No. 14-86

In the
Supreme Court of the United States

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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 AMICUS CURIAE THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF PETITIONER

JENIFER WICKS
*Counsel of Record*
*Litigation Director*
*Council on American-Islamic Relations*
*453 New Jersey Ave SE*
*Washington, DC 20003*
*CivilRights@CAIR.com*
*(202) 488-8787*

MUNIA JABBAR
*400 7th St NW Suite 202*
*Washington, DC 20004*

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## INTEREST OF THE AMICUS CURIAE

The Council on American-Islamic Relations (CAIR)[1] is the largest American Muslim civil rights organization in the country, dedicated to protecting the civil rights and liberties of all Americans by defending the United States Constitution and anti-discrimination laws. CAIR also engages in public advocacy to promote a greater understanding of Islam among the American public and policymakers. CAIR is particularly concerned with this case because it receives a significant number of employment discrimination complaints from the American Muslim community. In fact, this case arises out of a complaint initially filed by CAIR's Oklahoma chapter with the Equal Employment Opportunity Commission on behalf of Samantha Elauf, the Muslim job applicant who was denied employment because she wears a religious headscarf (also referred to as a "hijab"). CAIR believes this brief can offer the Court unique insight into the lives of American Muslims and the challenges they face in achieving equality in American public life, including in the workplace.

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief and their letters of consent have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, CAIR states that 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 amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission.

In this case, the Court has been asked to resolve legal issues that profoundly affect the ability of individuals who outwardly manifest their religion to obtain and secure employment. Although many Muslims display their Islamic faith through various dress and grooming practices, this is not an issue limited to one particular religion; many followers of several other faiths, such as Judaism and Sikhism, follow their respective religiously-motivated dress and grooming practices. Title VII of the Civil Rights Act of 1964 ensures equality of employment opportunities by prohibiting discrimination on the basis of religion. Because an applicant's religious views, and the need for the accommodation thereof, should not be any part of the basis for an employment decision, CAIR supports the position of the Petitioner and requests that the Court reverse the Tenth Circuit's decision requiring that a job applicant or employee provide direct, explicit notice of their religious observance or practice to trigger fundamental protections under Title VII.

## SUMMARY OF ARGUMENT

Religiously-motivated dress and grooming practices are both widespread and deeply embedded within the American Muslim community. Muslim women who wear a hijab are following what they believe to be God's command to be modest in their dress. The distinctive manner in which many wear a hijab, tightly covering their hair and neck, make the wearer readily identifiable as Muslim. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religion and imposes an obligation on employers to

reasonably accommodate the religious practices of an employee or job applicant. In doing so, Title VII ensures that an individual is not unnecessarily forced to compromise his or her religious beliefs in order to participate in the labor force and earn a livelihood.

This Court should reject the explicit notice rule because it places unreasonable burdens on individual job candidates and employees who outwardly display their religion through dress and grooming practices. Contrary to the underlying assumption upon which the explicit notice rule rests, it is employers, rather than potential employees, who are intimately familiar with their own workplaces and policies, and therefore are often better able to predict a need for a dress or grooming-based religious accommodation. Worse, the explicit notice rule would actually operate counter to the purpose of Title VII by permitting discrimination. This troubling outcome stems directly from the application of the explicit notice rule itself, which allows employers to refuse to hire those who, unaware of their rights or the nature of the workplace and employer policies, do not know that they must expressly request an accommodation, even when the employer acts out of animus towards the applicant. Because the explicit notice rule would perpetuate employment discrimination on the basis of religion, it will ultimately compound existing socioeconomic hardships that religious minority communities face.

## BACKGROUND

The Tenth Circuit's ruling requiring explicit, upfront notice of an employee's religious beliefs allows employers to "weed out" religious job candidates at a vulnerable stage: before they are hired. This "explicit notice rule" has a particularly detrimental effect on workers who follow religious dress and grooming standards. Given America's broad religious diversity,[2] the explicit notice rule would negatively impact a wide range of job applicants and employees whose physical appearance reveals their religious affiliation.

