

No. 26-____

IN THE
Supreme Court of the United States

SHANNON CROSS

Petitioner,

v.

CENTRAL CONTRA COSTA TRANSIT AUTHORITY

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the judicially-imposed application of the *McDonnell Douglas* burden-shifting framework at summary judgment in a Title VII religious discrimination case — where the employer pressured the plaintiff to abandon her religious practice of wearing a hijab, terminated her based on a purported reason contradicted by objective video evidence, and imposed uniquely harsh discipline not given to any similarly situated employee — led the courts below to credit the employer’s disputed account, in a manner incompatible with Rule 56 and this Court’s decisions.

**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner Shannon Cross was plaintiff in the district court and plaintiff-appellant in the court of appeals. Respondent Central Contra Costa Transit Authority was defendant in the district court and defendant-appellee in the court of appeals.

No corporate disclosure statement is required under this Court's Rule 29.6.

RELATED CASES

This case arises from the following proceedings in the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit:

Cross v. Central Contra Costa Transit Authority, No. 4:21-cv-01312-JST (N.D. Cal.) (judgment entered Sept. 3, 2024)

Cross v. Central Contra Costa Transit Authority, No. 24-6068 (9th Cir.) (memorandum disposition filed Jan. 13, 2026; petition for rehearing and rehearing en banc denied Feb. 20, 2026)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Shannon Cross respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit (App. 1a-15a) is unpublished but is available at 2026 U.S. App. LEXIS 788. The order of the Ninth Circuit denying rehearing and rehearing *en banc* (App. 28a-29a) is also unpublished.

The opinion of the United States District Court for the Northern District of California (App. 9a-27a) is unreported but is available at 2024 U.S. Dist. LEXIS 252435.

JURISDICTION

The Ninth Circuit entered its memorandum disposition on January 13, 2026, and denied rehearing and rehearing *en banc* on February 20, 2026. On May 15, 2026, Justice Kagan extended the time to file a petition for a writ of certiorari to July 20, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Federal Rule of Civil Procedure 56(a) provides:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

A. Statement of Facts

1. Shannon Cross is a practicing Muslim whose faith required her to wear a hijab, a practice that immediately placed her at odds with her employer's unwritten and selectively enforced policies from the outset of her employment. Cross was hired as a bus operator by the Central Contra Costa Transit Authority — known as County Connection — a public transit agency serving in and around Contra Costa County, California. During training for her new job, Cross learned that County Connection barred women from wearing head scarves while on duty. Another trainee, Terrice Hampton, was told she could not wear her head covering and was sent home to remove it. The instructor made clear that employees could be terminated for wearing head scarves. Cross was intimidated and fearful. The employee handbook contained no policy on religious accommodation and no training on religious harassment. To avoid conflict during her probationary period, Cross complied with her religious practice by wearing a wig to cover her natural hair. [Cross Decl. ¶¶1-2, 4-10 (App. 31a-32a).]

2. When Cross requested to wear her hijab after completing probation, her supervisors responded with repeated objections, and the employer began enforcing a no-hat policy that had not previously been applied to other drivers. Cross passed probation with high marks. Her performance was rated “outstanding,” and she was described as “exceptional behind the wheel.” She then asked supervisor Preston Ennis whether she could wear her hijab. Ennis said he did not know and never

followed up. She asked HR representative Kristina Martinez, who also did not know and had no policy to consult. Martinez gave Cross a generic accommodation form that made no mention of religion. Cross eventually received written permission to wear her hijab, but no one informed her supervisors, no policy was posted, and no training was provided. [Cross Decl. ¶¶11-20 (App. 32a-34a).]

About a week after receiving permission, supervisor Sophia Morris chased Cross down after she clocked out and told her she could not wear “that” — referring to her hijab. When Cross said she had permission, Morris changed her story and claimed the hijab was the wrong color. It was not. The hijab was maroon and matched Cross’s uniform. Morris said plainly she wanted Cross to stop wearing her hijab. On another occasion, supervisor Aline Carroll — a close friend of Morris — gave Cross a look of disgust and told her she could not wear “that thing” on her head. [Cross Decl. ¶¶21-26, 41 (App. 34a-36a, 38a).]

3. The employer’s response to Cross’s accommodation request included public humiliation, a refusal to investigate her complaints, and sustained pressure to abandon her religious practice. Up until Cross’s request, the no-hat policy had gone entirely unenforced. Bus operators wore hats of all kinds daily. After Cross received permission to wear her hijab, Morris announced to employees in the breakroom that the company would begin enforcing the policy — and made clear that Cross was the reason. A coworker responded by mocking Cross directly, stating “now I’m going to wear my hat for religious purposes.” Morris

added an insulting comment of her own and did nothing to stop the mockery. [Cross Decl. ¶¶30-33 (App. 36a-37a).]

Cross reported these incidents to Martinez, who assured her she would remind Morris of the accommodation but failed to initiate any investigation as company policy required. After Carroll told Cross she could not wear “that thing,” Cross reported the incident to HR director Lisa Rettig. Rettig dismissed it by saying “some people are stupid” and took no action. [Cross Decl. ¶¶34-35, 42, 46-47 (App. 37a-39a).]

The written permission Cross received did not eliminate the conflict between her religious practice and her job. Her supervisors — the people with direct authority over her employment — told Cross she could not wear the hijab. HR refused to investigate or intervene. Cross was left to conclude that despite the memo, the employer really wanted her to remove her hijab. As she testified: “I understood clearly that if I did not remove it, I was likely to face consequences.” Both supervisors held authority over her job, and she perceived their conduct as “threatening me with discipline if I continued to wear it. I felt they were pressuring me to remove my Hijab and conform to what everyone else was doing.” [Cross Decl. ¶¶44-45 (App. 38a-39a).]

Cross experienced severe emotional distress as a result. The first incident with Morris “completely changed everything. I no longer felt safe going to work, and I knew I did not fit in.” She “experienced anxiety every day I had to go to work. I felt my face flushed and hot, a tightness in my chest, and actual terror. I

was afraid of what might happen next, of being physically attacked.” After reporting to HR to no effect, she was “convinced the company would not protect me from further harassment” and “continued to go to work every day with anxiety and fear about what would happen next.” After Carroll’s comment, Cross felt “very angry” and “much shame.” She knew Morris and Carroll were close friends, and “things were getting worse for me, with these two supervisors harassing me on account of my hijab.” [Cross Decl. ¶¶25-28, 40, 43 (App. 35a-36a, 38a).]

4. About six weeks after Cross’s complaints, she was terminated following a bus-bicycle collision. The on-board video and expert analysis showed that the bicyclist, not Cross, caused the incident. The bicyclist was stopped at the corner with his foot on the curb as Cross approached. He did not signal an intention to enter the lane. By the time he entered, Cross was already in the lane. As she passed, the bicyclist fell into the side of the bus near the back end. Bicycle safety expert David Brinton reviewed the video and concluded that the bicyclist caused the collision by entering the lane unsafely and without signaling, in violation of California Vehicle Code § 22106. The bicyclist broke his watch. [Cross Decl. ¶¶48-49, 51 (App. 39a-40a); Brinton Decl. ¶5a-d (App. 47a-48a); ECF 73, Exh. C1 (video).]

5. The employer made the decision to terminate Cross before she returned to the yard, based on a video review by management in which the same supervisor who had harassed Cross about wearing her hijab participated. Cross called in the accident immediately,

as she had been trained to do. She waited at the scene, spoke with police, and was instructed to complete a final loop and return the bus. She drove another shift and did not return to the yard until 7:00 p.m. By then, management had already pulled the video and concluded — contrary to what the video showed — that Cross was at fault. An email from supervisor Miguel Duenas to the General Manager shows the employer had already formed an intent to terminate Cross by that afternoon. Supervisor Carroll, who had called Cross’s hijab “that thing” and told Cross she could not wear it six weeks earlier, participated in the video review. When Cross arrived, Carroll called her into her office and issued the notice of termination. Carroll had a pleased and smug look on her face. Cross was not questioned about what happened. She was not permitted to view the video. [Cross Decl. ¶¶49, 52-55, 61 (App. 40a-42a); ECF No. 80-2 at 272-273.]

County Connection’s own protocol, described by its General Manager, called for placing drivers on paid leave after collisions to allow them to overcome the emotional impact. The employer departed from this protocol for Cross. She was placed on suspension immediately. Even the union president knew the outcome was predetermined: when Cross asked whether she should come to her *Skelly* hearing in uniform in case she was returned to work, the union president said no. Cross was terminated before County Connection had formally determined the collision was “preventable” — the determination came after the termination. [Cross Decl. ¶¶55-56, 60-61 (App. 41a-42a); ECF No. 77 at 6-7.]

6. Cross's termination was a stark departure from County Connection's disciplinary practices and its own policies. This was Cross's first and only collision. Her driving record was clean, with no accidents or incidents. Yet she was fired immediately, without the progressive discipline that company policy required — warnings and retraining for a first collision within a twelve-month period. The union grievance identified multiple contract violations by County Connection, including the employer's failure to issue a required Pending Disciplinary Action Letter. Cross was the only non-probationary driver ever fired for a collision, despite hundreds of preventable collisions by other bus drivers over the relevant period. [Cross Decl. ¶¶11-12, 59, 64-65 (App. 32a-33a, 41a-43a); ECF 88-2 at 275-287; ECF 80-6 at 35:4-38:4, 58:13-65:1, 123:4-126:8; ECF 81:9-17; ECF 80-3 at 1, 2-21.]

7. After deciding to terminate Cross, County Connection searched for additional violations to justify its decision. The employer reviewed countless hours of video in search of misconduct — a practice that violated the union agreement, which expressly prohibited reviewing electronic media “solely for the purpose of looking for employee misconduct.” It cited a police report to support the termination, but the termination letter was written before the employer could have seen any such report: the letter referenced a police report “issued” on June 19, 2019, while the termination letter itself was dated June 13, 2019. The employer also cited alleged rolling stops, but rolling through stop signs at that location was a common occurrence for which no other driver had ever been disciplined. Records show several other drivers were

seen rolling through stop signs on video, and none was terminated. Moreover, the employer reviewed video footage outside the permissible time window under the union agreement — more than two hours before and after the collision — and did so after Cross had already been terminated. [Cross Decl. ¶¶63, 66-68 (App. 42a-43a); ECF 56-1 at 144; ECF 80-2 at 264.]

8. Other drivers who engaged in far more serious misconduct received last-chance agreements and kept their jobs. Cross was denied one. E.M. hit a pole, failed to report it, left the scene, and committed multiple stop sign violations. S.S. hit a truck, inspected the damage, left the scene without reporting it, and failed to stop at multiple stop signs. Y.D. ran multiple stop signs, went off route, ate on the job, and was dishonest. W.H. was caught on video urinating in a bottle. Each of these drivers received a last-chance agreement. Notably, one driver whose notice of intent to terminate cited both a collision and multiple stop sign violations received a last-chance letter that omitted any mention of stop signs — the very infraction the employer cited against Cross to justify her termination. Cross, whose only infraction was a single collision caused by the bicyclist's unsafe entry into her lane, was denied a last-chance agreement. [ECF 80-1, ¶¶2b, 2c, 3-21; ECF 74, at 34-39, 40-43, 44-49, 122-125, Exh. C4 (video).]

