deis described it—"us[ing] public funds to attend religious events; even if under the guise of leadership development." App. 12a. Ms. Largent, the City's "independent" investigator, called the Summit "a religious event" because it was held at a church, and she characterized it as serving to benefit only "those of a particular religion." App. 15a. According to Ms. Largent, the fact the event was religious "should have alerted Hittle that his participation and that of his managers would not be appropriate." *Id.* In fact, as the Ninth Circuit previously recognized, the allegedly inappropriate religious character of the Summit was the "gravamen" of Largent's Report. App. 50a. At other points in the process, Chief Hittle's supervisors repeated "discriminatory remarks," App. 29a, 35aa, such as the claims that he was part of a "Christian coalition" or a "church clique," app. 8a, 15a.

Chief Hittle sought Title VII's protection, but the Ninth Circuit held he had no recourse. The Court found the discriminatory statements from Hittle's supervisors were justified because his supervisors were concerned about perceptions of "favoritism" by some of Chief Hittle's coworkers. *See* App. 25a.

Such an interpretation of Title VII would grant the statute's protection only when a religious

employee's coworkers are friendly to religion. That is wrong, and it threatens to strip countless others of Title VII's protection.

I. Hostility Toward Religious Beliefs on Purportedly "Neutral" Grounds Cannot Stand.

A. The Constitution Demands "Neutral and Respectful Consideration" of Religious Activity.

This Court recently reiterated its instruction that States have an "obligation of religious neutrality" and that "religious hostility on the part of the State itself" is not acceptable. *Masterpiece*, 584 U.S. at 615. Thus, when individual religious practices are in question, they are entitled to "neutral and respectful consideration" free of any "hostility" towards religion. *Id.* at 634.

In *Masterpiece Cakeshop*, this Court found negative comments by members of the Colorado Civil Rights Commission directed at religious beliefs and practices to be particularly indicative of anti-religious bias by government actors. *Id.* at 634–35. Specifically, it criticized comments by members of the Commission who implied, or said outright, that religious beliefs cannot legitimately be carried into the public square, or that religious people could believe what they want, but could not act on their religious beliefs if they desired to do business in the state of Colorado. *Id.* The Court opined that these "inappropriate and dismissive comments" showed a "lack of due consideration" for free exercise rights and

the dilemma faced by religious individuals striving to navigate the challenges of living a faithful life in a diverse and sometimes hostile culture. *Id.* at 635. The Court criticized the Commission for neglecting its "solemn responsibility of fair and neutral enforcement" of a law that, like Title VII, protects against discrimination. *Id.* at 635–36.

The principle of neutral and respectful consideration of religious activity is grounded in well-established precedent. In *Kennedy*, this Court underscored that "the Constitution and the best of our traditions counsel mutual respect and tolerance. . . for religious and nonreligious views alike." *Kennedy*, 597 U.S. at 514. Likewise, in *Tandon v. Newsom*, 593 U.S. 61 (2021), this Court affirmed that granting more favorable treatment to *any* comparable secular activity than to religious activity triggers strict scrutiny. *Id.* at 62 (emphasis in original).

Recently, the *en banc* Ninth Circuit Court followed this Court and recognized the importance of neutral and respectful consideration in *Fellowship of Christian Athletes v. San José Unified School District Board of Education*. *See* 82 F.4th 664, 683–86 (2023) (holding that the San José School District's choice to strip the Fellowship of Christian Athletes of its status as a fully recognized student organization failed to provide the "mutual respect and tolerance" for religious views that the First Amendment requires). In that case, the court reasoned that when "religious animus infects [a government actor's] decision making," the Free Exercise Clause "guarantees protection" for the challenged religious views. *Id.* at 695–96. Regrettably, the Ninth Circuit declined to follow its own precedent in this case.

Although these cases did not involve Title VII, they make clear that the Free Exercise Clause bars government actors from exercising their power with hostility against religious individuals. Title VII prevents any discrimination against an employee "because of" religion." 42 U.S.C. § 2000e–2(a)(1). That means Title VII provides relief to employees who face religious hostility or discrimination—even when the employer claims the discrimination is based on "concerns" for unsubstantiated "perceptions." *See Hittle,* App. 25a.