As the facts of this case make clear, Muslim women are particularly vulnerable to discrimination under the explicit notice rule. Modesty is a deeply-embedded concept in Islam that is mandated upon both men and women.[3] Accordingly, as an outward

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[2] *U.S. Religious Landscape Survey. Religious Affiliation: Diverse and Dynamic*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Feb. 2008), religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf

[3] *See, e.g.,* THE QURAN. 24:30. Trans. by Muhammad Asad. London: The Book Foundation, 2003. ("Say to the believing men to lower their gaze and to be mindful of their chastity: this will be most conducive to their purity – [and,] verily, God is aware of all that they do."); *id.* at 24:31. ("And tell the believing women to lower their gaze and to be mindful of their chastity, and not to display their charms [in public] beyond what may [decently] be apparent thereof; hence, let them draw their head-coverings over their bosoms."); *id.* at 33:59. ("O Prophet! Tell thy wives and thy daughters, as well as all [other] believing women, that they should draw over themselves some of their outer garments [when in public]: this will be more conducive to their being recognized [as decent women] and not annoyed.").

manifestation of their faith, many Muslim women wear a headscarf, often referred to as a "hijab."[4] The distinctive and unifying feature of the hijab is that it covers the wearer's hair, and it also often covers the neck or upper body.[5] For some women, their hijab also encompasses a face veil, loose-fitting clothing generally, or specifically wearing skirts instead of pants.[6] Over half of American Muslim women wear

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[4] *An Employer's Guide to Islamic Religious Practices*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005). https://www.cair.com/images/pdf/employers_guide.pdf. *See also An Educator's Guide to Islamic Religious Practices*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/educators_guide.pdf (the hijab headscarf is also known as a "khimar"). This brief will exclusively use the term "hijab" to refer to a headscarf that a Muslim woman wears as required by her religious beliefs.

[5] *An Employer's Guide to Islamic Religious Practices*, supra note 4; *A Correctional Institution's Guide to Islamic Religious Practices,* COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/correctional_institution_guide.pdf. *See also EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492 at *3 (W.D. Ky. Mar. 31, 2010); *Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. Pa. 2009).

[6] *An Employer's Guide to Islamic Religious Practices*, supra note 4; *U.S. v. Washington Metro. Area Transit Auth.*, No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants, and to wear religious head coverings)**;** *EEOC v. LAZ Parking, LLC*, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010) (settlement on behalf of Muslim parking facility employee who was terminated for refusing to remove her hijab).

a hijab headscarf in accordance with their faith.[7] Muslim women are especially susceptible to an increase in workplace discrimination under any legal rule that scales back their rights. Not only have studies demonstrated that women wearing hijabs are subject to increased employment discrimination,[8] but many of these women face a hostile sociocultural environment and are subject to harassment, and even physical attacks, merely for wearing their hijabs.[9]

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[7] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, PEW RESEARCH CENTER (Sep. 1, 2011), http://www.pewresearch.org/daily-number/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/

[8] *Discrimination Against Muslim Women,* ACLU WOMEN'S RIGHTS PROJECT https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf

[9] *See, e.g.,* Chris Caesar, *Muslim Woman Describes Assault, Harassment near Malden Center*, MALDEN PATCH (May 7, 2013), http://patch.com/massachusetts/malden/muslim-woman-assaulted-harassed-near-malden-center (Muslim woman in Boston area wearing a hijab attacked by stranger on the street, who identified her as Muslim); Gail Paschall-Brown, *Florida Girl Attacked After Wearing Hijab to School*, WESH ORLANDO (Feb. 4, 2014), http://www.wesh.com/news/central-florida/florida-girl-attacked-after-wearing-hijab-to-school/24271022 (Florida schoolgirl repeatedly attacked after she began wearing a hijab to school); *CAIR-LA Seeks Public's Help in Identifying Man Who Attacked Muslim Woman*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 24, 2014), http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html (hate crime in which the assailant grabbed the woman's hijab while calling it a "hijab"); *CAIR-MI Calls for Hate Crime Probe of Attack on Muslim at Mall*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS

It is not only Muslim women like Ms. Elauf who would be harmed by the explicit notice rule. In accordance with their religious beliefs, many Muslim men wear beards,[10] skullcaps (commonly referred to as "kufis"),[11] or follow an Islamic mandate to remain well-covered from their navel to their knees to guard their modesty.[12] CAIR frequently receives complaints from men whose employers prohibit them from growing or maintaining beards in accordance with their religious beliefs.[13]

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(July 21, 2014), http://www.cair.com/press-center/press-releases/12569-cair-michigan-calls-for-hate-crime-probe-of-attack-on-muslim-at-mall.html.