9. The employer's treatment of Ronnette Brown, a non-Muslim driver, provides further evidence of disparate treatment and retaliatory intent. Brown ran over a teenage bicyclist and put her in the hospital. Expert analysis of the video shows Brown entered an intersection on a yellow light to make a right turn,

failed to maintain proper distance from the curb, exceeded appropriate speed while turning, and looked left rather than checking her right mirror — where the teenager was in the crosswalk. The teenage bicyclist stopped immediately; the trailing bus collided upon her. County Connection initially found Brown's accident preventable, as it did Cross's, but gave Brown only a suspension and retraining — and later removed even that discipline by reclassifying the incident as non-preventable. Brown had been involved in sixteen occurrences in the previous five years but ultimately received no discipline. [Cross Decl. ¶¶70-71 (App. 44a); Brinton Decl. ¶¶6-8 (App. 48a-50a); ECF 56-1 at 144, 148; ECF 79, ¶¶8, 9; ECF 80-1, ¶18; ECF 80-3 at 2-20, 121.]

10. The employer's denial of a last-chance agreement to Cross fits a pattern of retaliation against employees who complain of discrimination. Of all employees noticed for termination, only three were denied a last-chance agreement. One was Cross, who had complained to management about religious harassment. Another was Keith Polee, who also had complained about harassment on the job. Polee sued, and County Connection paid him \$250,000 in settlement plus a judicially-awarded fee exceeding that amount. [ECF 77, ¶¶2-6; ECF 80-6 at 123:4-126:10.]

B. Procedural History

Cross filed suit in federal district court alleging religious discrimination, retaliation, and harassment under Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. County Connection moved for summary judgment, invoking the *McDonnell Douglas* burden-shifting framework. Cross opposed, arguing that a convincing mosaic of direct and circumstantial evidence — including her own declaration, expert declarations from David Brinton and Gregory Hanson, hundreds of pages of the employer's personnel and disciplinary records, comparator data, and video evidence — precluded judgment as a matter of law under Rule 56. Cross did not request application of the *McDonnell Douglas* framework.

The district court granted summary judgment without oral argument. App. 9a-27a. Applying *McDonnell Douglas*, the court held that Cross failed to establish a prima facie case of discrimination because she had not identified a similarly situated employee outside her protected class. The court compared Cross solely to Ronnette Brown and found Brown not similarly situated. The court did not address the hundreds of other drivers who had preventable collisions and were not terminated. The court also held that Cross failed to show pretext, crediting the employer's stated reasons without addressing the video evidence, the expert analysis, or the evidence that the employer's reasons were generated after the termination decision.

The Ninth Circuit affirmed in an unpublished memorandum disposition, also without oral argument. App. 1a-15a. The panel issued its decision four days after submission. The panel's opinion recited as fact the employer's disputed assertions: that Cross was "completely at fault" for the collision, that she had "repeatedly violated multiple CCCTA policies and California Vehicle Code violations," and that Brown was not similarly situated. App. 2a, 5a-6a. The panel did not address the video evidence or the expert analysis showing the bicyclist caused the collision. It did not address the evidence that Cross was the only non-probationary driver ever fired for a collision, or that drivers with far more serious misconduct received last-chance agreements. The panel affirmed the dismissal of the harassment claim, treating the supervisors' statements and the breakroom mockery as three isolated incidents that were not severe or pervasive. The panel then declined to consider that same evidence as proof of discriminatory motive in the discrimination and retaliation analysis.

Cross sought panel rehearing and rehearing en banc, arguing that the court's application of *McDonnell Douglas* led to an opinion that ignored material facts and improperly weighed disputed evidence in favor of the employer, contrary to Rule 56 and this Court's precedent. The petition was denied without opinion. App. 28a-29a.

Cross never received a jury trial. She never received oral argument in the district court. She never received oral argument in the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the *McDonnell Douglas* burden-shifting framework, as applied at summary judgment, can be used to credit an employer's disputed account of the facts over evidence that would permit a jury to find discrimination. The courts below answered yes. They applied *McDonnell Douglas* to treat the employer's assertions as established fact — that Cross was completely at fault for the collision, that she repeatedly drove unsafely, that no similarly situated employee was treated more favorably — while disregarding the evidence Cross presented: video and expert analysis showing the bicyclist caused the collision, testimony that supervisors pressured her to abandon her hijab, and proof that none of the other drivers involved in preventable collisions were fired. The result is incompatible with Rule 56 and this Court's decisions.

The *McDonnell Douglas* framework was designed to help plaintiffs prove discrimination when direct evidence is unavailable. As applied in this case, it did the opposite. It required Cross to disprove the employer's stated reasons and obscured the full body of evidence that would allow a reasonable jury to find her religious practice and protected conduct was a motivating factor in her termination. This inversion of the summary judgment standard is not an isolated error. It is a systemic consequence of a framework that, as members of this Court have recognized, has strayed far from its original purpose and now operates to deny employment discrimination plaintiffs the same right to a jury trial that every other civil litigant enjoys.

A resounding chorus of jurists across the circuits has called for a reconsideration of *McDonnell Douglas* at summary judgment. This case is the vehicle that presents the problem in its starkest form. Cross did not invoke *McDonnell Douglas* below. She asked the lower courts to evaluate the evidence as a whole under Rule 56. The district court imposed *McDonnell Douglas* anyway, and the Ninth Circuit affirmed in an unpublished memorandum disposition. The panel treated the evidence of harassment — supervisors telling her she could not wear her hijab, the employer singling her out to coworkers for mockery, HR blocking investigation of her complaints — as trivial, and then refused to consider it as proof of motive. It never addressed the video or expert analysis showing the bicyclist caused the collision. It never addressed the hundreds of other drivers who kept their jobs after preventable collisions. The panel credited the employer's account, stripped the record of Cross's most powerful proof, and granted summary judgment.

The error below is not merely that the panel got the facts wrong. It is that *McDonnell Douglas* required the panel to get them wrong — to treat the employer's stated rationale as dispositive unless Cross could disprove it. Under *Bostock*, the employer's nondiscriminatory or non-retaliatory reason, even if true, is irrelevant if discrimination was also a but-for cause. Under *Abercrombie*, an employer may not make an employee's religious practice a factor in employment decisions. *McDonnell Douglas*, as applied below, has nullified these protections. This Court should grant review to restore them.

I. The Petition Should Be Granted Because This Case Is the Correct Vehicle for the Court to Address the Resounding Chorus of Jurists Calling for a Reconsideration of *McDonnell Douglas* at Summary Judgment

The *McDonnell Douglas* burden-shifting framework has been criticized almost from its inception. But the criticism has grown louder, more widespread, and more urgent in recent years. As Chief Judge Elrod of the Fifth Circuit recently observed, there is now “a resounding chorus calling for a reconsideration of *McDonnell Douglas Corp. v. Green*, especially as applied at summary judgment.” *Awe v. Harris Health Sys.*, 163 F.4th 969, 975 (5th Cir. 2026) (5th Cir. Jan. 12, 2026) (Elrod, C.J., concurring). She catalogued the jurists who have called for reform across decades and circuits: Judge Kavanaugh, who described the *prima facie* case as “a largely unnecessary sideshow” that has “spawn[ed] enormous confusion and wast[ed] litigant and judicial resources,” *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008); then-Judge Gorsuch, who questioned “whether the *McDonnell Douglas* game is worth the candle,” *Walton v. Powell*, 821 F.3d 1204, 1210-1211 (10th Cir. 2016); Judge Wood, who called the framework an “*allemande* worthy of the 16th century,” *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring); Judge Newsom, who wrote that the framework “not only lacks any real footing in the text of Rule 56 but, worse, actually obscures the answer to the only question that matters at summary judgment,” *Tynes v. Fla. Dep’t of Juv. Just.*, 88 F.4th 939, 949 (11th Cir. 2023) (Newsom, J., concurring);

Judge Quattlebaum, who observed that “[w]hat began as a tool for processing evidence in a Title VII bench trial has far too often turned into the substantive test for intentional discrimination at summary judgment,” *Hollis v. Morgan State Univ.*, 153 F.4th 369, 387-88 (4th Cir. 2025) (Quattlebaum, J., concurring); and Judges Hartz, Magnuson, Costa, and Eid, among others. *Awe*, 163 F.4th at 975 (collecting cases).

Members of this Court have said the same. Justice Thomas, joined by Justice Gorsuch, has written that the *McDonnell Douglas* framework is “incompatible with the summary judgment standard,” “lacks any basis in the text of Title VII or any other source of law,” and “fails to capture all the ways in which a plaintiff can prove a Title VII claim.” *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 319-324 (2025) (Thomas, J., concurring). He noted that the framework “has created outsized judicial confusion.” *Id.* at 326. Dissenting from the denial of certiorari in *Hittle v. City of Stockton*, Justice Thomas observed that *McDonnell Douglas* “may distort a lower court’s analysis” and has caused “significant confusion and troubling outcomes on the ground.” 145 S. Ct. 759, 761 (2025) (Thomas, J., dissenting).

This case presents the problem in its starkest form. The panel below recited as fact the employer’s disputed assertions: that Cross was “completely at fault” for the collision, that she had “repeatedly violated multiple CCCTA policies and California Vehicle Code violations,” and that Brown was not similarly situated. App. 2a, 5a-6a. None of this was undisputed. The video evidence showed the bicyclist

caused the collision by jumping off the curb into Cross's lane without looking or signaling. The expert analysis confirmed it. She had passed probation with high marks; her own supervisors had rated her "exceptional behind the wheel" and her performance "outstanding." Cross was the only non-probationary driver ever fired for a collision, out of hundreds of preventable collisions over the relevant period. Drivers who committed hit-and-run, falsified documents, and lied to the employer received last-chance agreements and kept their jobs. Cross and Keith Polee — the two employees who complained about discrimination — were among only three employees ever denied one. The employer's own protocol called for placing drivers on paid leave after collisions to allow them to recover from the emotional impact. Cross was fired before she returned to the yard. She was not questioned. She was not permitted to view the video. The employer then searched for justifications after the fact — reviewing video outside the permissible time window, citing rolling stops never charged against any other driver, relying on a police report that did not exist when the termination letter was written.

The panel ignored these facts. It treated the *quid pro quo* religious harassment as trivial — three isolated incidents, not severe or pervasive — and credited the employer's disputed claim that the counseling was over uniform colors, not religion. But the hijab matched Cross's uniform. Cross testified that she was left to choose between her faith and her job. The employer's failure even to investigate her complaints of religious harassment — itself evidence of discriminatory animus — was never addressed. If this

evidence cannot survive summary judgment, then the *McDonnell Douglas* framework has swallowed the right to a jury trial in employment discrimination cases.