Even more importantly, government actors may not "pass[] judgment upon [nor] presuppose[] the illegitimacy of religious beliefs and practices." *Masterpiece*, 584 U.S. at 638. Government actors need not be part of a formal adjudicatory body like the Colorado Civil Rights Commission in *Masterpiece* to be bound by this Constitutional requirement. *See Kennedy*, 597 U.S. at 543–44 (holding a school district liable); *see also Fellowship of Christian Athletes*, 82 F.4th at 691–92.

By denying relief in this case the Ninth Circuit violated these longstanding Free Exercise principles. Accordingly, this Court should grant the petition so that it can ensure religious employees are given the "neutral and respectful consideration" that Title VII and the Constitution demand. *See Masterpiece*, 584 U.S. at 634.

B. Chief Hittle Did Not Receive A "Neutral and Respectful" Inquiry of His Religious Practice.

For many religious employees like Chief Hittle, the idea of integrating faith into all aspects of life is essential to their religious identity. Professionals in all fields, including public sector leaders like Chief Hittle, are called to serve God through vocational excellence. This integration of faith and work cannot be confined to one's home or church —it is meant to be lived out every day.

When Chief Hittle sought to integrate his faith into his everyday life, he was subjected to an inquiry by his supervisors and an outside investigator (Ms. Largent, "The Largent Report") that was decidedly not "neutral and respectful." Comments by Chief Hittle's supervisors reflected a bias against religious activity and expression. Montes admonished Chief Hittle, chiding that he "shouldn't be involved" with religious groups, and "as the fire chief, [he] should refrain from doing any of those types of activities" with other firefighters. App. 8a. In this discussion, Montes had asked Chief Hittle about his "off duty Christian Activities." *Id.* Such targeted comments sound in the same type of animus towards religion that this Court found unacceptable from members of the Civil Rights Commission in *Masterpiece Cakeshop*. *See Masterpiece*, 584 U.S. at 634–37.

They also bear a striking resemblance to the comments the 9th Circuit Court found unacceptable in *Fellowship of Christian Athletes*, where members of the school district's Climate Committee characterized the religious beliefs and practices of the

Plaintiffs as "choosing darkness," "perpetuat[ing] ignorance" and "discriminatory in nature." 82 F.4th at 692. In that case, relying on this Court's guidance from cases like *Masterpiece Cakeshop* and *Kennedy,* the Ninth Circuit found such comments to be clear evidence of hostility toward religion. *Id*. Although these comments were not made as part of a formal adjudicatory process, they were still in conflict with the Constitution's prohibition against government actors being motivated by "animosity to religion or distrust of its practices." *Id*. at 693 (quoting *Lukumi*, 508 U.S. at 547). Religious employees, even leaders like Chief Hittle, are not required to check their beliefs and practices at the door just because they work for the government.

The City's conclusion that Chief Hittle's attendance at the Summit was only "for his personal benefit," *Hittle*, app. 28a, and that he attended only "under the guise of leadership development," App. 12a, reflect the City's animus towards activities that are religious. Indeed, the religious nature of the Summit was the "gravamen of Largent's Report," which characterized Chief Hittle's attendance as the "first 'most serious act[ ] of misconduct.'" *Id*. at 892, 884 (alteration in original). And according to Mr. Deis, "us[ing] public funds to attend religious events" was simply "not acceptable." *Id.* at 883.

The conclusion that the conference was of "no value" to the City overlooks the fact that in a time of financial crisis—when the City was willing to pay for Chief Hittle to travel out of state to attend leadership training—Chief Hittle was able to secure training for himself and three other leaders of the department at no cost to the city. He was also able to travel there

using routinely available city resources, rather than expending additional travel funds. At a minimum, Chief Hittle saved whatever resources the city would have expended sending him to another event farther away.