[10] *An Employer's Guide to Islamic Religious Practices*, supra note 4.

[11] *Id.*; *see also*, *An Educator's Guide to Islamic Religious Practices*, supra note 4. *See, generally, U.S. v. Washington Metro. Area Transit Auth.*, No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants and to wear religious head coverings); *EEOC v. UPS,* 94 F.3d 314 (7th Cir. Ill. 1996) (EEOC lawsuit on behalf of a Muslim employee at UPS challenging a policy that prohibits beards may not be worn by its employees working in public contact positions).

[12] *See, e.g., An Educator's Guide to Islamic Religious Practices,* supra note 4; *A Correctional Institution's guide to Islamic Religious Practices*, supra note 5.

[13] *See, e.g., Muslim Correctional Officer Wins Right to Wear Beard*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 13, 2012), https://www.cair.com/action-alerts/177-muslim-correctional-officer-wins-right-to-wear-beard.html

Beyond the Muslim community, the explicit notice rule would also impact a broad swathe of religious communities that are marked by distinctive dress or grooming practices. Sikh Americans have encountered challenges to employment based on their required religious grooming and dress, such as wearing turbans and beards for men and carrying dulled ceremonial swords called kirpans for men and women.[14] Similarly, conflicts involving religiously-motivated grooming and employment policies have also arisen with Rastafarian workers whose religion forbids them from cutting their hair,[15] Messianic

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[14] *See, e.g., EEOC v. United Galaxy, Inc.,* 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013) (EEOC lawsuit against auto-dealership on behalf of a qualified Sikh applicant alleging that company refused to hire and grant him a reasonable accommodation because of his turban and refusal to shave his beard, which is required by his faith); *Tagore v. United States*, No. H-09-0027, 2014 U.S. Dist. LEXIS 85316 at *2-3 (S.D. Tex. June 24, 2014) (denying motion to dismiss in case where employer forbade female Sikh employee from wearing her religiously-mandated kirpan blade to work).

[15] *See, e.g.*, *Sistrunk v. Camden County Workforce Inv. Bd.*, No. 05-1506, 2007 U.S. Dist. LEXIS 28854, at *4 (D.N.J. Apr. 18, 2007) (denying summary judgment on the grounds of lack of notice of religious conflict where Rastafarian plaintiff mentioned to his supervisor that he could not cut his hair because of his "way of life."); *EEOC v. Comair, Inc.*, Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree entered Nov. 2006) (settlement on behalf of Rastafarian airline applicant alleging he was not hired because he refused to cut his hair to conform with the company's grooming standards); *EEOC v. Grand Central Partnership*, Civil Action No. 08-8023 (S.D.N.Y. consent decree entered Aug. 2009) (settlement, along with policy and procedure changes and related training, in case alleging failure to accommodate long dreadlocks and short beards worn

Christian job applicants and employees whose religion requires them to grow beards,[16] Jewish employees who wear yarmulke skullcaps,[17] and Christian employees who wear crosses as outward manifestations of their faith.[18]

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pursuant to Rastafarian religious practice by workers performing sanitation, maintenance and public safety duties); *Lawrence Transportation Systems*, Civil Action No. 5:10CV 97 (W.D. Va. consent decree entered August 2011) (settlement on behalf of applicant for storage company loading position who alleged he was not hired due to his Rastafarian dreadlocks).

[16] *EEOC v. Pilot Travel Ctrs. LLC*, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree entered April 2004) (settlement on behalf of Messianic Christian maintenance worker who wore beard as part of his religious practice, and was terminated for refusing to shave in compliance with employer's no-beard policy).

[17] *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Jewish Orthodox member of the U.S. Air Force challenged a regulation that prohibited him from wearing a yarmulke while on duty alleging violations under the Free Exercise Clause of the First Amendment); *See also*, *United States v. New York State Dep't of Corr. Servs.*, Civil Action No. 07-2243 (S.D.N.Y. consent decree entered Jan. 2008) (settlement of case brought by U.S. Department of Justice, providing for individualized review of correctional officers' accommodation requests with respect to uniform and grooming requirements, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).

