No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AND OTHER ORGANIZATIONS SUPPORTING CIVIL RIGHTS FOR AMERICAN MUSLIMS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a religious observance and practice only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the application or employee.

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") is a non-sectarian and non-partisan organization, the country's largest Arab American nonprofit grassroots civil rights organization. ADC seeks to preserve and defend the rights of those whose Constitutional and federal rights are violated in the United States ("U.S."). Founded in 1980 by U.S. Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide. ADC has been at the forefront of protecting the Arab-American community for over thirty years against discrimination, racism, and stereotyping, and vigorously advocates for civil rights for all. ADC is joined in this brief by: Muslim Women Lawyers for Human Rights (KARAMAH), Cornell University Islamic Alliance for Justice, and Penn State Muslim Students' Association. *See* Appendix A for a full statement of interest from *amici*.

Amici's interest in this case arises from receipt of an increasing number of complaints and/or cases of employment discrimination based on religion. Title VII makes it unlawful for an employer to discharge

[1] The parties have consented to the filing of this brief pursuant to Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission of this brief.

any individual or discriminate based on the individual's religion.[2] The law requires employers to provide reasonable accommodations in respect to an employee or prospective employee's religious observance or practice unless the employer can demonstrate that the accommodation would cause undue hardship on its business.[3] Title VII religious accommodation protections are particularly vital where an applicant's or employee's faith is readily identifiable by an article of faith.

The rights of *Amici's* constituents of the Muslim faith will be fundamentally affected by the decision of this Court to reverse or uphold the Tenth Circuit decision. *Amici's* constituents will be effectively excluded from employment and/or terminated by employers based on religion under the guise of branding and/or "look" policy. Particular articles of faith are synonymous with specific religions and readily identifiable upon observation, such as a hijab with Islam. The Tenth Circuit decision that employers "live in a bubble", that employers are not aware that articles of faith may require a religious accommodation. If the Tenth Circuit Court decision is upheld, this Court effectively gives permission for employers to discriminate based on religion.

STATEMENT

The purpose of the *Amicus* is to urge this Court to reverse the Tenth Circuit's holding that an employer can only be held liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" if the employer

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[2] 42 U.S.C. § 2000e-2(a)(1).

[3] 42 U.S.C. § 2000e(j).

has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the application or employee.

First, the *Amicus* argues that the Tenth Circuit's decision undermines Title VII protections. Second, the *Amicus* argues that wearing the hijab is a sincerely held religious practice that is protected by Title VII. Third, the *Amicus* argues that the Respondents "Look Policy" is discriminatory. Lastly, the *Amicus* argues that permitting employees to wear hijab will have less than a *de minimis* cost or burden on the Respondent's commercial look.

ARGUMENT

I. The Tenth Circuit's Decision Undermines Title VII Protections.

Looking to the Congressional record indicates Congress amended Title VII to provide for religious accommodations in response to the grave implications of *Dewey v. Reynolds Metal Co* and *Riley v. Bendix Corp*.[4] Both cases held there was no religious discrimination where the employer's action was based on a uniformly applied, religion-neutral rule or working condition.[5] The reasoning of these cases also extended to where the rule or condition conflicted with the dictates of the employee's religion.[6] Upholding the

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[4] 429 F.2d 324 (6th Cir. 1970); 402 U.S. 689 (1971); *see* 118 CONG. REC. 705–06 (1972).

[5] Jamie Darin Prenkert and Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 474 (Fall 2006).

[6] *Id.*

Tenth Circuit's decision will reinvigorate the misapplication of Title VII in *Dewey* and *Riley*.

A. Distinguishing between constructive knowledge and actual knowledge encourages employers to conceal work conflicts with religion and not engage in the interactive process.

The Tenth Circuit improperly decided constructive knowledge is insufficient under the *McDonnell Douglas* framework.[7] There is no substantive difference between actual knowledge and constructive knowledge because "an employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'"[8] Both the District Court and Respondent acknowledged that the interviewer believed Ms. Elauf wore the hijab for religious reasons.[9] The Respondent "assumed she was Muslim" and "figured that was the religious reason why she wore her head scarf."[10] In spite of this, the Tenth Circuit reasoned that since the words did not

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[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 1130–31 (1973).

[8] *See e.g.*, *Brown v. Polk County*, 61 F. 3d 650, 654 (8th Cir. 1995); *see e.g.*, *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *see e.g.*, *EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492, at *16 (W.D. Ky. 2010).

[9] EEOC, 731 F.3d at 1115, 1148.

[10] *Id.* at 1114; *see also* EEOC, 798 F. Supp.2d at 1278. There is also testimony that the interviewer informed the Respondent's District Manager that Ms. Elauf wore the scarf for religious reasons. *Id.*

come out of Ms. Elauf's mouth, Title VII's religious accommodation protections did not apply.[11]

The Respondent acknowledges that it did not hire Ms. Elauf because she would need an accommodation and/or exception to their "no hat policy", but then states they did not know she needed an accommodation.[12] The Respondent should not be allowed to act upon the basis of a perceived need for an accommodation but at the same time argue that it did not know it was required to provide her an accommodation. The Respondent did not believe Ms. Elauf wore the hijab for a fashion reason, because then the Respondent would have asked Ms. Elauf to remove the headscarf or inform her that she could not wear the headscarf to work. But the Respondent did not do this. The Respondent acted on its belief that Ms. Elauf wore the hijab for religious reasons and would be inflexible about it by not hiring Ms. Elauf.

If the Respondent had engaged in dialogue with Ms. Elauf regarding whether she wore the hijab for religious reasons based on this same constructive knowledge and subsequently did not hire her that would violate Title VII. If acting upon constructive knowledge is sufficient under the work-religion dialogue element of the *McDonnell Douglas* framework, [13] constructive knowledge is also sufficient under the notice component of the framework. The Tenth Circuit's rationale to distinguish constructive knowledge from actual knowledge is absurd and

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[11] *See* EEOC, 731 F.3d at 1114–15, 1128–30.

[12] *See id.*

[13] *See McDonnell Douglas Corp.*, 411 U.S. at 800–05.

makes a mockery of Title VII because the Respondent had "enough information."

The *McDonnell Douglas* framework for accommodations is flexible, not rigid.[14] Federal courts have provided exceptions or modified the framework when an employer's obligation to consider a reasonable accommodation is triggered.[15] As the Tenth Circuit noted, accommodations under the Americans with Disabilities Act (ADA) are often looked to for guidance in religious accommodation cases.[16] However, the Tenth Circuit failed to consider in its 'notice' analysis that federal courts have determined in ADA cases that there is no requirement that an employer have actual knowledge in order to engage in the interactive process.[17] In *Barnett v. U.S. Air, Inc.*, the Ninth Circuit found that the employer violated the ADA although the employee did not request an accommodation.[18] The Ninth Circuit made sure to highlight that "[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation.[19] The Ninth Circuit in *Coley v. Grant County* reiterated that an employer in some cases has

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[14] *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

[15] *See e.g., Stover v. Martinez*, 382 F.3d 1064, 1077 (10th Cir. 2004).