The problem is not self-correcting. As Judge Elrod noted, the Fifth Circuit applies *McDonnell Douglas* because it is “bound” by precedent, even while recognizing the framework is “inefficien[t] and unfair[.]” *Awe*, 163 F.4th at 975 (Elrod, C.J., concurring) (quoting *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 351 (5th Cir. 2019) (Costa, J., specially concurring)). The Ninth Circuit had previously recognized that a plaintiff could survive summary judgment by presenting a convincing mosaic of circumstantial evidence. But after *Hittle*, and after this Court denied certiorari, the Ninth Circuit has retreated into unpublished memorandum dispositions that apply *McDonnell Douglas* to credit the employer’s account and dispose of cases without oral argument, without published reasoning, and without meaningful appellate review. These decisions create no circuit precedent. They cannot be cited. They cannot be reviewed *en banc*. Yet they determine the rights of litigants. The time to address this problem is now, because the lower courts will not — and in the Ninth Circuit, given the pattern of unpublished dispositions, cannot — correct it themselves.

II. The Petition Should Be Granted to Restore Rule 56 Standards to Their Proper Place in Employment Discrimination Cases

The *McDonnell Douglas* framework was created for a different era. It was designed to guide judges at bench trials, at a time when Title VII cases were tried exclusively to the bench and juries were not available. The framework was “viewed at the time as a plaintiff-friendly opinion,” *Wells v. Colo. Dep’t of Transp.*, 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., writing separately), meant “to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); Congress amended Title VII in 1991 to provide for jury trials. The framework, however, did not adapt. It migrated from the bench trial to summary judgment without this Court ever examining whether it belonged there. As Justice Thomas has noted, “as far as I can tell, this Court has never had occasion to decide whether the *McDonnell Douglas* framework is a useful or appropriate tool for evaluating any kind of claim at summary judgment.” *Ames*, 605 U.S. at 321 n.4 (Thomas, J., concurring).

What began as a tool to help plaintiffs overcome the lack of direct evidence has become the principal mechanism by which courts deny them access to a jury. As Judge Elrod put it, quoting Justice Thomas: “circuit and district courts ‘know how to apply Rule 56,’ but we do not do so in Title VII cases.” *Awe*, 163 F.4th at 975 (quoting *Hittle*, 145 S. Ct. at 763) (Thomas, J., dissenting from denial of certiorari). The reason is

McDonnell Douglas. The framework directs courts away from the question Rule 56 asks — whether the evidence, viewed as a whole and in the light most favorable to the non-moving party, would permit a reasonable jury to find discrimination — and toward a different question: whether the plaintiff has disproved the employer’s stated reason.

The distinction is not academic. It determined the outcome here. Rule 56 requires the court to view the evidence in the light most favorable to Cross, to draw all reasonable inferences in her favor, and to disregard evidence favorable to the employer that a jury would not be required to believe. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000). Credibility determinations and the weighing of evidence presented are “jury functions.” *Anderson*, 477 U.S. at 255. That rule applies to credibility and evidence by any party, including employers.

McDonnell Douglas required the opposite. The district court held that Cross presented “no direct evidence of discrimination” because “it is possible that Morris and Carroll were merely attempting to enforce the dress code.” App. 17a. Once Cross’s evidence was classified as circumstantial rather than direct, the *McDonnell Douglas* framework applied. The employer articulated its reasons: the collision, the alleged traffic violations, the claim that Cross drove unsafely. Under *McDonnell Douglas*, those reasons became dispositive of Cross’s claims. The burden shifted to Cross to disprove them. The court never asked whether a

reasonable jury, viewing all the evidence together, could find that Cross’s religious practice or protected activity was a motivating factor in her termination. It asked only whether Cross had shown pretext.

The question whether evidence is “direct” or “circumstantial” should not be dispositive — or even relevant — at summary judgment. This Court has held that direct and circumstantial evidence are treated alike under Title VII. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). The Seventh Circuit, applying that principle, has instructed district courts to “stop separating ‘direct’ from ‘indirect’ evidence and proceeding as if they were subject to different legal standards.” *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). The question is “simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff’s race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself — or whether just the ‘direct’ evidence does so, or the ‘indirect’ evidence.” *Id.* Cross cited *Ortiz* below. Both courts ignored it and applied *McDonnell Douglas* instead.

The *McDonnell Douglas* framework also encourages courts to compartmentalize evidence rather than evaluate it as a whole. Here, the panel treated the harassment evidence — supervisors telling Cross she could not wear her hijab, the breakroom announcement singling her out, the coworker mockery — as relevant only to the hostile work environment claim. Once that

claim was dismissed under the “severe or pervasive” standard, the panel refused to consider the same evidence as proof of discriminatory and retaliatory motive in the termination analysis. This is precisely the problem Judge Tymkovich identified: *McDonnell Douglas* causes courts to “put on blinders” to the “various ways in which a plaintiff could prove his claim,” compartmentalizing evidence as relevant to one step or another rather than considering the full picture. Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503, 519 (2008); *see also Awe*, 163 F.4th at 975 (Elrod, C.J., concurring) (quoting same). The district court’s comparison of Cross’s harassment claim to the facts in *Vasquez v. County of Los Angeles*, 349 F.3d 634, 644 (9th Cir. 2003), illustrates the problem: the court isolated individual incidents rather than considering how the harassment evidence, the failure to investigate, the departure from protocol, and the disparate discipline fit together as part of a single picture.

The solution is straightforward. Rule 56 already provides the standard. The California Legislature has recognized as much, codifying the principle that harassment cases involve issues “not determinable on paper.” Cal. Gov’t Code § 12923(e). The same is true of discrimination and retaliation cases. Motive is a fact question. Credibility is a fact question. Whether the employer’s stated reason displaces a discriminatory or retaliatory reason is a fact question. These are jury questions. *McDonnell Douglas*, as applied at summary judgment, has supplanted them. This Court should grant review to restore Rule 56 to its proper place.

III. The Petition Should Be Granted to Harmonize Summary Judgment Practice with *Bostock v. Clayton County*

In *Bostock v. Clayton County*, this Court held that an employer violates Title VII when a protected characteristic is a but-for cause of the adverse employment action. 590 U.S. 644 (2020). But the Court went further — and it is this further step that the lower courts have not absorbed. *Bostock* held that the existence of a legitimate, nondiscriminatory reason for the employer’s decision is not a defense. “When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision.” *Id.* at 656. The nondiscriminatory reason is “irrelevant.” *Id.* at 665. It is of “no significance” if another factor “might also be at work, or even play a more important role in the employer’s decision.” *Id.* at 646. It need not be the main factor; it is enough that it was a but-for cause. *Id.* at 667.

These statements are irreconcilable with the *McDonnell Douglas* framework as applied below.¹ *McDonnell Douglas* makes the employer’s stated reason the center of the entire analysis. The plaintiff

¹See Noelle N. Wyman, *Because of Bostock*, 119 Mich. L. Rev. Online 61, 62 (2021) (“*Bostock* calls into doubt the continued utility of the *McDonnell Douglas* framework”); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 396 (2021) (“*McDonnell Douglas* and related judge-created doctrines must be clarified to conform to the statutory standard — or simply abandoned”).

must disprove it. If she cannot, she loses — regardless of what other evidence she presents. But *Bostock* says the employer’s non-discriminatory or non-retaliatory reason does not matter.

In Cross’s case, the employer’s stated reasons — the collision, the alleged traffic violations, the claim that Cross drove unsafely — may all be true. The employer may have believed them. But under *Bostock*, that does not end the inquiry. If Cross’s religious practice, her request for accommodation, or her complaints of harassment were also a but-for cause of her termination, the employer is liable. The question is not whether the employer had a legitimate reason to fire Cross. The question is whether the unlawful factor was a but-for cause. On this record, a reasonable jury could find in Cross’s favor. Cross was the only non-probationary driver ever fired for a collision. Drivers with far worse records kept their jobs. The supervisor she complained about participated in the decision and delivered the news with a smug, satisfied look on her face. A jury could disbelieve the employer’s account — not because Cross disproved it, but because the evidence, viewed as a whole, supports her claim. That is enough under Rule 56. That is enough under *Bostock*.

The panel never asked this question. It asked whether Cross had disproved the employer’s stated reasons. It concluded she had not, and it granted summary judgment. App. 5a-7a. That is the wrong question under *Bostock*.

The evidence supporting that conclusion is not limited to the discrimination claim. It applies with

equal force to retaliation. Cross engaged in protected activity when she requested accommodation and when she complained to HR about the harassment. She was fired six weeks later. The supervisor she complained about participated in the video review and delivered the termination notice with a pleased and smug look. The employer departed from its own protocols — firing Cross before she returned to the yard, before any investigation, before she could view the video or tell her side. It then searched for justifications after the fact. And Cross was one of only three employees ever denied a last-chance agreement — the other being Keith Polee, who also complained about discrimination. A jury could find that Cross’s complaints were a but-for cause of her termination. The panel never reached that question because *McDonnell Douglas* directed it elsewhere.

The employer pleaded a mixed-motive affirmative defense in its answer; but the employer never moved for summary judgment on that defense. The district court never placed the burden on the employer to prove it would have terminated Cross regardless of her protected activity. Instead, the court placed the burden on Cross to disprove the employer’s reasons — the very burden that *Bostock* and the mixed-motive amendment to Title VII were designed to eliminate. See 42 U.S.C. § 2000e-2(m) (an unlawful employment practice is established when a protected characteristic “was a motivating factor for any employment practice, even though other factors also motivated the practice”).

The problem is structural. *McDonnell Douglas* was built on the assumption that an employment decision has a single “true” reason — either discrimination or the employer's stated justification. *Bostock* rejected that assumption. Employment decisions can have multiple causes. The employer’s reason can be true, and discrimination can also be true.

The question is not which reason was “the” reason. The question is whether discrimination or retaliation was a reason. *McDonnell Douglas*, by requiring the plaintiff to disprove the employer’s stated reason, treats these as mutually exclusive. *Bostock* says they are not. The framework and the precedent cannot coexist. This Court should grant review to resolve the conflict.

IV. The Petition Should Be Granted Because the Result in This Religious Discrimination Case Cannot Be Reconciled with *EEOC v. Abercrombie & Fitch Stores, Inc.*

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, this Court held that an employer violates Title VII when an applicant’s religious practice is a motivating factor in the employer’s decision not to hire her — even if the employer did not know for certain that she needed an accommodation. 575 U.S. 768 (2015). Samantha Elauf wore a hijab to her interview. Abercrombie refused to hire her because its “Look Policy” prohibited head coverings, and it assumed — correctly — that she wore the hijab for religious reasons. The Court held that motive, not knowledge, is

what matters. “An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.” *Id.* at 773.

The facts of this case are stronger than *Abercrombie*. Abercrombie did not know whether Elauf needed an accommodation; it suspected she did and refused to hire her. County Connection knew. Cross requested accommodation. She explained to her supervisor and to HR why the hijab was important to her faith. She received what purported to be written permission, but County Connection had no policy of religious accommodation, and gave no training on religious harassment. Despite the letter, Cross’s supervisors told her she could not wear it anyway. Supervisor Morris chased her down and told her she could not wear “that.” Supervisor Carroll gave her a disgusted look and told her she could not wear “that thing.” The employer announced a policy change that singled Cross out to her coworkers. A coworker mocked her in the breakroom, in front of other co-workers and the supervisor, who added her own derogatory comment. HR blocked investigation of her complaints. Cross was left to choose between her religious practice and her job. As she testified: “I understood clearly that if I did not remove it, I was likely to face consequences.” Cross Decl. ¶44 (App. 39a). The supervisors had authority over her job, and Cross perceived them as “threatening me with discipline if I continued to wear it. I felt they were pressuring me to remove my Hijab and conform to what everyone else was doing.” Cross Decl. ¶45 (App. 39a).