[18] *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2003) (public librarian brought First Amendment free speech and free exercise claims against employer after she was fired for wearing a cross on her necklace in violation of the library's dress code).

The explicit notice rule impedes the employment of those who, as in the aforementioned examples, manifest their religious beliefs through dress and grooming practices. It permits an employer to decline to hire or to fire a religious worker based entirely on their religious appearance, motivated by anti-religious animus, simply because the religious worker is unaware that their beliefs potentially conflict with workplace policy.

## ARGUMENT

### I. THE EXPLICIT NOTICE RULE RESTS UPON THE INCORRECT ASSUMPTION THAT ONLY JOB CANDIDATES AND EMPLOYEES HAVE REASON TO KNOW OF A NEED FOR A RELIGIOUS ACCOMMODATION.

To establish a prima facie case for a religion-based failure to hire claim, a plaintiff must allege that: 1) the applicant's religious belief conflicted with a job requirement; 2) the employee notified the employer of the religious belief; and 3) the employer declined to hire for failing to satisfy the job requirement. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013); *Dixon v. Hallmark Co.*, 627 F.3d 849, 855 (11th Cir. 2010). With respect to the notice requirement, the Tenth Circuit is the only appeals court to have instituted an "explicit notice rule" requiring the applicant to give explicit verbal notice of a religious accommodation conflict. App. at 28a. Under this rule, even if the employer receives

notice of the conflict from a source other than the candidate's explicit statement, the plaintiff's prima facie notice requirement is not satisfied. *Id.* at 30a.

In adopting the explicit notice rule, the Tenth Circuit relied on the underlying assumption that employees and job candidates are far more likely than employers to be able to predict a possible conflict between their religious practice and workplace policies. App., 46a-53a. The Court went so far as to conclude that the facts giving rise to a need for a Title VII religious accommodation "ordinarily are only within the ken of the applicant or employee." App., 46a. This assumption distorts and fails to take into account essential facts, especially where the religious accommodation is for dress or grooming practices. The general American public, including employers, can identify many religious dress standards. In contrast, however, job applicants are generally not aware of employer policies that may conflict with their religious practice. This is further exacerbated in the American Muslim community, which is largely comprised of recent immigrants and youths who have little U.S. job market experience that can signal to them the possible need for accommodation.

Employers are necessarily better situated to predict a need for religious accommodation than either job applicants or employees. Based on these underlying realities, the explicit notice rule should be rejected and this Court should instead adopt the majority circuit standard. Under the majority standard, an employer has an obligation to offer a reasonable religious accommodation where they have

"enough information" about an employee's need for religious accommodation from *any* source to allow them to "understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). The majority circuit approach allocates the burden among applicants and employers more fairly and consistent with the realities of the job market.

### A. **Employers are often on notice of a job candidate's need for religious accommodation because they can visually identify types of religious grooming and dress.**

The Tenth Circuit was incorrect to assume that only employees and job candidates are able to know whether there is a possible religion-work policy conflict. In reality, employers can visually identify religious dress and grooming, thus putting them on notice of the need for accommodation.[19] Therefore,

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[19] *See, e.g.*, App. at 7a-9a (describing Abercrombie assistant manager's recognition of Petitioner's hijab); *United States EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 51905, at *10 (N.D. Cal. Apr. 9, 2013) (describing interviewer's recognition of applicant's hijab as marking her as Muslim); *EEOC v. United Galaxy, Inc.*, 2013 U.S. Dist. LEXIS 89200 at *2 (D.N.J. June 25, 2013) (describing employer's recognition of plaintiff's turban by asking if he was Sikh); *EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492 (W.D. Ky. Mar. 31, 2010) (explaining that interviewer recognized hijab and its significance because of prior

even in the absence of explicit notice, employers often have reason to know of a need for a dress or grooming-based religious accommodation.

For example, as in this case, employers widely understand that a Muslim woman's hijab is worn for religious reasons. Hijab use is widespread in the United States; thirty-six percent of Muslim women wear a hijab all of the time and an additional twenty-four percent wear it most or some of the time.[20] Researchers in the United States have found that when using standardized photographs of women wearing hijabs, well over 90% of respondents were able to correctly identify them as Muslim.[21] The hijab's recognizability is further evidenced by the numerous incidences of women being attacked by strangers because they are wearing a hijab as an act

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conversations with another Muslim employee); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 611 (W.D. Ky. 2003) (describing employer's recognition of plaintiff's cross necklace as a religious symbol).