[16] EEOC, 731 F.3d at 1123, 1141.

[17] *See e.g.*, *Barnett v. U.S. Air, Inc.*, 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002).

[18] 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated on other grounds, US Airways, Inc. v. Barnett,* 535 U.S. 391, 152 L. Ed. 2d 589, 122 S. Ct. 1516 (2002).

[19] *Id.* at 1112–13.

an obligation to engage in the interactive process without a request from the employee where the employee's job performance was attributable to his disability.[20] In *Jacques v. DiMarzio*, the Second Circuit also reasoned that employers have an obligation to engage in an interactive process with a person who *may* need a disability accommodation, although no formal request by the employee is made.[21] The Seventh Circuit has also acknowledged that where notice is ambiguous, but sufficient to notify the employer that the employee *may* have a disability that requires accommodation, the employer must ask for clarification.[22]

This Court should hold that based on the particular facts of a case, an employer is required to engage in an interactive process upon recognizing that an employee or applicant *may* need a religious accommodation. Such a holding would not place an additional burden on the Respondent. There are no additional responsibilities placed on the Respondent based on whether it has "actual" knowledge versus "constructive" knowledge. The Respondent is merely asked to inquire into whether the applicant or employee wears the headscarf for a religious reason. Without this, inevitably, employers will actively conceal work-religion conflicts and refrain from engaging in dialogue, striking at the heart of Title VII.

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[20] *See Coley v. Grant County*, 36 Fed. Appx. 242, 244 (9th Cir. 2002).

[21] 386 F.3d 192 (2d Cir. 2004).

[22] *See EEOC v. Sears, Roebuck & Co*., 417 F.3d 789, 804 (7th Cir. 2005); *see Bultemeyer v. Fort Wayne Community Sch*., 100 F.3d 1281, 1285 (1996).

The obligation to engage in an interactive process is to address both the needs of the employee's religion and the employer's business.[23] However, under the Tenth Circuit's decision, employers who conceal a work-religion conflict will effectively have a choice not an obligation, to engage in the work-religion dialogue under Title VII. As articulated above, the Tenth Circuit's decision would allow Title VII not to apply to an employer who acts on constructive knowledge but does not engage in the interactive process. This will gut the purpose and intent of Title VII religious accommodation protections. As Judge Ebel gravely warned in his dissent, "[Abercrombie] was able to affirmatively . . . avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf religious practice by not mentioning the possible conflict and then not hiring her because of it."[24]

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[23] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

[24] EEOC, 731 F.3d at 1143–44 (Ebel, J., dissent) ("Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice. If true, that would be religious discrimination proscribed by Title VII"); *see also Albert v. Smith's Food & Drug Ctrs., Inc*., 356 F. 3d 1242, 1253 (10th Cir. 2004) ("neither party may create or destroy liability by causing a breakdown of the interactive process") (disability accommodation case). The Seventh Circuit in *EEOC v. Sears, Roebuck & Co.*, similarly held that employers cannot shield themselves from liability by "intentionally remaining in the dark. 417 F.3d 789, 804 (7th Cir. 2005).

B. Pervasive employment discrimination in the Muslim community.

The Tenth Circuit's decision will permit pervasive employment discrimination against the Muslim community and reward employers who circumvent the law. Based on the drastic growth of discrimination against Muslims before and after 2001, and continuing trends, the pervasive discrimination is hardly speculative.

Discrimination against Muslim hijabi women is widespread and has been documented over the past twenty years as discussed below. Between 1996 and 2000, the majority of employment discrimination complaints received by the Council of American-Islamic Relations were filed by Muslim hijabi women.[25] In 1996, J.C. Penny engaged in adverse employment action against a Muslim woman who wore a hijab, citing violation of the dress code.[26] In 1997, Office Depot suspended a Muslim woman for

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[25] CAIR, *2001 Civil Rights Report: Accommodating Diversity,* at 5, 9–24, *available at* https://www.cair.com/civil-rights/12-civil-rights/32-2001-civil-rights-report-accommodating-diversity. html.

[26] Rudolph A. Pyatt Jr., *Penney's Too-Revealing Dress Code,* WASHINGTON POST , Aug. 12, 1996; CAIR, *1997 Civil Rights Report: Unveiling Justice*, at 13, *available at* https://www.cair.com/images/pdf/1997-The_Status_of_Muslim_Civil_Rights_in_the_United_States_1997.pdf [hereinafter *CAIR 1997 Report*]. Complaints have also been filed regarding dress code violations by wearing a hijab against Office Max and hospitals, and other clothing stores including Nordstrom, Bradlees, and KMART. *Id.*at 13, 15–16; CAIR 1998 Report, at 31, 33, 35; *see also* CAIR, *1999 Civil Rights Report: Expressions of Faith*, at 4, 11–14 (detailing repeat offenders by employers with image and brand driven or uniform policy including waitresses, McDonalds, and Dunkin Donuts).

wearing a hijab, citing violation of dress code.[27] U.S. Airways removed a Muslim woman who wore a hijab from her position as flight attendant in 1995[28] and placed another Muslim woman who wore a hijab on leave upon instituting a new "image policy."[29] The 1997 CAIR Report details several incidents where a hotel employer, namely the Marriott, informed their employee that they could not grant her an accommodation for the hijab because it was not part of the uniform.[30] In 1998, CAIR found that the hijab was the top identifying factor, related to 31% of employment-related incidents reported.[31] In 2000, 28% incidents reported to CAIR were hijab and/or khimar related.[32]

Post 2001, hijabs remained a high identifying factor for employment discrimination.[33] Between 2000 and

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[27] Heather Salerno, *Workplaces Taking Leaps of Faith,* WASHINGTON POST, May 18, 1997.

[28] Andrea Cooper, *Interview With Rose Hamid: Flight Attendant, Hijab Wearer*, WORLD HUM, Aug. 21, 2009, http://www.worldhum.com/features/travel-interviews/interview-with-rose-hamid-the-life-of-a-muslim-flight-attendant-20090716/.

[29] CAIR, *1998 Civil Rights Report: Patterns of Discrimination*, at 19.

[30] *Id.*; CAIR 1997 Report, at 11, 15–16, 19; *see also* CAIR 1998 Report, at 35 (involving Sheraton Hotel).