The City's criticism of Chief Hittle's decision to attend the Summit "on city time," when he would have attended any other leadership training (which the city presumably would have paid for) on city time, reveals the true animus underlying the City's decision: Chief Hittle's supervisors (and the investigator they hired) simply believe that leadership principles learned from a religious perspective—or merely learned *in a church*—are "worth less" than comparable secular activities.

The City seems to believe that Chief Hittle cannot apply these particular leadership lessons to his job as Fire Chief simply because he learned them at a religious conference, or from instructors who taught from a religious perspective. These conclusions reflect a "religious hostility on the part of the [City]" that the Constitution prohibits. *See Masterpiece*, 584 U.S. at 625; *see also Fellowship of Christian Athletes*, 82 F.4th at 672 (quoting *Kennedy*, 597 U.S. at 512) ("[T]he government may not 'single out' religious groups 'for special disfavor' compared to similar secular groups.").

II. A Coworker's Hostility to Religion Does Not Insulate an Employer from the Requirements of Title VII.

The Ninth Circuit's opinion held that "[w]hen discriminatory remarks are merely quoting third

parties and the real issue is public perception or other forms of misconduct (such as engaging in an activity that does not benefit the employer), there is no genuine issue of material fact that the employer was discriminatory." App. 35a. In the Circuit Court's view, the disparaging remarks and other statements by Chief Hittle's supervisors merely "show[ed] concerns about other persons' perceptions," such as the "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." App. 25–26a (referring to the supervisors' "legitimate constitutional and business concerns").[2]

In other words, the City convinced the Ninth Circuit that religious discrimination does not violate Title VII as long as it is based on the perceptions and statements of a religious employee's coworkers. But that conflicts with this Court's First Amendment decisions, with its Title VII decisions, and with the

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[2] Even if the Ninth Circuit's opinion can be read to refer to Title VII alone, and not the Establishment Clause, that does not save it. This Court has already rejected coworkers' perceptions and discomfort as a basis for rejected religious accommodations under Title VII, *see Groff*, 600 U.S. at 471–72, and the same rationale applies here. But to the extent that the Ninth Circuit's language can be read to refer to the Establishment Clause, the Petition explains why obsolete endorsement concerns do not justify religious discrimination either. *See* Petition, p. 28–29; App. 25–26a; *see also Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1164 (9th Cir. 2022) (quoting *Kennedy*, 597 U.S. at 535) (noting that the Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious'") (citation omitted).

purpose of Title VII's prohibition against religious discrimination.

A. This Court Has Held That Perceptions and Discomfort Do Not Justify Government Censorship.

This Court has long prevented the government from stifling unpopular speech based on concerns about the public's reaction. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (rejecting anti-indecency provisions of the 1996 Communications Decency Act that would have "confer[red] broad powers of censorship, in the form of a 'heckler's veto'"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949) (holding that the First Amendment prohibits the government from outlawing speech just because it angers or disturbs the public). The alternative—allowing the government to suppress views just because they are unpopular—"would be a complete repudiation of the philosophy of the Bill of Rights." *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943).

But as this Court's religion jurisprudence developed, government actors faced the prospect that allowing religious activity could expose them to liability if it was perceived as "endorsing" religion. *See, e.g.*, *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 621 (1989) (holding that displaying a crèche in the county courthouse violated the Establishment Clause because it appeared to endorse religious beliefs). This threatened to chill religious exercise in the name of establishment concerns, despite the fact that the "Constitution [] itself gives 'religion in general'

preferential treatment." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in judgment).

This Court addressed this issue in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). There, it "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto" where a school district denied a Christian student club after-hours access to school facilities. *Id.* at 119. When the Court put *Lemon* and its endorsement test to rest in *Kennedy*, it also reiterated that "the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Kennedy*, 597 U.S. at 534 (quoting *Good News Club*, 533 U. S. at 119). As this Court has recognized, "the Establishment Clause does not 'compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.'" *Waln*, 54 F.4th at 1164 (quoting *Kennedy*, 597 U.S. at 535).