[20] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, *supra* note 7.

[21] Sonia Ghumman & Ann Marie Ryan, *Not welcome here: Discrimination towards women who wear the Muslim headscarf* 66 HUMAN RELATIONS 5, 671-698 (2013)**;** *See also,* Sonia Ghumman & Linda Jackson, *The downside of religious attire: The Muslim headscarf and expectations of obtaining employment,* 31 J. ORGANIZ. BEHAV. 4, 5 (2010) ("… Muslim women living in America who wear the hijab (headscarf) [are] an example of a group whose religious attire is a salient characteristic of their physical appearance."); *id.* at 6-7 (explaining women in hijab's status at stigmatized group in workplace).

of anti-Muslim bias.[22] In the employment context, Muslim women who wear hijabs are more likely to face discrimination; one study shows that 69% of hijab-wearing women have faced discrimination, as opposed to 29% of non-hijab wearing women.[23] Another study has found that wearing a job applicant's wearing a hijab is associated with less employer interest in hiring and less frequent permission to apply for a job.[24] Muslim girls wearing hijab get bullied at school because of their hijab, and, in some cases, instructors even engage in harassment.[25]

Besides hijab, other religious dress and grooming standards are widely recognizable by the public. On more than one occasion, Muslim men have been taken off airplanes after other passengers expressed discomfort at their being clad in Muslim

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[22] *See, supra* note 9. *See also*, *CAIR-NY Recommends Safety Precautions After Muslim Family Attacked by Ex-Marine*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Sep. 16, 2014), http://www.cair.com/press-center/press-releases/12651-safety-precautions-after-muslim-family-attacked-by-ex-marine.html; http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html (hate crime in which the assailant grabbed the woman's hijab while calling it a "hijab").

[23] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8.

[24] Ghumman & Ryan, *supra* note 21.

[25] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8. *See also*, *Growing in Faith: California Muslim Youth Experiences with Bullying, Harassment & Religious Accommodation in Schools*, CAIR-CALIFORNIA 22-24 (2013) http://ca.cair.com/downloads/GrowingInFaith.pdf.

attire and grooming, such as beards.[26] Muslim men have also been subjected to anti-Muslim attacks after being identified as Muslim by religious clothing such as kufi skullcaps.[27] Sikh turbans are also widely recognizable.[28] There is a measurable bias against turbans themselves, even amongst people with

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[26] *See, e.g., Muslim group: two imams pulled from plane bound for North Carolina*, CNN (May 7, 2011), http://www.cnn.com/2011/TRAVEL/05/07/muslims.kicked.off.plane/; Amy Gardner, *Nine Muslim Passengers Removed From Jet,* WASHINGTON POST (Jan. 2, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/01/AR2009010101932.html?hpid=topnews (detailing incident where nine Muslims pulled off plane, who believed it was because of their headscarves and beards).

[27] *E.g.*, *CAIR-NY Calls for Hate Crime Probe of Attack on Muslims Outside Mosque* (July 21, 2014), http://www.cair.com/press-center/press-releases/12567-cair-ny-calls-for-hate-crime-probe-of-attack-on-muslims-outside-mosque.html; *see also* Lisa Fernandez, *Sunnyvale: Man attacked for being Muslim, public safety officers say*, SAN JOSE MERCURY NEWS (Jun. 14, 2010), http://www.mercurynews.com/breaking-news/ci_15295575?nclick_check=1.

[28] *E.g. EEOC v. United Galaxy, Inc.*, 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013) (employee's prominent beard and turban helped put his employer on notice that he was Sikh and that there may be a religion-work conflict). Even where people cannot identify a turban as a Sikh article of faith, they can identify it as a required religious practice for the wearer. One report found that half of the public mistakenly associates a Sikh turban with Islam. *See Turban Myths*, SOUTH ASIAN LEGAL DEFENSE FUND at 9 (Sep. 9, 2013), http://issuu.com/saldefmedia/docs/turbanmyths_121113.

knowledge of Sikhism.[29] And examples of animus against turbaned Sikhs have become very common.[30]

Thus, it is evident that certain religious dress standards, such as hijabs for Muslims women, are widely recognizable by the American public, including employers. Therefore, imposing the explicit notice requirement on employees and job candidates merely allows employers to legally discriminate against religious employees and job candidates who signal their faith through dress or grooming by exploiting the explicit notice loophole. If this Court were to adopt the rule, it would lead to decreased hiring of those minority religious populations marked by distinctive dress and grooming practices.