[31] CAIR, *1998 Civil Rights Report: Patterns of Discrimination*, at 11*, available at* https://www.cair.com/images/pdf/CAIR-1998-Civil-Rights-Report.pdf. An additional 2% of incidents were identified as scarf and niqab related.

[32] CAIR, *2001 Civil Rights Report: Accommodating Diversity,* at 5, 9–24, *available at* https://www.cair.com/civil-rights/12-civil-rights/32-2001-civil-rights-report-accommodating-diversity.html.

[33] *See* CAIR, *2006 Civil Rights Report: The Struggle for Equality*, at 17–18, *available at* https://cair.com/images/pdf/CAIR-2006-Civil-Rights-Report.pdf [hereinafter *CAIR 2006*

2006, complaints filed with CAIR drastically increased by 674% to 2,467 employment-related complaints by Muslims.[34] In 2002, a diner informed their employee that the hijab violated the company's handbook.[35] Upon finding that the company handbook did not have any headwear policy, the company added a no headwear policy and fired the Muslim women.[36] In 2002, image and brand driven companies such as Sears and Subway took adverse employment action against Muslim women who wore a hijab.[37] In 2005, Dunkin Donuts told a Muslim woman not to report to work wearing her hijab.[38] A 2006 assessment conducted by the American Civil Liberties Union revealed that the hijab or headscarf were the main motivating factor that triggered discrimination against Muslim women.[39] According to 2008 data, 69% of Muslim women who wore hijab reported at least one incident of discrimination compared to 29% of women who did

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Report]; *see also* CAIR, *2009 Civil Rights Report: Without Fear of Discrimination*, at 15–16, *available at* https://www.cair.com/images/pdf/CAIR-2009-Civil-Rights-Report.pdf [hereinafter *CAIR 2009 Report*].

[34] CAIR, *2007 Civil Rights Report: Presumption of Guilt: The Status of Muslim Civil Rights in the United States,* at 8, *available at* https://www.cair.com/civil-rights/civil-rights-reports/2007.html

[35] *Id.* at 46.

[36] *Id.*

[37] CAIR, *2002 Civil Rights Report: Stereotypes and Civil Liberties*, at 44–45, *available at* https://www.cair.com/images/pdf/CAIR-2002-Civil-Rights-Report.pdf.

[38] CAIR 2006 Report *supra* note 31, at 22.

[39] *See* ACLU Women's Rights Project, Report on Discrimination Against Muslim Women, *referring to* CAIR, unpublished data, 2006, copy on file with the Women's Rights Project, *available at* https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf.

not wear hijab.[40] In 2008, a janitorial services contractor informed employees, including Muslim women who wore hijabs, that non-compliance with the mandatory dress code, pants and a tucked in shirt, would be fired, transferred, or subjected to a pay cut.[41]

"Although Muslims make up less than 2 percent of the United States population, they accounted for about one-quarter of the 3,386 religious discrimination claims filed with the E.E.O.C. [in 2009]."[42] In 2009, the Washington Metro Transportation Authority prohibited two Muslim employees from wearing their hijab.[43] In 2010, image and brand driven companies such as McDonalds and Disney continued to take adverse employment action against Muslim women who wear a hijab citing conflict with "look policy".[44] Muslim women who wear a hijab and/or head scarf are more likely to be subjected to discrimination than those who do not.[45]

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[40] *Id.*

[41] CAIR 2009 Report, at 18.

[42] Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NY TIMES, Sep. 23, 2010.

[43] *See* Kytja Weir, *Metro Secretary Sues Agency over Religious Discrimination*, WASHINGTON EXAMINER, June 5, 2012. Mary Jo O'Neill, regional attorney for the Phoenix district office of the EEOC states, "There is a hatred, an open hatred, and a lack of tolerance for people who are Muslim." Eve Tahmincioglu, *Muslims Face Growing Bias in the Workplace*, Sept. 13, 2010.

[44] CAIR, *Islamaphobia and Its Impact in the United States* (Jan. 2009—Dec. 2010), at 32, *available at* https://www.cair.com/images/islamophobia/2010IslamophobiaReport.pdf; Jae C. Hong, *Muslim Woman Sues Disney Over Wearing Hijab at Work*, NBC NEWS, Aug. 13, 2012.

[45] *See* Alyssa E. Rippy & Elana Newman, unpublished raw data, 2008, copy on file with the Women's Rights Project.

Current reports demonstrate that employment discrimination against Muslim hijabi women will continue to rise. The Equal Employment Opportunity Commission ("EEOC") reports that Muslims have filed more charges of religious discrimination and failure to provide religious accommodations than any other religious group.[46] In 2012, over 20% of the 3,836 EEOC religious discrimination claims were filed by Muslims.[47] In June 2014, the EEOC filed a lawsuit against Shadescrest Nursing Home which ordered a certified nursing assistant to either remove her hijab or be subject to termination.[48] In consideration of the above, coupled with employers actively concealing work-religion conflict incidents, religious discrimination by employers will pervasively perpetuate if the Tenth Circuit decision is upheld.

The Court should also be cognizant of the evolution of employment discrimination from blatant to concealed discrimination.[49] The purpose of Title VII was

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[46] EEOC Statistical Data: Discrimination and Retaliation Charges Filed by Arab and Muslim Americans, http://www.adc.org/fileadmin/ADC/ADC_EEOC_Stats_Press_Release_2013.pdf.

[47] *Id.*; *see also* EEOC, Enforcement and Litigation Statistics, http://eeoc.gov/eeoc/statistics/enforcement/religion.cfm.

[48] Press Release, *EEOC Sues Shadescrest Healthcare for Religious Discrimination and Retaliation*, July 7, 2014, http://eeoc.gov/eeoc/newsroom/release/7-7-14.cfm.

[49] *See* Kingsley Brown, The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?, 43 CASE W. RES. 287, 292 n.4 (1993) ("[W]hat the Court has said to employers in *Wards Cove* is that while you still can't commit blatant, obvious acts of discrimination against minorities and women, if you are sophisticated and discreet about it, we will look the other way. You cannot hang a "no blacks allowed" sign on your door, but if you're clever and come up with

to eliminate subtler forms of discrimination, not just obvious, blatant discrimination.[50] In theory, Title VII under the *McDonnell Douglas* framework, namely the dialogue component, protects all persons from discrimination in employment based on religion. When discrimination is blatant, there is no question that Title VII will be invoked. But if the Tenth Circuit's decision is upheld, there is doubt whether Title VII will protect persons in employment from subtler forms of discrimination, like that suffered by Ms. Elauf. The Court should give due consideration to the severe ramifications of the Tenth Circuit's decision on Muslim and other religious communities.