This is religious coercion. The EEOC has long recognized that Title VII “is violated when an employer or supervisor explicitly or implicitly coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or privilege or avoiding an adverse employment action.” EEOC Compliance Manual, Section 12: Religious Discrimination.² The Fifth Circuit has recognized that “[p]utting employees to this coercive choice imposes a distinct and irreparable harm beyond lost pay, benefits, seniority, and other tangible and remediable losses.” *Sambrano v. United Airlines, Inc.*, 2022 U.S. App. LEXIS 4347, at *24 (5th Cir. Feb. 17, 2022). Monetary damages cannot compensate for being told to abandon one’s faith.

The written permission Cross received did not eliminate the conflict. The people with direct authority over her employment told her she could not wear the hijab. HR refused to intervene. Under both Title VII and the California Fair Employment and Housing Act, a reasonable accommodation must “eliminate the conflict” between the job duty and the religious practice. *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1467 (9th Cir. 1996); Cal. Code Regs. tit. 2, § 11062. A memo that the employer’s own supervisors contradict — and that HR refuses to enforce — does not eliminate the conflict. It creates one.

²The EEOC Compliance Manual can be accessed at: https://www.eeoc.gov/laws/guidance/section-12-religiousdiscrimination#h_38342662426791610748907146.

The panel below dismissed all of this in a footnote. It acknowledged Cross’s argument that she was subjected to *quid pro quo* religious harassment but held that “even assuming such a theory applies here, Cross does not present sufficient evidence to support it.” App. 15a n.1. That holding cannot be squared with the record. Cross presented evidence that two supervisors told her she could not wear her hijab. That the employer singled her out to coworkers. That she was mocked. That HR blocked investigation. That she believed she would face discipline if she continued her religious practice. That she was fired six weeks later, and informed of her termination by one of the same supervisors. A jury could find — easily — that Cross was pressured to abandon her religious practice and terminated when she would not. The panel’s conclusion to the contrary is not a reflection of the evidence. It is a reflection of a framework that allowed the court to credit the employer’s account over Cross’s, to isolate the harassment evidence from the termination analysis, and to dispose of the claim without ever confronting what the record showed.

This Court should grant review to ensure that the protections of *Abercrombie* are not hollow. An employer who would be liable under *Abercrombie* for refusing to hire a Muslim woman based on her hijab cannot escape liability for firing her based on the same religious practice simply by articulating a reason she cannot disprove. Title VII does not permit it. *Abercrombie* confirmed as much. *McDonnell Douglas*, as applied below, has nullified that protection. This case presents the opportunity to restore it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 20, 2026

Counsel for Petitioner

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED JANUARY 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6068
D.C. No. 4:21-cv-01312-JST

SHANNON CROSS,

Plaintiff-Appellant,

v.

CENTRAL CONTRA COSTA
TRANSIT AUTHORITY,

Defendant-Appellee.

Filed January 13, 2026

MEMORANDUM*

NOT FOR PUBLICATION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted January 9, 2026**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: NGUYEN and BENNETT, Circuit Judges, and MATSUMOTO, District Judge.***

Plaintiff-Appellant Shannon Cross (“Cross”) appeals the district court’s grant of summary judgment in favor of her former employer, Defendant-Appellee Central Contra Costa Transit Authority (“CCCTA”). Less than a year after her employment as a bus operator, Cross collided with a bicyclist while operating a CCCTA bus. After an investigation revealed that Cross was completely at fault for the collision, and had also repeatedly violated multiple CCCTA policies and California Vehicle Code violations, CCCTA terminated Cross. Cross sued, alleging claims for religious discrimination, retaliation, and hostile work environment under Title VII of the Civil Rights Act and California’s Fair Employment and Housing Act (“FEHA”). We have jurisdiction under 28 U.S.C. § 1291, and review *de novo*. *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1047 (9th Cir. 1995). We affirm.

1. The district court did not err in granting summary judgment to CCCTA on Cross’s religious discrimination claims under Title VII and FEHA. “To establish a *prima facie* case, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination.” *Cordova v. State Farms Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997) (citation modified). A *prima facie* case may be established either by “direct evidence of discriminatory intent” or through the *McDonnell Douglas* framework. *Wallis v. J.R.*

*** The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

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Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354 (2000) (“Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.”).

“Direct evidence of discriminatory intent consists of evidence which, if believed, proves the fact of discriminatory animus *without inference or presumption.*” *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280 (9th Cir. 2017) (quoting *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662 (9th Cir. 2002)) (emphasis added).

As direct evidence, Cross points to the statements of Supervisors Morris and Carroll that she cannot wear her hijab. But CCCTA explained that the supervisors were “merely attempting to enforce the dress code,” and under CCCTA’s handbook for transit operators, supervisors were expressly empowered to issue verbal warnings for perceived rule infractions of CCCTA’s policy, such as wearing unauthorized headwear. “[W]here there are obvious alternative explanations for the purportedly . . . invidious discrimination plaintiff asks us to infer, discrimination is not a plausible conclusion.” *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1014 (9th Cir. 2024) (citation modified). Because these statements do not necessarily lead to the conclusion that the supervisors harbored an animus against the Muslim religion rather than an attempt to enforce the dress code, Cross fails to establish discriminatory intent through direct evidence.

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Under the *McDonnell Douglas* burden-shifting framework, a plaintiff may establish a prima facie case of discrimination by showing: (1) they belong to a protected class; (2) they were qualified to do the job; (3) they were subject to an adverse employment action; and (4) the employer treated similarly situated employees outside of the plaintiff's class more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). If the plaintiff establishes a prima facie case, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the employer satisfies that burden, then the burden shifts back to the plaintiff to show that the "proffered reason was a pretext for discrimination." *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001).

As evidence of a similarly situated employee who was treated more favorably, Cross points to Brown, a non-Muslim bus operator at CCCTA who also had an occurrence with a bicyclist. But there were "significant differences between" Cross and Brown. First, the Police Department found that Brown was "not at fault" for her accident, whereas Cross was found "100% at fault by the Police Department." Second, Brown's occurrence was deemed "non-preventable," whereas Cross's occurrence was deemed "preventable." Finally, Brown had been a "25+ year veteran," whereas Cross had been driving with CCCTA for less than a year. See *Tyson v. Gannett Co.*, 538 F.3d 781, 784 (7th Cir. 2008) (citation omitted) ("[D]

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ifferences in seniority will tend to make two employees dissimilar for purposes of the plaintiff's prima facie case."). Thus, because of these differences, Brown is not similarly situated "in all material respects," *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006), and Cross failed to establish a prima facie case of discrimination under *McDonnell Douglas*.

2. The district court did not err in granting summary judgment to CCCTA on Cross's retaliation claims under Title VII and FEHA. Cross argues that a reasonable jury could find that she was unlawfully terminated in retaliation "because of" her request to wear a hijab or her complaints of harassment. To determine retaliation claims brought under Title VII and FEHA, courts apply the *McDonnell Douglas* burden-shifting framework. See *Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 894 (9th Cir. 2004); *Loggins v. Kaiser Permanente Int'l*, 151 Cal. App. 4th 1102, 1108–09 (2007). An employee may establish a prima facie case of retaliation by showing: (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). If the plaintiff establishes a prima facie case, "the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision." *Id.* If the employer satisfies that burden, then the burden shifts back to the plaintiff to show that the "proffered reason was a pretext for unlawful discrimination." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007).

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At issue is the district court's analysis in the third step. Cross has not shown that CCCTA's termination was pretextual. CCCTA terminated Cross because Cross violated California Vehicle Code § 21760(b) when she hit a bicyclist. Cross "acknowledged that she was 'at complete fault'" for the accident. As part of the investigation on Cross's termination, a human resources director observed that Cross had "violated several other serious rules and traffic laws, including running stop signs and red lights, using her cell phone while in revenue service, and failing to stop at BART crosswalks." The director concluded that Cross "repeatedly drives unsafely." Finally, contrary to Cross's argument, CCCTA did not violate its own policy and procedure, which allowed CCCTA to initiate "termination" for reasons including "poor job performance" and "violation of law." Because Cross did not demonstrate that CCCTA's reasons for her termination were pretextual, she fails to meet her burden on her retaliation claims, and CCCTA is entitled to summary judgment.

3. The district court did not err in granting summary judgment to CCCTA on Cross's harassment claims alleging hostile work environment under Title VII and FEHA. To allege a prima facie hostile work environment based on religion, Cross needed to plead: "(1) that [s]he was subjected to verbal or physical conduct of a harassing nature [based on her religion]; (2) that this conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of [her] employment

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and create an abusive working environment.” *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir. 2000); *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 279 (2006). “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). But “that conduct must be extreme to amount to a change in the terms and conditions of employment.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Cross testified that there was never religious insult directed towards her, and based her harassment claim on three statements: Supervisor Morris telling Cross “you can’t wear that” hijab; Supervisor Carroll telling Cross she could not wear “that thing” on her head; and an unidentified bus operator remarking to Cross “now I’m going to wear my hat for religious purposes” after Morris announced that the uniform policy for unauthorized headwear would be enforced. But three allegedly offensive comments over the course of nearly a year are not sufficiently severe or pervasive to constitute a hostile work environment. *See Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 643–44 (9th Cir. 2003) (holding that “[t]wo isolated offensive remarks” combined with “other complaints about unfair treatment” were “not severe or pervasive enough to create a hostile work environment”). Because these “offhand comments[] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment,’” *Faragher*, 524 U.S. at 788, the

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district court did not err in granting summary judgment for CCCTA's motion on her harassment claim.¹

AFFIRMED.

1. Cross urges the Ninth Circuit to recognize the theory of *quid pro quo* harassment in the context of religious discrimination, which essentially occurs when “a supervisor demands that an employee alter or renounce some religious belief in exchange for job benefits.” *Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (citing *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983)). But even assuming such a theory applies here, Cross does not present sufficient evidence to support it.

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**APPENDIX B — ORDER GRANTING
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT OF THE UNITED STATES COURT OF
APPEALS, FILED SEPTEMBER 3, 2024**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. 21-cv-01312-JST

SHANNON CROSS,

Plaintiff,

v.

CENTRAL CONTRA COSTA TRANSIT
AUTHORITY,

Defendant.

**ORDER GRANTING DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Re: ECF No. 56

Before the Court is Defendant Central Contra Costa Transit Authority’s (“CCCTA”) motion for summary judgment. ECF No. 56. The Court will grant the motion.