### B. Job candidates often have no reason to suspect a need for a religious accommodation, especially those applicants who are recent immigrants or youth.

The Tenth Circuit also erred in assuming that employers do not have reason to know of a need for religious accommodation because it is employers, not

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[29] See SOUTH ASIAN LEGAL DEFENSE FUND, supra note 28 at 9; http://america.aljazeera.com/articles/2014/3/13/a-go-home-terroristasikhchildrenbulliedtwicenationalaverage.html (noting that Sikh children are bullied at twice the national average).

[30] Lisa De Bode, *Sikh professor attacked in New York in alleged hate crime*, AL JAZEERA AMERICA (Sep. 23, 2014), http://america.aljazeera.com/articles/2013/9/23/columbia-universityprofessorattackedinallegedhatecrime.html.

employees, who have superior knowledge of workplace policies. In fact, job candidates frequently will not have any information about internal workplace policies, including safety and uniform standards, which may conflict with their religious beliefs or dress and grooming practices. Employers often do not inform job applicants (and sometimes, even their existing employees) about workplace policies.[31] On the contrary, as in this case, they are buried in workplace manuals or posted for existing employees and are not available to job applicants until they are hired. *See* 29 CFR 1903.2 (Occupational Safety and Health Act Regulation requiring only that its OSHA rights poster be posted for employees).

This problem is particularly acute in the American Muslim community, a large proportion of which is composed of people who have little to no prior experience attempting to find work in the United States. A significant portion of American Muslims are recent immigrants who are not familiar with employer practices, and these populations are much less likely than employers to predict the need for religious accommodation. There are 1.8 million

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[31] *See, e.g.*, *Sistrunk v. Camden County Workforce Inv. Bd.*, No. 05-1506, 2007 U.S. Dist. LEXIS 28854, at *2-3 (D.N.J. Apr. 18, 2007) (noting that employer did not notify Rastafarian job applicant, who wore long hair in accordance with his religious beliefs, of workplace policies until after he had been hired and showed up for first day of work); *Goldman v. Weinberger,* 475 U.S. 503, 505 (1986) (noting that Jewish employee who wore yarmulke was not notified it violated workplace policy for eight years).

Muslim adults in America, and 2.75 million Muslims total.[32] Sixty-three percent of American Muslims are foreign born, and a quarter of American Muslims arrived in America in the last decade.[33] In recent years, an estimated 80,000 to 90,000 new Muslim immigrants have entered the United States each year.[34] In addition, 36 percent of American Muslims are in the 18-29 age group.[35]

The significant portion of the Muslim population which has recently settled in the United States from Muslim-majority countries[36] would likely have no basis to recognize that their religious grooming may conflict with the types of uniform or safety policies that are common in American workplaces. There is also a significant Muslim youth population entering the American workforce for the first time that does not understand the possibility of a religious accommodation conflict when applying for jobs. Additionally, those who are entering the job market for the first time have not previously been exposed to company "image" or "look" policies or to American safety standards under OSHA or state worker safety laws. These groups are particularly inexperienced in the U.S. job market, and are thus even less likely to be able to predict that an

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[32] *No Signs in Growth of Alienation or Support for Extremism, supra* note 7 at 8.

[33] *Id.*

[34] *Id.* at 20.

[35] *Id.* at 15.

[36] *See id.* at 8, 13-14.

employer's workplace policies that may conflict with their religious beliefs.

These demographic realities highlight the fact that the Tenth Circuit's assumption that only employees can predict a need for a religious accommodation is particularly unfounded. Contrary to this assumption, employees should not be presumed to have better knowledge about potential conflicts with workplace policies than employers. It is unfair to place the burden on these members of the workforce to understand conflicts of which they are unaware and to place them in the uncomfortable position of constantly proclaiming their need for accommodation.