II. Wearing the Hijab is a Religious Practice Protected by Title VII.

The Tenth Circuit Court improperly questioned the motivation that Muslim women have for wearing the hijab, implying that the motivation for some women is cultural rather than religious.[51] It is not the Court's role to distinguish the nuances of religion and culture in attempt to determine whether "religious beliefs are

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a standardized test or some other superficially neutral ruse that achieves exactly the same result, no one will stand in your way"); *see also* Robert Belton, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 438–39 (Spring 2005); *see generally* Sahar Aziz, *Coercive Assimilation*, MICH. J. OF RACE & L. (*forthcoming* Fall 2014).

[50] *See* 118 CONG. REC. 705–06 (1972) (statements of Senator Randolph).

[51] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1112 (10th Cir. 2013) (*citing* the EEOC's expert witness, Dr. John L. Esposito).

mistaken or insubstantial."[52] Further, wearing the hijab is a recognized and easily identifiable religious practice of Islam.

A. Religious beliefs are a personal matter.

While membership in a religious sect helps to simplify the matter of identifying sincerely held beliefs,[53] "the guarantee of free exercise is not limited to the beliefs which are shared by all the members of a religious sect."[54] The Court should refrain from any decision that would implicate what is a flexible or inflexible religious practice because it is not the Court's job to determine the verity of religious beliefs.[55] Therefore, the court should only judge whether the Ms. Elauf's religious belief was "sincerely

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[52] *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 U.S. at *37–38.

[53] *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 (1989).

[54] *Eddie Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981).

[55] *Hobby Lobby Stores, Inc.*, *supra* note 52, at *37–38; *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (holding that "it is not within the judicial function and judicial competence to inquire whether the petitioner or [another member of his faith] more correctly perceived the commands of their common faith," because "courts are not arbiters of scriptural interpretation"); *see Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (Sotomayor, J., Opinion) ("[F]ree exercise claims often test the boundaries of the judiciary's competence, as courts are "singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs", *quoting Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

held"[56] or "bona fide,"[57] as the District court did in finding that Ms. Elauf wore her "headscarf based on her belief that the Quran requires her to do so."[58]

This Court recently addressed and affirmed the personal nature of religious beliefs and practices in *Hobby Lobby*, which concerned the religious beliefs of Christian persons (corporations).[59] This Court stated that "it is not for us to say that their religious beliefs are mistaken or insubstantial . . . [i]nstead, our narrow function . . . in this context is to determine" [whether the line drawn reflects] an honest conviction."[60] In

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[56] Frazee, *supra* note 53, at 833; *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1011 (D. Ariz. 2006) ("It is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course to the verity—of someone's religious beliefs in . . . the Title VII context", *quoting Philbrook v. Ansonia Bd. of Educ*., 757 F.2d 476, 481 (2d Cir. 1985)).

[57] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (The modified McDonnell-Douglas framework for religious accommodations provides that employee must prove: (1) a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement. *See Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *see Dixon v. Hallmark Cos*., 627 F.3d 849, 855 (11th Cir. 2010); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973).

[58] *EEOC v. Abercrombie & Fitch Stores, Inc*., 731 F.3d 1106, 1114 (10th Cir. 2013) (citing the district court's finding that Ms. Elauf wore her "headscarf based on her belief that the Quran requires her to do so"); *see*, Defendant-Appellant Appeal, EEOC v. Abercrombie & Fitch Stores, Inc., No. 11-5110 (10th Cir. Oct. 1, 2013); *see also EEOC v. White Lodging Services Corp*., 2010 U.S. Dist. LEXIS 32492, 3 (W.D. Ky. Mar. 31, 2010) (Noting that each women wore a hijab "in accordance with Muslim practice.")

[59] *Hobby Lobby Stores, Inc*., *supra* note 52, at 37–38.

[60] *Id.*

contrast with the Tenth Circuit's Opinion in this Case, which posited that wearing the hijab could be influenced more by culture than religion, this Court granted great deference to the individual's religious practice in *Hobby Lobby*.[61] This Court did not determine whether the practices are a result of culture rather than religion, which can be very difficult to differentiate.[62] Indeed, religious and cultural practices are so heavily intertwined that decision about which practices are sincerely religious and which are merely cultural are risk reflecting nothing more than the norms of the dominant culture or majority religion.[63]

B. Wearing the hijab is a religious practice of Islam.

Muslims believe that Islam is the complete way of life which allows one to achieve inner peace with the universe.[64] The word Islam is derived from the Arabic world "salam," which means peace.[65] The word Islam

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[61] *Id.* at 14.

[62] Frazee, *supra* note 53, at 833 ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining wither a professed belief is sincerely held").

[63] *See Goldman v. Weinberger*, 475 U.S. 503, 521 (1986) (Brennan, J., dissenting) (noting that "under the guise of neutrality and evenhandedness, majority religions are favored over minority faiths").

[64] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 448 (2008); ABUL A'LA MAWDUDI, TOWARDS UNDERSTANDING ISLAM 1-2 (American Trust Publications 1986).

[65] *Id.*

itself means "submission, surrender, and obedience."[66] Therefore, many Muslims believe that they must follow certain religious practices in order to surrender their lives to God and achieve inner peace.[67]

Wearing the hijab is a religious practice of Muslim women. The Tenth Circuit observed that a hijab is the "veil or head covering worn by Muslim women in public."[68] Hijab comes from the word 'hajaba', which means "to prevent from seeing."[69] Hijab refers to broad notions of modesty, privacy, and morality.[70]

The Qur'anic text itself refers to a practice of wearing a certain type of head covering in order to effectuate the principles of modesty, privacy, and morality. A verse of the Quran says, "O Prophet, tell your wives and daughters and the women of the believers to draw their cloaks close round them."[71] Further, the Islamic Hadith or "prophetic tradition" explains how women can fulfill the requirements of the hijab by covering their bodies with the exception of the hands, face, and feet upon the age of puberty.[72]

In addition to Islam, the religious practice of wearing a head covering to effectuate modesty and spirituality is utilized in a variety of religions, and recognized by the EEOC as a protected religious

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[66] *Id.*

[67] *Id.*

[68] JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 310 (4th ed. 2011).

[69] Abdo *supra* note 65, at 448.

[70] *Id.*

[71] Al-Qur'an 33:59.

[72] Abdo, *supra* note 65, at 448.

practice.[73] The EEOC provides that employers must accommodate an employee's religious beliefs or practices, including things such as dress or grooming.[74] These protected religious practice include "wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf), or wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard)."[75]

A majority of American Muslim women regularly wear a hijab. According to a 2011 survey by Pew Research Center, about 6 out of 10 Muslim women in America wear the hijab veil at least some of the time, including 36% who say they wear it whenever they are in public.[76] Muslim hijabi women wear the hijab because of a sincerely held religious belief that a hijab is required by Islam.