I. BACKGROUND

CCCTA is a joint powers authority formed by eleven jurisdictions to provide public transportation and

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paratransit services in central Contra Costa County. In the summer of 2018, CCCTA hired Plaintiff Shannon Cross, a Black Muslim woman, as a transit operator trainee. Cross Dep. at 108:8-20, ECF No. 56-3; Cross Decl. ¶ 1, ECF No. 76. As part of her Muslim faith, Cross wears a hijab to cover her natural hair. Cross Decl. ¶ 2. During orientation, Cross learned that CCCTA had a policy prohibiting employees from wearing head wear. *Id.* ¶ 4. To comply with this uniform policy, she wore a wig to cover her hair during her probationary period. *Id.* ¶ 7. After completing her probationary period in February 2019, Cross requested that she be permitted to wear her hijab. Cross Dep. at 163:12-165:2; Cross Decl. ¶¶ 13, 17. Initially she asked one of her supervisors, Preston Ennis. Cross Decl. ¶ 13. However, he told her he was unaware of the company's policy and said he would get back to her. *Id.* He left CCCTA before giving Cross an answer. *Id.* Cross then asked Kristina Martinez in human resources who gave her an accommodation form. *Id.* ¶¶ 17, 19. CCCTA granted this request, permitting her to wear a hijab consistent with CCCTA's uniform policy which required she wear certain "regulatory solid color choices." Cross Dep. at 170:13-21, Martinez Decl., Ex. A., ECF No. 56-2; Cross Decl. ¶ 20. On February 13, 2019, Transportation Director Yvette Glenn emailed all supervisors informing them that Cross had been approved to wear a hijab consistent with CCCTA's uniform requirements. Glenn Decl., Ex. G, ECF No. 56-1.

Sometime after CCCTA approved Cross's request to wear her hijab, supervisor Sophia Martinez Morris chased after her on the stairs to the parking lot and said

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she could not “wear that” referring to Cross’s hijab. Cross Dep. at 175:14-178:23; Cross Decl. ¶ 21. Cross reported this incident to Martinez, who reminded Morris that CCCTA had approved the color of Cross’s hijab. Cross Dep. at 182:22-183:22. Sometime after, Morris announced in the breakroom to all bus operators that she would be disciplining operators who wore unauthorized head wear, such as snap hats, fisherman hats, fedoras, and headbands. Cross Dep. at 184:4-185:5; Cross Decl. ¶ 30. Another operator, looking at Cross as he walked by, said “now I am going to wear my hat for religious purposes.” Cross Dep. at 185:2-5; Cross Decl. ¶ 32. Although Morris was present, she did not say anything to this other bus operator. Cross Dep. at 185:7-14. Cross reported the incident to Human Resources Director, Lisa Rettig, who responded: “some people are stupid.” Cross Dep. at 185:18-186:8. Cross was approached again, this time by Transit Manager Aline Carroll, who said Cross could not wear “that thing,” referring to Cross’s hijab. Cross Dep. at 187:16-188:3; Cross Decl. ¶ 41. Cross again reported the incident to Rettig. Cross Dep. at 188:19-190:1.

On Thursday, May 30, 2019, while on her bus route, Cross was involved in a collision with a bicyclist. Glenn Decl., Exs. H, I, J. Cross contacted CCCTA dispatch and informed them that the bicycle had run into the bus. Glenn Decl., Exs. H, J at 1, 3-7; Cross Dep. at 206:14-207:25. Police officers arrived at the scene. Glenn Decl., Exs. I, J at 7. That same day, the police went to CCCTA’s administrative office and requested to view the video from the on-board cameras of the bus. Glenn Decl. ¶ 9. Director of Transportation Yvette Glenn and

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Transportation Managers Aline Carroll and Miguel Duenas also watched the on-board video. *Id.* The police determined that Cross was at fault for the collision and that she violated California Vehicle Code Section 21760(b), which requires drivers to remain at a “safe distance” from any bicycle proceeding the same direction as the driver and to “not interfere with the [bicycle’s] safe operation.” Glenn Decl., Ex. I at 4-5. CCCTA likewise concluded that Cross was at fault and violated California traffic laws and numerous work rules, including rules requiring that bus operators proceed only when safe to do so, regardless of the right-of-way; remain alert and fully aware of traffic and pedestrians in the immediate area; and perform all duties to the best of their abilities and in accordance with written and unwritten standards, policies, and practices. Glenn Decl., Ex. K. CCCTA issued Cross a notice of intent to terminate. *Id.*

On June 7, 2019, CCCTA had a *Skelly* hearing for Cross. Glenn Decl. ¶ 13, Ex. M at 1; Cross Dep. at 248:5-14. During the hearing, Cross claimed that an alarm on the bus was distracting her. Glenn Decl., Ex. M at 1. As a result, CCCTA reviewed additional on-board audio and video footage but did not hear an alarm at the time of the collision. *Id.* This additional footage review revealed that Cross had run 30 stop signs and red lights, used her phone while the bus was in revenue service, and failed to stop at BART crosswalks. Glenn Decl. ¶ 13, Ex. M at 1-3. Accordingly, Glenn determined Cross’s termination was appropriate. Glenn Decl., Ex M at 3.

On or around June 20, 2019, the Union grieved Cross’s termination. Glenn Decl., Ex. P. The grievance

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included a statement by Cross in which she claimed that her termination was discriminatory because another bus operator struck a bicyclist but received less severe discipline. *Id.* Cross later revealed that individual was bus operator Ronnette Brown. Glenn Decl., Ex. Q; Cross Dep. at 300:3-13. CCCTA denied Cross's grievance, explaining that Brown's conduct and circumstances were dissimilar: CCCTA had employed Brown for over 25 years; she had demonstrated safe driving skills; and the police determined she was not at fault for the collision. Glenn Decl., Exs. Q, R at 2.

On February 24, 2021, Cross brought this action against CCCTA for (1) discriminatory termination; (2) retaliation; and (3) harassment in violation of both Title VII and California's Fair Employment and Housing Act ("FEHA"). ECF No. 1.

II. JURISDICTION

The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1367.

III. EVIDENTIARY OBJECTIONS

In its reply, CCCTA raises various objections to evidence Cross presented in her opposition. ECF No. 82 at 19-20. CCCTA's objections are overruled. Cross's motion to file a sur-reply to address these evidentiary objections is denied as moot. ECF No. 87.¹

1. Cross also requested leave to file a sur-reply to address new evidence and arguments presented in CCCTA's reply. ECF No. 87.

*Appendix B***IV. LEGAL STANDARD**

Summary judgment is proper when a “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is genuine only if there is sufficient evidence “such that a reasonable jury could return a verdict for the nonmoving party,” and a fact is material only if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, the court must draw “all justifiable inferences” in the nonmoving party’s favor and may not weigh evidence or make credibility determinations. *Id.* at 255.

Where the party moving for summary judgment would bear the burden of proof at trial, that party “has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party “must either produce evidence negating

The Court construes the request as an objection to the introduction of new evidence, and sustains the objection as to the reply declaration of Yvette Glenn. The balance of Cross’s objections are overruled. *See Garcia v. Biter*, 195 F. Supp. 3d 1131, 1134 (E.D. Cal. 2016) (“Defendants, however, did *not* provide any new evidence in the reply to Plaintiff’s opposition nor did Defendants raise new issues or arguments. Rather, Defendants cited to the record, their Motion, and various legal authorities and substantively addressed those new issues raised by Plaintiff in his opposition.” (emphasis in original)).

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an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies its initial burden of production, the nonmoving party must produce admissible evidence to show that a genuine issue of material fact exists. *Id.* at 1103. It is not the court's duty "to scour the record in search of a genuine issue of triable fact"; instead, the nonmoving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citation omitted). If the nonmoving party fails to make the required showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

V. DISCUSSION**A. Religious Discrimination**

Cross alleges she was terminated in violation of Title VII and FEHA, which prohibit an employer from discriminating against an individual with respect to the terms, conditions, or privileges of their employment because of her religion. Cross bears the burden of proving her prima facie case of religious discrimination. *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1123 (9th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). "To establish a prima facie case, a plaintiff must offer evidence that gives rise to an inference

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of unlawful discrimination.” *Cordova v. State Farms Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997) (internal quotation marks, alterations and citation omitted). “The prima facie case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas*, or by more direct evidence of discriminatory intent.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Under the *McDonnell Douglas* framework a plaintiff may make out a prima facie case by showing: (1) they belong to a protected class; (2) they were qualified to do the job; (3) they were subject to an adverse employment action; and (4) the employer treated similarly situated employees outside of the plaintiff’s class more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004). If the plaintiff makes out a prima facie case, the burden shifts to the employer to produce evidence of “a legitimate, nondiscriminatory reason” for the adverse employment action. *Bergene v. Salt River Project Agric. Imp. & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001). If the employer satisfies that burden, then the burden shifts back to the plaintiff to show that the “proffered reason was a pretext for the discrimination.” *Id.*

Despite Cross’s argument to the contrary, she presents no direct evidence of discrimination. Direct evidence of discriminatory intent consists of “evidence which, if believed, proves the fact [of discriminatory animus] *without inference or presumption.*” *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) *as amended* (July 18, 2002) (alteration and

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emphasis in original) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)). “Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer.” *Coghlan v. Am. Seafoods Co. LLC.*, 413 F.3d 1090, 1095 (9th Cir. 2005). Cross contends that the statements of two supervisors, Morris and Carroll, constitute direct evidence of discrimination. ECF No. 75 at 19. Specifically, after Cross clocked out one day and was walking to the parking lot, she was approached by Morris who told her she could not “wear that” referring to Cross’s hijab. Cross Decl. ¶ 21. On a separate occasion, Carroll told her she “could not wear ‘that thing’ on [her] head” referring to Cross’s hijab. *Id.* ¶ 41. These statements, however, do not lead inevitably to the conclusion that Morris and Carroll harbored discriminatory animus against Muslims; it is possible that Morris and Carroll were merely attempting to enforce the dress code. Concluding from these statements that Morris and Carroll harbored discriminatory intent requires an inferential step. The Court cannot find discriminatory intent “[w]here there are ‘obvious alternative explanations for the purportedly unlawful conduct and the purposeful invidious discrimination plaintiff asks us to infer.’” *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1014 (9th Cir. 2024) (quoting *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 276 (1st Cir. 2022)).

Thus, the Court considers whether Cross has made out a *prima facie* case under the *McDonnell Douglas* framework. CCCTA does not dispute Cross is a member of a protected class, was qualified to do the job, and was subject to an adverse employment action. ECF No. 56 at

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18-22. Accordingly, the only issue is whether Cross has put forth evidence that CCCTA treated similarly situated employees outside of Cross's class more favorably, or whether other circumstances surrounding her termination give rise to an inference of discrimination.

Cross points to Brown as a similarly situated, non-Muslim, individual who was treated more favorably. ECF No. 75 at 23. CCCTA responds that the two are not similarly situated. ECF No. 56 at 19-21. "In order to show that the 'employees' allegedly receiving more favorable treatment are similarly situated . . . the individuals seeking relief must demonstrate, at the least, that they are similarly situated to those employees in all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). While Cross and Brown both had accidents involving a bicyclist while operating a bus, the Court agrees with CCCTA that the two were not similarly situated in all material respects. In Brown's case, the police found that the bicyclist was at fault for the collision, whereas the police found Cross caused the collision she was involved in, by violating California Vehicle Code Section 21760(b). Glenn Decl., Exs. I, R at 2; Glenn Dep. at 149:11-15; Cross Dep. at 352:23-353:14. Although CCCTA initially prepared a notice of intent to terminate Brown's employment, the Union successfully appealed CCCTA's finding that her collision was preventable and her fault. Glenn Decl., Exs. S, T; Glenn Dep. at 155:2-9. By contrast, the Union and Cross never disputed that the collision was her fault or preventable. Cross Dep. at 244:16-248:4; Glenn Decl., Exs O, P. Moreover, Brown worked for CCCTA for over 25 years where Cross had been employed for less than

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a year. Glenn Decl., Exs Q, N; *see Tyson v. Gannett Co.*, 538 F.3d 781, 784 (7th Cir. 2008) (citation omitted) (length of employment if it “is something that an employer must credit when making employment decisions,” will “tend to make two employees dissimilar for purposes of the plaintiff’s prima facie case”). In short, there were significant differences between them.