B. The Circuit Court's Opinion Relies on Arguments that this Court Has Rejected.

This Court has also rejected the modified heckler's veto in the context of religious accommodation under Title VII. There, too, the ghoul of *Lemon* cast a long shadow. *Trans World Airlines, Inc. v. Hardison*, which narrowed Title VII's protections for religious employees seeking accommodations, was thought by many to have been

driven by Establishment Clause concerns. *See Groff*, 600 U.S. at 460 n.9 (noting that "[a] few courts assumed that *Hardison* actually was an Establishment Clause decision" and that "[s]ome constitutional scholars also suggested that *Hardison* must have been based on constitutional avoidance"). But *Groff* did away with *Hardison*'s "de minimis" standard, reiterating that Title VII demands more than "mere neutrality" towards religion—rather, it gives religious employees "'favored treatment' in order to ensure [their] full participation in the workforce." *Id.* (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015)). *Groff* also recognized the Establishment Clause concerns that influenced *Hardison* are no longer present today. *Id.* at 448 (describing *Lemon* as "abrogated").

The Court clarified in *Groff* that employers may not cite "bias or hostility" to religion by coworkers as grounds for an undue hardship. *Id.* at 451. Such "'impacts' on coworkers" are "off the table." *Id.* at 472. Similarly, government employers may no longer point to establishment concerns as a basis for denying religious accommodations. *Cf., e.g.*, *Berry v. Department of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (holding prior to the decisions in *Kennedy* and *Groff* that allowing a social worker to "discuss religion with the Department's clients" was an undue hardship because it threatened "violations of the Establishment Clause"). Indeed, "[i]f bias or hostility to a religious practice . . . provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Groff*, 600 U.S. at 472.

The Ninth Circuit's explanation for why there was no religious discrimination here repeats

arguments—whether for censorship of speech or restriction of religious exercise—that the Supreme Court has rejected. The Circuit Court dismissed Chief Hittle's allegations of religious discrimination stemming from the use of pejorative terms and other statements by Chief Hittle's supervisors, holding that such language merely "show[ed] concerns about other persons' perceptions" and "reflect[ed] Montes's legitimate concern that the City could violate constitutional prohibitions and face liability if it is seen to engage in favoritism with certain employees because they happen to be members of a particular religion." App. 25a.

The result of this flawed logic is that an employer can overcome a religious discrimination claim by showing that some coworkers have an unfavorable view of another employee's religious exercise. As was the case here, in a workplace where some coworkers are unfamiliar with or hostile to certain religious practices, their animus can easily translate into discriminatory remarks and complaints about alleged "religious favoritism." *See id.* at 888–89. The employer can then cite those unsubstantiated "perceptions" to squash the employee's religious exercise. And if the employee responds with a Title VII religious discrimination claim, the employer may defend by arguing that the discriminatory actions started with the coworkers, not the employer—or in any event, the employer is simply trying to avoid any perception of religious favoritism.

This Court must not allow employers this "escape hatch" to avoid Title VII protections. As this Court has repeatedly pointed out, Title VII gives religious employees "'favored treatment' in order to

ensure [their] full participation in the workforce." *Groff*, 600 U.S. at 461 n.9 (quoting *Abercrombie*, 575 U.S. at 775). Mere neutrality is not enough. *Id*. "An employer who intentionally treats a person worse because of [religion]—such as by firing the person for actions or attributes it would tolerate in an individual of another [religion]—discriminates against that person in violation of Title VII." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 658 (2020). An employer may not avoid liability by relying on "concerns" prompted by discriminatory remarks from coworkers or other third parties. *But cf.* App. 35a.

The outcome of a religious discrimination claim should not rely on the temperament of a religious employee's workplace, on misconceptions about his religious exercise, or on the attitudes of his coworkers. Such a result is inconsistent with a core function of Title VII—permitting space for religious exercise in the workplace. *See Abercrombie*, 575 U.S. at 775.

CONCLUSION

"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*, 597 U.S. at 511. This Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit Court's decision so that Title VII jurisprudence aligns with the Constitution's demand for neutral and respectful treatment of religious activity.

Respectfully submitted,

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