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[73] *Id.* (noting that Catholic nuns, Morman, Sikh and Orthodox Jewish women also wear veils or head coverings as part of their religious practice. Orthodox Jewish men wear head coverings, yarmulke, as a religious practice).

[74] EEOC Guidance, http://www.eeoc.gov/laws/types/religion.cfm.

[75] *Id.*; *see EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006).

[76] *Muslim Americans: No signs of growth in alienation or support for extremism*, PEW RESEARCH CENTER, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

i. The hijab is an easily identifiable religious article of Islam, especially in the United States.

The hijab is an Islamic article of faith.[77] A Muslim women's belief the she should wear the hijab is easily identifiable.[78] The hijab makes a Muslim woman's religious beliefs visible, in plain sight and cannot be hidden, just as a Jewish person's religious practice of wearing the Yarmulke is readily apparent by the fact that the person wears the Yarmulke. In America, the hijabi Muslim cannot pass as a non-Muslim, because "there is no acceptable way of wearing a headscarf that circumvents stereotypes."[79] The hijab not only identifies a woman as a Muslim, but identifies her religious practice of wearing the hijab.

While non-Muslims might wear the hijab in other countries for cultural reasons and in part to assimilate into the predominant Muslim and/or local culture, there is no such incentive in the United States. Here, there is actually a strong incentive for non-Muslims to not wear a hijab. There is apparent cultural pressure for Muslims to not wear the hijab in order to fit in and

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[77] Sadia Aslam, *Hijab in the Workplace: Why Title VII does not adequately protect employees from discrimination on the basis of religious dress and appearance*, 80 UMKC L. REV. 221 (2011).

[78] *Leo C. Goodwin Symposium: Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice: Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?* 31 NOVA L. REV. 279, 306 (2007). ("Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab").

[79] *See* Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 229 (2012).

assimilate with 99.7% of American society who do not wear the hijab.[80] The Respondent's "Look Policy" risks further ostracizing Muslim hijabi women.

ii. Women wear the hijab for religious reasons because wearing the hijab will subject women to heightened risk of persecution.

In the United States, non-Muslim women will avoid wearing a hijab, because wearing it would unnecessarily subject them to the persecution that Muslim women face in post 9/11 America.[81] As the United States Court of Appeals for the Fourth Circuit observed in *EEOC v. Sunbelt Rentals*, "[i]n the wake of September 11th, some Muslim Americans, completely innocent of any wrongdoing, became targets of gross misapprehensions and overbroad assumptions about their religious beliefs."[82] Particularly after the September 11th attacks, Muslim women—readily identifiable by their hijabs—suffered hate crimes and discrimination.[83]

In 2001, the FBI reported that hate crimes against Muslims and people of Middle Eastern ethnicity increased by more than 1600 % from the previous

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[80] *See* Pew Research, Report 1: Religious Affiliation, http://religions.pewforum.org/reports.

[81] *See* Rachel Saloom, *I Know You Are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 HAMLINE J. PUB. L. & POLY 55, 67 (2005).

[82] *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 321, (4th Cir. 2008).

[83] *See* Aziz, *supra* note 79, at 192. The September 11th terrorist attacks transformed the meaning of the Muslim headscarf. *Id.*

year.[84] Anti-Islamic incidents went from being the second least reported in 2000, to the second highest reported type of hate crimes in 2001.[85] In 2002, Human Rights Watch released a report entitled "WE ARE NOT THE ENEMY" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11.[86] Human Rights Watch reported that persons who are easily identifiable as "Muslim" are more likely to be targeted for hate crimes.[87] HRW reported that "hate crimes included murder, beatings, shootings, vehicular assaults and verbal threats." Further, ADC reported over six hundred September 11 related hate crimes against those perceived to be Arabs or Muslims.[88]

Many American Muslims who wear the hijab are persecuted due to anti-Arab and anti-Muslim stereotypes.[89] The EEOC reported that "complaints

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[84] Federal Bureau of Investigation Uniform Crime Reporting Program, "Hate Crimes Statistics, 2001", *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001/hatecrime01.pdf.

[85] *Id.*

[86] Human Rights Watch, *"We are Not the Enemy" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arabs or Muslims after September 11*, Vol. 14 no. G, at 15 Nov. 2002, http://www.hrw.org/reports/2002/usahate/usa1102.pdf.

[87] *Id.*

[88] *Id.*

[89] Goodwin, *supra* note 79, at ("Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab. Hence, post-9/11, throughout the United States, there have been dramatic increases in reported incidents of discrimination and harassment, not only against Muslims in general, but also against Muslim women in particular").

from Muslims have almost tripled in the years since the events of September 11, 2001."[90] The number of complaints of unlawful discrimination against Muslim employees more than doubled from 697 in 2004 to 1,490 in 2009, 425 of which were filed by Muslim women.[91] Some companies changed their policies after 9/11 in order to discriminate against Muslim women who wear headscarves.[92]

As noted by Professor Sahar Aziz,[93] an "[p]ost-9/11, the Muslim headscarf symbolizes more than a mere cloth worn by a religious minority seeking religious accommodation, it is a visible 'marker' of her membership in a suspect group."[94] Therefore, a woman is highly discouraged from wearing a hijab unless her belief that it is required is sincerely held. According to a Pew Research Survey, nearly seven in ten U.S. Muslims (69%) say that religion is "very important" in

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[90] *See Religious Freedom Has a Place in the Workplace*, FIND LAW, Nov. 9, 2010, http://knowledgebase.findlaw.com/kb/2010/Nov/208334.html.

[91] Aziz *supra* note at 79, at 242.

[92] *Mohamed-Sheik v. Golden Foods/Golden Brands*, No. Civ. A. 303 (W.D. Ky. 2006).

[93] Associate Professor of Law at Texas A&M University School of Law, teaching national security and civil rights law. Professor Aziz has a strong legal background litigating class action civil rights lawsuits and serving as a senior policy advisor for the Office for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security, where she worked on law and policy at the intersection of national security and civil rights .Professor Aziz is a well-recognized published author with her scholarship focusing on the intersection of national security and civil rights law with a focus on the post-9/11 era.

[94] Aziz, *supra* note 79, at 196.

their lives.[95] As the Tenth Circuit noted, "[r]eligion typically concerns ultimate ideas about life, purpose, and death."[96] Given the danger that hate crimes against Muslims' identified by their hijabs, Muslim women would not knowingly subject themselves to discrimination if they believed the hijab was optional, not required. Thus, because wearing the hijab can be dangerous, an American Muslim woman must sincerely believe wearing it is required by Islam in order to justify this otherwise unwarranted risk.