Nor do the other bus drivers Cross identifies qualify as similarly situated employees outside of her class. For one, Cross does not submit evidence regarding whether these bus drivers were outside of her protected class. In fact, CCCTA presents evidence that at least one of these drivers is himself a practicing Muslim. Sadat Decl. ¶ 3, ECF No. 82-4. Moreover, none of the other incidents involved a pedestrian or bicyclist. *See Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003) (finding that plaintiff was not similarly situated to comparator because comparator “did not engage in problematic conduct of comparable seriousness to that of” plaintiff). And Cross fails to supply other details regarding their conduct, the surrounding circumstances, what happened during any *Skelly* hearing or grievance proceedings, or their length of employment.

Cross’s other evidence surrounding the circumstances of her termination - specifically, the statements by her two supervisors that she could not wear her hijab - also fail to give rise to an inference of discrimination. Cross Decl. ¶ 21 (describing how Morris approached her in the parking lot and told her she couldn’t wear her hijab); *Id.* ¶ 41 (describing how Carroll told her she “could not wear

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‘that thing’ on [her] head” referring to Cross’s hijab). Ambiguous comments that are not tied directly to the adverse employment action are “weak evidence and not enough to create an inference of . . . discrimination.” *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996). Accordingly, Cross has failed to establish a prima facie case of discrimination and CCCTA is entitled summary judgment on her discrimination claim.²

B. Retaliation

The *McDonnell Douglas* burden-shifting framework also applies to retaliation claims brought under Title VII and FEHA. *See Porter v. Cal. Dep’t of Corrs.*, 419 F.3d 885, 894 (9th Cir. 2004); *Loggins v. Kaiser Permanente Int’l*, 151 Cal. App. 4th 1102, 1108-09 (2007). To make out a prima facie case of retaliation, an employee must show that (1) she engaged in a protected activity; (2) her employer subjected her to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). If the plaintiff establishes a prima facie case, “the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision.” *Id.* If the employer satisfies that burden, then the burden shifts back to the plaintiff to show that the “proffered

2. Cross also claims that CCCTA failed to adequately accommodate her religious beliefs. ECF No. 75 a 16-18. Cross did not make these allegations in her complaint, so they are not properly before the Court. *See Earth Island Inst. v. United States Forest Serv.*, 87 F.4th 1054, 1073 (9th Cir. 2023) (“Since Earth Island did not plead this claim in its complaint, it was not properly before the district court, and fails.”).

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reason was a pretext for unlawful discrimination.” *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007).

CCCTA does not dispute that Cross has made out a *prima facie* case of retaliation. ECF No. 56 at 24-25. Thus, the burden shifts to CCCTA to articulate “a legitimate, nondiscriminatory reason for the adverse employment action.” *Fonseca*, 374 F.3d at 849. CCCTA has met that burden. CCCTA claims it terminated Cross because she was found to be responsible for an accident, and to have violated California Vehicle Code Section 21760(b), when she hit a bicyclist. Glenn Decl., Exs. K, L, M, O, Q, R. Accordingly, the burden shifts back to plaintiff to show that CCCTA’s proffered reason was pretextual. *Fonseca*, 374 F.3d at 849. Cross advances several arguments in an effort to meet her burden.

First, Cross argues that “an employer’s failure to conduct a proper investigation can itself be evidence of unlawful pretext.” ECF No. 75 at 20. The argument is supported by the law, *e.g.*, *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 277 (2009), but not by the facts. The evidence shows that before issuing the Notice of Intent to Terminate Cross’s employment, CCCTA dispatch spoke to Cross at the scene of the collision and CCCTA management reviewed the video of the accident. Glenn Decl. ¶ 9. A few days later, CCCTA’s manager of training found that the collision was preventable. Glenn Decl., Ex. L. CCCTA gave Cross a *Skelly* hearing, during which she claimed that an alarm was distracting her, and the Union requested that CCCTA confirm this through further review of the onboard video. Glenn Decl., Ex. M. But

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that review only made things worse for Cross - not only was there no evidence of an alarm, but the video showed Cross running stop signs and red lights. CCCTA then performed a further review and confirmed that Cross had committed additional traffic violations over the course of multiple days; that Cross had used her cell phone while in revenue service; and that Cross failed to stop at BART crosswalks. Glenn Decl., Ex. M.

After Glenn issued the Notice of Termination, Cross grieved her termination and submitted a statement laying out why she believed CCCTA incorrectly terminated her employment. Glenn Decl., Exs. P, R. At Step 2 of the grievance process, a different manager, Human Resources Director Rettig, met with Cross and discussed CCCTA's investigation into Cross's claim about her driving record. Glenn Decl., Ex. Q. Rettig observed Cross "running stop signs and speeding at Concord BART every day" and concluded that Cross was not "just having a bad day" but that "[s]he repeatedly drives unsafely." *Id.* Rettig also investigated Cross's claim about Brown and found "significant differences in the two occurrences." *Id.* At Step 3, Assistant General Manager Bill Churchill met with Cross and considered all the evidence, including the video of the incident, radio and phone communications between Cross and dispatch, the police report, Supervisor logs, vehicle defect logs and all documents related to the termination and grievance proceedings including the notes of those who attended the hearings on behalf of CCCTA. Glenn Decl., Ex R. Churchill came to the same conclusion as the other managers—that Cross "clearly hit the cyclist causing the accident," violated CCCTA

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work rules, and engaged in an “extremely dangerous and illegal driving practice.” *Id.* Cross’s Union decided not to escalate the grievance to arbitration. Glenn Reply Decl. ¶ 7. Cross fails to explain why, or offer any evidence that, this investigation was insufficient.

Second, Cross contends that CCCTA’s failure to follow its own policies and procedures provide evidence of pretext. ECF No. 75 at 20. The only specific policies Cross points to are CCCTA’s “progressive discipline policy,” which she contends requires notice and retraining following a preventable collision, and Article 52 of the MOU, “which prohibited the employer from searching through electronic media not directly present in the pending infraction in order to buttress its termination decision.” *Id.* at 21. Regarding the former point, the evidence shows that CCCTA’s practice and policy of progressive discipline varies depending on the severity of driver’s conduct. Glenn testified that following a preventable accident, “the normal course is to give someone, depending on the incident, a written warning, which is the form itself; and then on a second occurrence, to be given a four-hour retraining.” Glenn Dep. at 86:14-20. But she also testified that “it all comes back to discipline and the level and the severity of the accident and the occurrence,” *id.* at 86:20-22, and that CCCTA “can go straight to termination, depending on the facts and the severity,” *id.* at 141:10-13; *see also* Glenn Decl., Ex. E, ECF No. 56-1 at 92 (CCCTA and Union’s MOU establishing that “if the seriousness of the infraction warrants, disciplinary action may begin” at termination). Thus, there is no evidence that CCCTA

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violated its own policies. And Article 52³ of the MOU does not bar searching electronic media not directly present in the pending infraction. *Id.* at 92-93. Rather, Article 62 provides that CCCTA “may use electronic media evidence as support for employee disciplinary action” but cannot “initiate the review of electronic media solely for the purpose of looking for employee misconduct.” *Id.* at 103. It must “have a legitimate business reason, such as but not limited to, a reported or observed incident, law enforcement request, accident or unreported damage,” to review electronic media. *Id.* Cross points to no evidence that CCCTA violated this policy. Instead, the evidence reflects that CCCTA only reviewed video footage beyond the incident in question because the Union requested that CCCTA investigate Cross’s claim that an alarm distracted her on the day of the incident and that she was a safe driver. Glenn Decl., ¶ 13, Ex M. In any event, CCCTA’s policy gave it the right to review the footage because Cross had been involved in an accident.

Third, Cross contends that other bus operators were treated more favorably, indicating CCCTA’s proffered reason for her termination was pretextual. ECF No. 75 at 21-23. However, as explained above, Cross has failed to show that these individuals were similarly situated. *Moran*, 447 F.3d at 755 (“In order to show that the ‘employees’ allegedly receiving more favorable treatment are similarly situated . . . the individuals seeking relief must demonstrate, at the least, that they are similarly situated to those employees in all material respects.”).

3. Cross cites Article 52 of the MOU in her briefing, but that Article does not say anything regarding electronic media. Cross appears to be referring to Article 62.

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Finally, Cross contends that she was “falsely” found to have violated the “3 feet” rule, Cal. Veh. Code § 21760, and to have sideswiped a bicyclist. ECF No. 75 at 21-23. The relevant question, however, is not whether the decisionmaker based its termination decision on an “objectively false” version of an employee’s conduct, but whether the decisionmaker “honestly believed” the reasons given for the termination. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (emphasis and citation omitted). Given Cross’s own admission and the police’s finding her at fault, CCCTA had legitimate reasons to believe she was at fault for the accident, and Cross presents no evidence that CCCTA did not honestly believe its proffered reasons.

Because Cross has not shown that CCCTA’s legitimate, nondiscriminatory reasons for her termination were pretextual, she has failed to meet her burden on her retaliation claim and CCCTA is entitled to summary judgment.

C. Hostile Work Environment

To make out a prima facie hostile work environment claim under Title VII and FEHA, Cross must prove that: (1) she was subjected to verbal or physical conduct of a religious nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment.” *Vasquez*, 349 F.3d at 642; *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 279 (2006). “Courts determine whether an

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environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1206 (9th Cir. 2016) (internal quotation marks and citation omitted).

Cross bases her harassment claim on three incidents. First, on the stairs going to the parking lot, supervisor Morris came running behind her and said that she could not "wear that," referring to Cross's hijab. Cross Dep. at 175:14-178:23; Cross Decl. ¶ 21. Second, another employee remarked that he would like to wear his hat for religious purposes. Cross Dep. at 185:2-5; Cross Decl. ¶ 32. Third, supervisor Carroll told her she could not wear "that thing," referring to Cross's hijab. Cross Dep. at 187:16-188:3; Cross Decl. ¶ 41. This conduct, even viewed in the light most favorable to Cross, is not severe or pervasive enough to constitute a hostile work environment. In *Vasquez*, the plaintiff's colleague told him he had "'a typical Hispanic macho attitude' and that he should consider transferring because 'Hispanics do good in the field.'" 349 F.3d at 643. The same colleague also yelled at him in front of the youth they supervised and made continual, false complaints about the plaintiff to their supervisor. *Id.* The Ninth Circuit found that these events were not severe or pervasive enough to constitute a hostile work environment. *Id.* The incidents here are less severe and pervasive than in *Vasquez*—Cross relies on three incidents in her year-long employment. Accordingly, CCCTA is entitled to

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summary judgment on Cross's hostile work environment claim.⁴

CONCLUSION

For the foregoing reasons, CCCTA's motion for summary judgment is granted. The Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

Dated: September 3, 2024

/s/ Jon S. Tigar
JON S. TIGAR
United States District Judge

4. Cross also contends that CCCTA engaged in *quid pro quo* religious harassment. ECF No. 14-15. However, the Ninth Circuit has not recognized a claim for *quid pro quo* religious harassment. *See Quinones v. Donahoe*, No. 1:13-cv-1553, 2014 WL 2524429, at *3 (E.D. Cal. June 4, 2014). Regardless, Cross has not presented sufficient evidence of *quid pro quo* harassment. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1175-76 (9th Cir. 2003) (finding plaintiff did not present sufficient evidence of *quid pro quo* harassment when she produced no evidence connecting any discussion of her job duties with Wiggins's requests that she engage in sexual acts with him.)

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED FEBRUARY 20, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6068
D.C. No. 4:21-cv-01312-JST
Northern District of California, Oakland

SHANNON CROSS,

Plaintiff-Appellant,

v.

CENTRAL CONTRA COSTA TRANSIT
AUTHORITY,

Defendant-Appellee.

Filed February 20, 2026

ORDER

Before: NGUYEN and BENNETT, Circuit Judges, and
MATSUMOTO, District Judge.*

The panel has voted to deny the petition for panel
rehearing.

* The Honorable Kiyo A. Matsumoto, United States District
Judge for the Eastern District of New York, sitting by designation.

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The panel has voted to deny the petition for rehearing en banc, and Judge Matsumoto has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc, Dkt. No. 61, is **DENIED**.

**APPENDIX D — DECLARATION OF SHANNON
CROSS IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, FILED JUNE 14, 2024**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 21-cv-01312-JST

SHANNON CROSS,

Plaintiff,

v.

CENTRAL CONTRA COSTA TRANSIT AUTHORITY,

Defendant.

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DECLARATION OF SHANNON CROSS

I, Shannon Cross, declare under penalty of perjury that the following is true and correct:

- 1 I began work for CCCTA on July 23, 2018. I am an African American Muslim woman who grew up in Oakland, California. Oakland is a very diverse community, and I never experienced any discrimination or racism until I came to work for CCCTA.
- 2 As a Muslim woman, wearing the Hijab is a very important part of my faith and practice. My faith teaches me to cover up my natural hair. The Hijab is also a very public expression of my faith, and a witness to Allah.
3. When I began work at CCCTA, I attended a period of training.
4. During my training, we worked through the employee handbook and were trained on company policies. One of the policies had to do with uniform and the prohibition on wearing hats. [Plaintiff's Exhibits are compiled in volumes, and referenced by page number. Vol. A, p. 144.]
5. One of operators in the class, Terrice Hampton, had a black wrap on her head, and was told she could not wear the headcovering. My recollection is that she had to go home that day at lunch, and remove her headcovering, but she returned to class.

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6. Seeing the treatment Hampton received, I was intimidated and fearful of asking to wear my Hijab. The instructor made it very clear we could be terminated for wearing something on our head.
7. As a result, I was scared that if I asked to wear my Hijab during probation, I would never pass probation. So instead, I compromised on my belief, and instead of wearing the Hijab as a public witness to my faith, I bought a wig to cover my natural hair.
8. The employee handbook had not made any mention of a policy about providing religious accommodation, nor did it reference that accommodation forms might be available.
9. When the training covered the topic of harassment, the main thing covered was sexual harassment. No mention was made of racial or religious harassment.
10. In reviewing the employee handbook during this litigation, I was reminded there is no policy about religious accommodation, nor is there any mention of an accommodation form.
11. When I passed probation, Miguel Duenas and Aline Carroll issued me a memo, and stated: “Your performance during the probationary period was found to be outstanding.” Plaintiff’s Exhibits, Volume A, p. 189.] [Plaintiff’s exhibits are compiled into three volumes. Volume A comprises documents that are not filed under seal, Volume B are those documents filed

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under seal, and Volume C comprises videos supplied to the court on a flash drive, and manually filed.]

12. The evaluator's comment stated: "Operator Shannon is very professional at her job. She is always asking questions and wants to do well. She was exceptional behind the wheel and has a great attitude towards her job. Great job Shannon!" [Vol A, p. 193.]
13. I completed probation on January 23, 2019. [Vol A. p. 189.] That same week, I asked one of the supervisors, Preston Ennis, whether I could wear my traditional Muslim head covering. We had a brief discussion during which I explained to him what the head covering was. He was on duty at the County Connection office where I would clock in and out of my shifts.
14. Ennis said he didn't know and would have to look into it and get back to me. He never got back to me before he left the company, nor did anyone else.
15. Clearly, because there was no written policy about religious accommodation, and no training of supervisors, Ennis lacked any information or understanding as to whether I would be permitted to wear my Hijab.
16. Since Ennis didn't know about a policy, and I didn't hear back, I became concerned that I might not be permitted to wear my Hijab.

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17. When I didn't hear back, I contacted Kristina Martinez in human resources, and asked her the same question, about whether I would be permitted to wear my hijab. As I had done with Ennis, I had a brief conversation with Martinez and explained to her about why my Hijab was important to me.
18. Even though Martinez is in human resources, like Ennis, she did not know whether I would be permitted to wear my Hijab. She had no policy to consult. She told me she would have to get back to me.
19. She gave me a generic accommodation form that made no mention of religion on it and had me fill it out. [Vol. A, p. 194.] I wrote that I was "asking permission to wear my hijab this headpiece is worn for the purpose of my religion as a Muslim."
20. I received written permission to wear my Hijab, but the permission made no mention about any company policy. [Vol A, p. 274.¹] After my initial request to Martinez, no one reached out to me to discuss my request further; no one assured me CCCTA stood by my religious freedom or my right to religious expression. Nor did anyone ever tell me that my supervisors had been informed I had permission to wear it.
21. I found out that my supervisors did know when, about a week after receiving written permission, I clocked

1. The document is an image and could not be bated numbered. It is the last page of Volume A.

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out at the window where supervisor Sophia Morris was on duty. I left and climbed up the stairs to the parking lot. As I reached the top of the stairs, I saw Morris running after me and chasing me down. She called out to me that you can't wear that, referring to my hijab.

22. When I saw her chasing after me, I became afraid. I had just been at the window inside with her a few moments before, and if she had anything to say to me, she could have had the conversation with me in a respectful and professional manner inside the building. Instead, she ran after me and chased me down. It immediately startled me and made me afraid.
23. Morris also made me feel she was attacking me and my religion, even though I had permission to wear the hijab.
24. I told Morris I had permission to wear the hijab, but she didn't let up on me. Instead, she changed her story, and admitted she knew I had permission, but having been put on the defensive, she now made up something about the hijab being the wrong color. Then she said: "Well, I'm telling you you can't wear that."
25. The hijab was maroon. It matched my uniform. It was exactly the color that was permitted. When Morris argued with me about the color, I was offended and disgusted that she would stoop to such falsehoods in attacking my religious practice.

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26. Morris said plainly she wanted me to stop wearing my hijab. I became very uncomfortable and self conscious about wearing it at work. It didn't seem like I could continue working there if kept wearing my Hijab.
27. Before this happened, I felt good about going to work, and that I could have a career there.
28. But this incident completely changed everything. I no longer felt safe going to work, and I knew I did not fit in. I experienced anxiety every day I had to go to work. I felt my face flushed and hot, a tightness in my chest, and actual terror. I was afraid of what might happen next, of being physically attacked. I began to doubt I had made a good decision going to work for the company.
29. The person I mainly confided in was my mom, Cheryl Edwards. I told her about how I felt harassed, and how much fear and anxiety it caused me. I also told her I didn't feel like I belonged there, and wondered how long I would last.
30. Not long after, I was in the breakroom, and Morris came in and informed everyone she was going to begin enforcing the policy forbidding hats. It was clear to me and everyone else I was the reason they started enforcing the policy -- because of my Hijab. I was being singled out. I would be the only one permitted to wear something on my head.
31. Up until this time, bus operators wore hats all the time. And they would wear all different kinds of hats.

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32. Predictably, Morris' announcement caused resentment and hostility. One of the bus operators responded in a mocking and humiliating tone, and said, while looking directly at me, "now I'm going to wear my hat for religious purposes."
33. Morris did not chastise him for his offensive and discriminatory remark but added a similarly insulting comment of her own. I don't recall her exact words, but I do remember just how humiliated and embarrassed I felt. The entire experience was very painful.
34. The very next day, I reported to Kristina Martinez about both these incidents with Morris, and told her how offensive they were, and how upset I was.
35. Martinez assured me she would remind Morris I was permitted to wear my Hijab. But she did not follow the policy which required her to have the company initiate a harassment investigation, take appropriate action, and report the results to me. [Vol A, p. 23.]
36. I never heard about any such investigation.
37. As I read the policy, if I am harassed by a supervisor, I am permitted to bring my complaint directly to a manager: "to the Affirmative Action Officer or to any other manager." I did this.
38. The policy says I should let them know that I "find the behavior offensive." I did way more than simply tell Martinez I was offended. I told her how upset, embarrassed and humiliated I was by the harassment.

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39. It seemed to me that the employer did not care about my being harassed. CCCTA didn't take my complaint of harassment seriously.
40. After this, I was convinced the company would not protect me from further harassment. I continued to go to work every day with anxiety and fear about what would happen next.
41. It didn't take long before I was harassed again. On a Friday in April, I was wearing a black hijab with subtle designs portraying religious symbols on it. Many other bus drivers would wear hats with all kinds of symbols – sports teams, etc. I was at the window in the County Connection office when supervisor Aline Carroll gave me a look of disgust and told me I could not wear “that thing” on my head.
42. In her declaration, Carroll says she told me I could continue to wear my Hijab. This is untrue. To the contrary, she told me I could not wear it.
43. That “thing” as she put it, is a sacred garment, and worthy of respect. Carroll's comment was extremely disrespectful and hostile. I felt very angry when she said it, and also much shame. I had seen that Aline and Morris were good friends, and I knew that things were getting worse for me, with these two supervisors harassing me on account of my hijab.
44. This was the second time a supervisor told me not to wear my Hijab, even though I was complying with

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policy. The only conclusion I could draw was that despite having written permission to wear it, CCCTA really wanted me to remove it. So I understood clearly that if I did not remove it, I was likely to face consequences.

45. According to the company's progressive discipline policy, the first step in discipline is a verbal warning. Both times when supervisors Morris and Aline confronted me about my Hijab in a harassing manner, I perceived they were threatening me with discipline if I continued to wear it. I felt they were pressuring me to remove my Hijab and conform to what everyone else was doing.
46. I went and spoke to Lisa Rettig, head of human resources. I told her what Carroll had said, how offensive it was, and how upset it made me. I also told her about the prior incidents with Morris and what happened in the breakroom. All she could say is "some people are stupid." She did not initiate an investigation, retain an outside workplace investigator, or follow up with me in any way.
47. I was not reassured. If anything, I was left feeling that H.R. did not have my back, and that I was at the mercy of the supervisors who were clearly not happy I was wearing my Hijab. To my knowledge, I was the only Muslim woman working there – I did not see any other women wearing Hijab.
48. About six weeks later, on May 30, 2019, I had an accident wherein a bicycle collided with the bus. The

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bicyclist was at the corner, with his foot on the curb as I approached. The bicyclist did not signal that he was intending to enter the lane, and by the time he did so, I was already in the lane. As I was passing him, the bicyclist fell into the rear of the bus.