III. Respondent's "Look Policy" is Discriminatory.

The Respondent misuses the appearance standards of its "Look Policy" as a pretext to discriminate. The "Look Policy" goes beyond a brand or image, and attempts to promote a culture that is exclusive of certain groups of people not usually associated with the "look."[97] This was demonstrated in *Gonzalez v. Abercrombie & Fitch Co.*[98] *Gonzalez* stems from a

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[95] *Muslim Americans: No sign of growth in alienation or support for extremism*, PEW RESEARCH CENTER, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

[96] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013) (*citing* EEOC Compliance Manual Section 12-1(A)(1)).

[97] *See* Jenny Strasburg, *Abercrombie & Glitch / Asian Americans Rip Retailer for Stereotypes on T-Shirts*, SFGATE, April 18, 2002 (discussing Abercrombie selling clothing with discriminatory phrases against Asian Americans, namely a shirt that read "Wong Brothers Laundry Service—Two Wongs Can Make It White" featuring caricatured faces with slanted eyes and rice-paddy hats).

[98] 2011 U.S. Dist. LEXIS 67356, at *7 (N.D. Cal. 2011) (addressing A&F selection criteria having a disparate impact on

lawsuit filed by the NAACP-Legal Defense Fund ("LDF") against the Respondent's discriminatory hiring practices against African-Americans and Latinos.[99] The LDF's 2003 complaint alleged that

> [t]o the extent that it hires minorities, it channels them to stock room and overnight shift positions and away from visible sales positions, keeping them out of the public eye . . . Abercrombie implements its discriminatory employment policies and practices in part through a detailed and rigorous "Appearance Policy" . . . [t]he "A&F Look" is a virtually all-white image that Abercrombie uses not only to market its clothing, but also to implement its discriminatory employment policies or practices.[100]

In the 2011 consent decree enforcement action of *Gonzalez*, the Special Master held that the Respondent's selection criteria for hiring to the "Model" position has an adverse impact on the Respondent's selection of African Americans, African American women, and Latinos.[101] Further, the Respondent did not demonstrate it used 'Best Efforts' to determine whether alternative use of the current selection criteria or an entire separate selection criterion would have a less adverse impact on hiring

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African Americans and Latinos being hired for the "Model" position).

[99] NAACP-Legal Defense Fund, Complaint *Gonzalez v. Abercrombie & Fitch*, *available at* http://www.naacpldf.org/files/case_issue/Abercrombie_Complaint.pdf.

[100] *Id.* at ¶ 3–4.

[101] 2011 U.S. Dist. LEXIS 67356, at *7.

minorities.[102] There were also indications that the Respondent's "Look Policy caused the Respondent to be unable to meet the hiring benchmarks for minorities, as provided in the consent decree."[103]

Additionally, the Respondent's position that their "Look Policy" is necessary to its branding is a crutch. The Respondent has engaged in adverse employment action against Muslim hijabi women, even in positions that do not have a direct brand and/or image duty. The Respondent terminated Umme-Hani Khan, a Hollister "Impact" employee and refused to hire Halla Banafa as a part-time Abercrombie "Impact" associate because they wore hijabs.[104] Respondent acknowledged that it took these adverse employment actions even though an "Impact" employee' primary duties are performed in the stockroom, not on the floor.[105] The Respondent acknowledged that "Impact" employees' primary function is not to model the Abercrombie style.[106] Further, the Respondent's District Manager stated in his testimony at the District Court, "there [is] no difference between a yarmulke, a head scarf, or a ball cap or a helmet for all that matters. It's still a cap, and if an applicant asked to wear a ball cap for religious reasons, [I] still would have denied them."[107]

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[102] *Id.*

[103] *See id.*

[104] *EEOC v. Abercrombie & Fitch Stores, Inc* ., 966 F. Supp. 2d 949, 955 (N.D. Cal. 2013); *EEOC v. Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids*, No. 10-cv-03911-EJD, 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. 2013).

[105] *See* EEOC, 966 F. Supp. 2d at 955.

[106] *See* EEOC, 2013 U.S. Dist. LEXIS 51905, at *5.

[107] EEOC, 798 F. Supp. 2d at 1278.

The Respondent does not hire Muslim women who wear a hijab because they do not like the way they look. Applicants or employees must suppress or change their identity and religious beliefs to work for Respondent. This policy should not be legal. The Court should not uphold a discriminatory branding and imaging strategy that effectively excludes Muslims.

IV. Permitting Employees to Wear the Hijab Will Have Less Than a *de minimis* Cost or Burden on the Respondent's Business.

Federal courts have recognized that an employer must provide a religious accommodation where there is no undue hardship on the employer's business, *i.e.,* no more than a *de minimis* cost or burden.[108] Federal courts have held there was more than a *de minimis* cost or burden where there was a significant cost or more than just an inconvenience.[109] There must be an actual cost or burden, not speculative or hypothetical.[110] The Respondent's position is that they cannot provide a reasonable accommodation allowing Ms. Elauf and other employees to wear a hijab without undue hardship.[111] However, there is no significant cost to the Respondent by permitting an employee to wear a hijab. Permitting employees to wear a hijab

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[108] *Lee v. ABF Freight Sys*. 22 F.3d 1019, 1022 (10th Cir. 1994); *Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 402 (9th Cir. 1978).

[109] *Toledo v. Nobel-Sysco, Inc*. 892 F. 2d 1481, 1492 (10th Cir. 1989); *Tooley v. Martin-Marietta Corp*., 648 F.2d 1239, 1243 (9th Cir. 1981).

[110] Tooley, *supra* note 109, at 1243; Toledo, *supra* note 109, at 1492.

[111] *EEOC v. Abercrombie & Fitch Stores, Inc*. 731 F.3d at 1114.

will have less than a *de minimis* effect on their business.

The Respondent improperly asserts that permitting employees to wear a hijab will conflict with or is inconsistent with their "Classic East Coast collegiate style of clothing."[112] The Respondent maintains that it puts a great deal of effort in to "ensur[ing] its customers receive a consistent brand-based, sensory experience in its stores."[113] The Respondent further asserts that its "Look Policy" is critical to its preppy and casual brand, and that deviation will negatively impact their business through customer experience.[114]

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[112] *Id.* at 1111.

[113] *See* Brief of Respondent in Opposition for Writ of Cert, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 at 2 (S. Ct. Aug. 27, 2014).

[114] EEOC, 731 F. 3d at 1111. Federal courts have rejected a similar contention that customers would not be receptive to an employee wearing a hijab and/or head-covering. *See EEOC v. Alamo Rent-a-Car* Center, 432 F. Supp. 2d 1006, 1014–15 (D. Ariz. 2006). There are broad implications of this case on headwear policies throughout the employment sector. *See e.g.*, *Lewis v. New York City Transit Auth*., 2014 U.S. Dist. LEXIS 46471, at *4–9, 58–60 (E.D.N.Y. 2014) (involved a Muslim women who wore a khimar the same color of the transit authority uniform with the Transit authority logo on her shirt rather than on her head as a bus driver. Subsequently, was transferred out of passenger service based on noncompliance with headwear policy, failure to remove or cover khimar. The court found no undue hardship and held no "deleterious effects on the Transit Authority's public image"); *see e.g. EEOC v. White Lodging Servs. Corp*., 2010 U.S. Dist. LEXIS 32492, at *3–4 (W.D. Ky. 2010) (involving Marriot not hiring Muslim women who wore an hijab due to a conflict with the Marriott's Employee Appearance standards and/or dress code); *see also* U.S. Dep't of Justice, Religious Discrimination in Employment, http://www.justice.gov/crt/spec_topics/religiousdiscrimination/ff_employment.php (discussing pending DOJ cases involving an employer prohibiting

The "Classic East Coast collegiate style of clothing" is not exclusive of Muslim hijabi women.

A. No substantial deviation from Respondent's commercial look.

The Respondent improperly characterizes the hijab as little more than an item of clothing. A hijab is not a hat and Muslim women do not wear the hijab for fashion. Muslim women who wear a hijab do so because of a personal religious obligation.[115]

The Respondent's view of fashion is that they "never, ever wear hats"[116] and prohibit employees from wearing caps.[117] However, Respondent's view of fashion and prohibition on employees is contradicted by Respondent's other policies and actions. First, Respondent's "Look Policy" requires Models to wear clothing styles similar to the clothing sold by the

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religious headcoverings in *U.S. v. New York Metropolitan Transit Authority* and *U.S. v. Essex County*).

[115] *See Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010); *see* Council on Am.-Islamic Relations, *Mich. v. Callahan*, 2010 U.S. Dist. LEXIS 41924, at *12 (E.D. Mich. 2010); *see Kaukab v. Harris*, 2003 U.S. Dist. LEXIS 13710 (N.D. Ill. 2003). Personal beliefs not mandated by a religious organization can constitute a religious belief. *Eddie Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 714 (1988). Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 386 (1997). The EEOC Guidelines allow for "dissenting views among members of particular religions about what the obligations of that religion might be" and self-definition regarding both belief and observance." EEOC, Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2004).

[116] *See* EEOC, 798 F. Supp. 2d at 1278.

[117] EEOC, 731 F. 3d at 1111.

Respondent.[118] Respondent and its subsidiaries or affiliates, including but not limited to Hollister, sell hats to their customers.[119] The Respondent sells hats throughout the year and not just merely when hats are seasonal.[120] The hats are sold in various colors, styles, and fabrics.[121] The Respondent also partners with other companies to sell caps and hats within the Respondent's stores.[122] Thus, the Respondent's "Look Policy" cannot be invoked as a basis to exclude any woman who wears a hijab, scarf or other head covering when inconsistent with other policies.

Second, the Respondent can easily allow for employees who wear hijabs, to wear hijabs of similar color or pattern as the scarfs sold by the Respondent. This is an accommodation that aligns with the power of Respondent's human resources managers to grant

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[118] *See* Brief of Respondent in Opposition for Writ of Cert, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 at 2 (S. Ct. Aug. 27, 2014).

[119] *See Abercrombie & Fitch Stores, Inc*., http://www.abercrombie.com/shop/us/womens-caps-accessories/embellished-beanie-3552604_01 (last visited Nov. 5, 2014) (embellished beanie); *see Abercrombie & Fitch Stores, Inc*., http://www.abercrombie.com/shop/us/womens-caps-accessories/dots-ball-cap-3020593_01 (last visited Nov. 5, 2014) (dots ball cap); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-hats/felt-floppy-hat-2526574 (last visited Nov. 5, 2014) (felt floppy hat); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-hats/classic-winter-beanie-3588571 (last visited Nov. 5, 2014) (winter beanie).

[120] *Id.*; *Abercrombie & Fitch Stores, Inc*., http://www.abercrombie.com/shop/us/p/woolrich-with-a-and-ampf-buffalo-checked-wool-baseball-cap-3555573 (last visited Nov. 10, 2014) (Woolrich with A&F Buffalo Checked Wool Baseball Cap).

[121] *Id.*

[122] Tim Feran, *Abercrombie & Fitch offers another outside brand—Woolrich*, THE COLUMBUS DISPATCH, Nov. 4, 2014;

accommodations that do not distract from the brand.[123] The Respondent sells scarfs throughout the year and not just merely when scarfs are in season.[124] The scarfs are also sold in various colors, styles, and fabrics.[125] The appearance of women wearing a hijab who seek employment with the Respondent would not deviate substantially from the Respondent's Look Policy.

Furthermore, the Respondent has permitted numerous exceptions to the "Look Policy" since 2001.[126] These exceptions include allowing employees to wear head scarfs, hijabs, and yarmulkes.[127] The Respondent has even allowed female employees to wear long skirts inconsistent with the type of skirts sold by the Respondent based on religious reasons.[128] The Respondent points to unsubstantiated allegations that providing an accommodation will impact

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[123] *See EEOC*, 798 F. Supp. 2d at 1276.

[124] *See e.g.*, *Abercrombie & Fitch Stores, Inc*., http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/duofold-plaid-scarf-3621617_01 (last visited Nov. 5, 2014) (duo fold plaid scarf); *see e.g.*, *Abercrombie & Fitch Stores, Inc*., http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/cozy-plaid-scarf-2722087_01 (last visited Nov. 5, 2014) (cozy plaid scarf); *see e.g.*; *Hollister*, http://www.hollisterco.com/shop/us/girls-accessories/vintage-plaid-scarf-2463070 (last visited Nov. 5, 2014); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-accessories/supersoft-infinity-scarf-3577608 (super soft infinity scarf).

[125] *Id.*

[126] In a separate case, the Respondent acknowledged that Respondent has made at least seventy exceptions to the "Look Policy." 2013 U.S. Dist. LEXIS 51905, at *7.

[127] *Id.*; EEOC, 798 F. Supp. 2d at 1279–80, 1287; EEOC, 731 F.3d at 1113, 1115.