49. I called in the accident as I had been taught to do, and reported what I believed occurred, which is that the bicycle hit the bus, not the other way around. I was very shaken up.
50. Just before the accident, I called in to report a problem with the alarm. After the accident, I reported that the alarm going off distracted me. In the notice of termination, CCCTA does not dispute my statement that the alarm had been going off. Further, when I got to the BART station, one of the bus drivers, Darrell, told me not to turn off the bus because the alarm was going off. I called in from the BART station and was told to complete the final loop and bring the bus in.
51. I have since watched the video several times, and the alarm is clearly audible.
52. After bringing the bus back, I drove another shift, and didn't return to the yard until 7:00 p.m. When I arrived, Aline Carroll called me into her office, and issued me a notice of termination, just like that. [Vol.A, p. 194-196.] She had a pleased and smug look on her face. She is the same supervisor who had referred to my Hijab as "that thing" and told me I could not wear it only six weeks earlier.

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53. No one questioned me about what happened. I was just fired, on the spot.
54. I was in shock.
55. I was placed on suspension immediately.
56. I was issued a notice that CCCTA considered the incident “preventable” dated June 5th, but my termination was issued even before CCCTA had formally made that determination. [Dkt. 56-1 p. 134.]
57. Because of the tremendous stress caused by the accident and my termination, my doctor put me on stress leave, extending my time off work.
58. In anticipation of my Skelly hearing, I submitted a written statement complaining about discrimination, stating in part: “As an over 40 African American woman who is a practicing Muslim that openly wears a Hijab, I feel that I am being scrutinized differently than those who don’t outwardly present their religion.” [Vol. A, p.197-198.]
59. I also noted that my driving record was clean, with no accidents or incidents. (I did have a tardy for being 9 minutes late.) No one had criticized my driving.
60. My Skelly hearing was on Friday, June 7th. Friday is free dress day. The union president told me to come in uniform. I asked her why? Was I going to be returned to work? She said no. I said I would have the uniform

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in the car, but I was going to Juma prayer after the Skelly.

61. Even the union president knew the Skelly hearing was pre determined. She knew I would not be returned to work. I was not even permitted to view the video of the bus accident prior to the Skelly.
62. When I finally got the police report, I found out that CHP did not even issue me a point on my driving record. My understanding is that if there were damages in excess of \$750 they would have been required to issue me a point on my license. Of course, it could have been serious, and I'm very grateful Mr. McKenzie was not injured.
63. I received my termination letter dated June 13, 2019. [Vol A. p. 199.] It referenced the police report that was "issued" on June 19th. Hmm. Seems the letter was written before CCCTA had the police report, but falsely claimed the police report as support for my termination. *Ibid.*
64. The union filed a grievance on my behalf on June 20, 2019. [Dkt 56-1 p. 144.] The union said CCCTA failed to pay me for the period from June 10 to June 13 while I was on stress leave, and before the date of my termination, in violation of the union agreement ("MOU").
65. This was not the only contract violation. As the union stated in the grievance, CCCTA failed to issue me a

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“Pending Disciplinary Action Letter” as required by Article 52 of the contract. [Dkt. 56-1, p. 144.]

66. According to the grievance, [Dkt. 56-1, p. 144.] CCCTA also violated Article 62 of the agreement: “The Authority will not, however, initiate the review of electronic media solely for the purpose of looking for employee misconduct.” [Vol A, p. 264.] 67. CCCTA reviewed countless hours of video to search for additional evidence that I had engaged in misconduct, allegedly discovering rolling stops. They used this after the fact, in violation of the union contract, to justify their decision not to issue me a last chance agreement.
68. Rolling through stop signs at the Concord BART station was a common occurrence, and I was angry I was being singled out for this. Sometime later, I spent a morning at the Concord BART station watching bus after bus roll through those very same stop signs without coming to a complete stop. I never heard of anyone being disciplined for rolling stops. It was plain they were just trying to justify the decision to terminate me, which they made even before I returned to the yard.
69. In anticipation of the grievance proceedings, the union advised me to submit a letter admitting fault, so I did. That was supposed to be help me avoid termination. Instead, it backfired, and is now being used against me as though I have already conceded my fault.

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70. At the grievance hearing, I argued that my accident did not warrant more severe treatment than Ronnette Brown's – she actually ran over a teenage girl's leg and her bicycle, putting her in the hospital! CCCTA first found her accident to be preventable, as they did mine, but only gave her a suspension and retraining.
71. At both the Skelly hearing and the grievance hearing, it was very clear to me that CCCTA had already made up their mind to terminate me, and that they weren't interested in the facts. I was represented at the grievance by the union president, Michelle Gray. She told me that at the last step of the grievance, CCCTA would offer a "last chance" agreement. But even though I repeatedly asked for a last chance agreement, CCCTA refused to make the offer.
72. During training, we were trained on how to relate to bicyclists. Our training said to "pass 'em up, pick 'em up." That meant to pass the bicyclist, and then pick them up in the mirror. But this had to do with bicyclists that were actually in the lane and riding. There was no discussion about any procedure for dealing with bicyclists who were stopped at a red light, at the curb. Nor was there any instruction to slow to a crawl or stop for bikes that were not moving.

Sworn to under penalty of perjury this 14th day of June, 2024

/s/ Shannon Cross
By: Shannon Cross

**APPENDIX E — DECLARATION OF DAVID
BRINTON IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, FILED JUNE 14, 2024**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 21-cv-01312-JST

SHANNON CROSS,

Plaintiff,

vs.

CENTRAL CONTRA COSTA TRANSIT AUTHORITY,

Defendant.

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Filed June 14, 2024

**DECLARATION OF DAVID BRINTON IN
OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT**

I, David Brinton, declare and state:

1. I have been retained by plaintiff's counsel to offer an opinion regarding bicycle-related actions of Ian Mackenzie, and of Lili Smith, two individuals involved in separate collisions with Central Contra Costa Transit Authority ("CCCTA") busses, operated by Shannon Cross and Ronette Brown, respectively. Attached hereto as Exhibit A is a true and accurate copy of the report and exhibits I prepared for this case.

2. The facts stated in my report and in this declaration are true and correct, based on my personal knowledge, and the opinions expressed there and herein are my true opinions based on my experience as Licensed Level- Coach and Certified Bicyclist Instructor. teaching safe riding practices, traffic awareness, rider predictability, and other handling skills on the road. If called as a witness to this action, I would and could testify competently to the matters stated herein and in my attached report.

3. A true and accurate copy of my *Curriculum Vitae* is attached as the first exhibit to my report. In addition to my license as a coach and certification as an instructor, since 1984 I have privately coached safety and bike handling skills to more than 2,000 persons, from

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beginners through professional bicyclists, from ages two to 85 years old. Throughout my coaching career, I have conducted hundreds of group rides with support vehicles, bicycle safety, bike handling, and crash awareness clinics and workshops. I have ridden over 300,000 miles, competed in the Olympic Games, earned 4 Master World Championships, and was a Hollywood stuntman for 17 years specializing in bicycle crashes, evasive maneuvering, and jumping.

4. In preparation for my opinion, I reviewed videos from the on-bus cameras and collision reports produced in the litigation, for both incidents: the one between Cross and Mackenzie; and the one between Brown and Smith. My opinions are based upon my review of those materials, my subsequent analysis and my bicycling experience.

5. Mackenzie's collision with the side of the bus operated by Cross was the result of the bicyclist's own failure to take reasonable measures to ensure that he was riding in a safe manner on the public streets.

a. Mackenzie did not take control of the #3 eastbound lane on Clayton road where the collision occurred. The bicyclist was stopped at the gutter with a foot on the curb, and he had released whatever control he might have had of the lane to a white SUV that passed him on the left before it turned right onto Ellis street. It is common practice for bicyclists to position themselves towards the center or slightly right of center of the lane if they wish to message other drivers that they intend to proceed at the light in control of the lane. Mackenzie's

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positioning was likely to indicate to other drivers that it was safe to pass by as he was stopped off the roadway in the gutter.

b. Mackenzie did not look back to check if traffic was clear, or signal an intent to proceed from a stopped position before entering the roadway from the gutter. It is the bicyclist's responsibility to take these actions so he does not endanger himself or others. (Exhibits DB-03 and DB-04.)

c. Mackenzie's actions could have confused other drivers as to his intent. By remaining in one place in the gutter for two to three seconds after the light had turned green, he did not indicate an intent to proceed until, what appears to be, less than one-second before the bus passed him, when he kicked off the curb and started to proceed. (Report Exhs. DB-04 and DB-05.)

d. Had he looked over his shoulder to his left before proceeding, Mackenzie likely would have realized that the bus was in traffic on the lane, and he would have waited for it to pass or ride to the right and entered into the crosswalk to proceed forward. Instead, he drifted left towards traffic, and into the line of traffic. When he saw the bus passing him, Mackenzie abruptly turned his front wheel to the right, in attempt to turn away from the bus without first leaning the bike to the right. This oversight on his part directly led to him falling into the bus. (Report Exhs. DB-07 and DB-08).

6. In contrast with the collision of Mackenzie, the collision involving Smith and the bus driven by Brown had

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far less to do with the actions of the bicyclist. When Smith entered into the cross road and proceeded along the right side of the crosswalk (away from the traffic and the lane of the bus she had just disembarked), the light was still yellow. Upon entering, Smith looked ahead to where she was going, and she could see pedestrians still walking in the crosswalk ahead of her. She thus appeared to believe that it was safe to cross.

7. Unlike Mackenzie, who drifted into the bus's lane, Smith was in the crosswalk riding alongside the bus when the bus driven by Brown began to turn to the right. At the moment that the bicyclist recognized the bus was beginning to turn into her, she was roughly six feet into the crosswalk and almost immediately came to a complete stop with her bicycle leaned right and her front wheel turned to the right. The trailing end of the bus continued to come inward, reducing the gap between it and the stationary bicycle, until the bus collided with Smith, and partially ran over Smith and the bicycle.

8. Smith's stepping onto the sidewalk after disembarking the bus was safe and reasonable. Smith's entering into the crosswalk through the left side of the ADA transition after passing a pedestrian was the safe and reasonable path to follow. Entering an intersection while the light was still yellow is a common and reasonably expected practice for bicyclists. Had the collision not occurred, it is reasonable to believe that Smith would have caught up, or be reasonably close, to the crossing pedestrians in front of her. Smith's actions were thoughtful, reasonable, showed a high level of awareness, and what

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many other bicyclists would have done in that situation. If the bus operator had first looked to see if anyone was in the crosswalk, the incident would not have happened.

I declare under penalty of perjury under the laws of the United States and California that the foregoing is true and correct. Executed this 14th day of June, 2024.

/s/ David J. Brinton
David J. Brinton