[128] 798 F. Supp. 2d at 1280.

the brand, sales, and compliance.[129] However, the Respondent has been unable to demonstrate that these exceptions to the "Look Policy" have incurred significant cost and/or actual hardship to its business.[130]

B. The Respondent's "look" is not exclusive of Muslims.

The Respondent's "look" is not exclusive of Muslims.[131] Muslim hijabi college students also embrace Abercrombie & Fitch's "classic East Coast collegiate style of clothing." Muslim hijabi college students in their daily activities sport graphic shirts, cardigans, and embossed lettering shirts and sweaters, a staple of the Respondent's clothing "look" and clothing line.[132] Muslim hijabi women are part of Abercrombie & Fitch's targeted college population. Notably as students at preppy collegiate institutions like Harvard, Princeton, and UC Berkeley,[133] as well

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[129] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1279–80, 1287 (N.D. Okla. 2011).

[130] EEOC, 798 F. Supp. 2d at 1287 (Abercrombie has not "measured whether [exceptions to look policy] have had any negative impact on how customers view the Abercrombie style").

[131] Jamie Feldman, *Stylish Blogger Reminds Us: 'The Hijab And Fashion Are Not Mutually Exclusive'*, HUFF POST, Jan. 13, 2014.

[132] *See 3 Way to Wear a Graphic Tee if You're Done with Bum Sweats*, MUSLIM GIRL, Oct. 13, 2014, http://muslimgirl.net/8210/graphic-tee-3-ways/ (last visited Nov. 18, 2014); *see also* Turban Outfitters 48, http://www.turbanoutfitters48.com/products (last visited Nov. 18, 2014).

[133] *See* Muslim Students Association, *Hijabi Monologues,* http://www.princeton.edu/~msa/events.html; *see* Anna Challet, *Young Muslims Choosing to Wear the Hijab Despite Rising Tide of Islamophobia*, NEW AMERICAN MEDIA, Apr. 21, 2014,

as members of Muslim sororities such as Gamma Gamma Chi Sorority, Inc. and Mu Sigma Alpha Sorority, Inc.[134]

The clothing choices of Muslim hijabi women who have interviewed for employment with the Respondent, further demonstrates that Muslim hijabi women are part of the Respondent's branding and image. Halla Banafa, who was also rejected in an interview by Respondent for wearing a hijab, wore skinny jeans and a colorful, non-black head scarf to her interview.[135] Ms. Elauf, a Muslim woman, wore an Abercrombie-like T-shirt and jeans to her interview with Respondent.[136]

Muslim women, just like other American women, are diverse and fashionable.[137] Islam does not dictate

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http://newamericamedia.org/2014/04/young-muslims-choosing-to-wear-the-hijab-despite-rising-tide-of-islamophobia.php.

[134] Mu Sigma Alpha (founded at the University of Michigan), https://www.facebook.com/pages/Mu-Sigma-Alpha-First-Under graduate-Muslim-Sorority/127457574030953; Gamma Gamma Chi Sorority, Inc., http:// gammagammachi.org/splash/ (sorority has chapters in Washington DC, New Jersey, Pennsylvania, Illinois, North Carolina, and Georgia).

[135] *EEOC v. Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids*, No. 10-cv-03911-EJD (N.D. Cal. 2013).

[136] EEOC, 731 F.3d at 1113.

[137] *See* Amarra Ghani, Muslim 'Hipsters' Turn A Joke Into A Serious Conversation, NPR, Dec. 28, 2013, http://www.npr.org/blogs/codeswitch/2013/12/28/250786141/muslim-hipsters-turn-a-joke-into-a-serious-conversation (last visited Nov. 7, 2014); Homa Khaleeli, *The Hijab Goes High Fashion*, THE GUARDIAN, July 27, 2008; *see* Shaimaa Khalil, *Muslim Designers Mix the Hijab with Latest Fashions,* BBC NEWS, May 14, 2010, http://www.bbc.co.uk/news/10105062; *see also* Haute Hijab, http://www.hautehijab.com/.

what outfil or colors Muslim women can wear.[138] "Many people are not used to seeing a woman wearing a hijab with, say, a Chanel bag. But there's no reason a Muslim woman, like any other woman, couldn't do so."[139] Yunalis Zara'ai, a Muslim woman who wears skinny jeans, is featured in Barneys New York ad campaign.[140] Donna Karan New York ("DKNY") also markets fashionable dress to Muslim women, namely by opening an affiliate store called DKNY Ramadan.[141] Recently, Ibtihaj Muhammad, a member of the U.S. fencing team and a Muslim woman, opened Louelle in Los Angeles.[142] Louelle is a clothing store catering to "women who combine modest dressing with fashion."[143] The Respondent's "look" is not exclusive of Muslims.

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[138] *See* Jamie Feldman, *Stylish Blogger Reminds Us: 'The Hijab And Fashion Are Not Mutually Exclusive'*, HUFF POST, Jan. 13, 2014.

[139] Ellie Krupnik, *Muslim Clothing Gets Chic with 'Hijab Couture'*, HUFF POST, June 6, 2013.

[140] *See* Chen May Yee, *A Malaysian Pop Star Clad in Skinny Jeans and a Hijab - Yuna Has Become Poster Girl for Young 'Hijabsters'*, THE INT'L NY TIMES, Oct. 13, 2014.

[141] *See* Aya Batraway, *Young Muslim Women Want to Fuse Fashion with Faith*, DETROIT FREE PRESS, Oct. 20, 2014.

[142] *See* Aya Batraway, *Hijabi Hipsters Fuse Fashion with Faith*, THE DAILY TELEGRAPH, Oct. 21, 2014.

[143] *Id.*

CONCLUSION

Amicus respectfully urges the Court to reverse the Tenth Circuit decision in this Case and find in favor of the Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

Interest Statements of Amici Curiae

KARAMAH: Muslim Women Lawyers for Human Rights is a nonprofit organization committed to promoting human rights globally, especially gender equity, religious freedom and civil rights in the United States. It pursues its mission through education, legal outreach and advocacy.

Cornell University Islamic Alliance for Justice: Islamic Alliance for Justice is a student organization at Cornell University that aims to raise awareness and coordinate effective response to local, national, and global issues of social, economic and political justice. The Alliance engages in informational outreach activities as well as advocacy and discourse. This club intends to both provide a way for students interested in the Muslim world to become active in the political realm and to raise awareness of issues of injustice across campus and around the globe.

Penn State Muslim Students' Association: Four students with a vision to create a haven for Muslims on campus and to spread awareness and tolerance for Islam founded the MSA Penn State in February of 1964. With over 300 Muslims, the Penn State MSA celebrates 50 years of being a leading voice for understanding at University Park. We have a commitment to creating a climate of racial harmony and social justice.