## II. THE EXPLICIT NOTICE RULE ALLOWS EMPLOYERS TO CIRCUMVENT TITLE VII PROTECTIONS AND DENY EMPLOYMENT OPPORTUNITIES BASED ON THE APPEARANCE OF INDIVIDUALS WHO VISIBLY MANIFEST THEIR RELIGION.

By permitting employers to refuse to hire an applicant (or discharge an employee) based entirely on perceived religious beliefs and practices, the explicit notice rule would, if adopted by this Court, provide a loophole for employers to circumvent core Title VII protections and impermissibly discriminate against on the basis of religion. Such troubling results directly contravene both the letter and intent of Title VII.

The fundamental purpose of Title VII of the Civil Rights Act of 1964 is reflected in the plain language of the statute. *Griggs v. Duke Power Co.*,

401 U.S. 424, 429 (1971). Under Title VII, it is unlawful for employers "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his . . . employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In enacting Title VII, Congress sought to achieve "equality of employment opportunities" and eliminate discriminatory employment practices. *Griggs*, 401 U.S. at 429; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355, n.15 (1977). Accordingly, this Court has repeatedly emphasized that Congress intended to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977); *Conn. v. Teal*, 457 U.S. 440, 448-49 (1982). Title VII's legislative history also affirms that Congress hoped to promote hiring on the basis of qualifications of the applicant or employee, rather than on the basis of any of the five enumerated attributes. [37] Moreover, in the context of Title VII's religious accommodation provision, courts

[37] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess., 26 (1963). *See also* 110 Cong. Rec. 13079-13080 (1964) (remarks of Sen. Clark). 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id*., at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

have recognized that both its statutory framework and legislative history promote an interactive process, in which "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (citing *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (CA5 1982); *see also Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

The explicit notice rule, however, eschews "bilateral cooperation" and allows employers to simply refuse to employ those whose appearance reveals what otherwise would be their private religious beliefs if they fail to expressly inject their religion into the employment process. Worse, by requiring applicants to request specific religious accommodations, the rule makes the burden they would impose on employers an element of the employment decision, thereby saddling the religious applicant with baggage that other applicants do not have.

Consistent with the rule for visually apparent classifications such as race, gender and ethnicity, religious dress and grooming should never become a barrier to employment. However, under the explicit notice rule, if the employer has correctly identified a job candidate or employee's religion by reference to his or her visual appearance, they are free to discriminate against them if the employee does not have the knowledge that he or she must expressly invoke his or her rights. This gap in protection under

the law would allow employers who are inclined to discriminate against their employees or job candidates to do so without any legal repercussions. This is not a hypothetical shortcoming; Abercrombie's failure to hire Ms. Elauf here is an example of the explicit notice rule's underlying flaws: an employer may refuse to hire an individual applicant based solely on that applicant's religiously identifiable appearance. Such a perverse outcome directly conflicts with this Court's central recognition that Title VII does not tolerate even indirect or subtle discrimination based on the statute's enumerated attributes, such as race or gender. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989); *McDonnell Douglass Corp*., 411 U.S., at 801. Thus, in allowing an employer to take religion into account when making an employment decision, the explicit notice rule defies Title VII's overarching objective of eradicating discrimination by ensuring that "sex, race, religion, and national origin *are not relevant* to the selection, evaluation, or compensation of employees." *See Price Waterhouse,* 490 U.S. at 239 (emphasis added).

Moreover, an employer may make such a decision even when the applicant or employee is unaware that a potential religion-work conflict exists. Taking advantage of its superior knowledge of its own particular policies and workplace demands, an employer may take adverse actions against job applicants or employees if they fail to make a request that they do not know they need to make. This imbalance of power directly results from the application of the explicit notice rule. If adopted by this Court, it would undermine Title VII's core

principle of equal access to work for all, without regard to religious differences.

## III. THE EXPLICIT NOTICE RULE WILL ADD TO THE EXISTING EMPLOYMENT DISCRIMINATION AND CHALLENGES FACED BY RELIGIOUS EMPLOYEES AND JOB APPLICANTS, PARTICULARLY MUSLIMS.

As explained in Section II, the explicit notice rule will lead to increased terminations and failures to hire of job applicants who are religious, ultimately leading to increased socioeconomic hardship for religious minority communities. The risk of increased unemployment is particularly high for religious minorities who can be visually identified by unique religiously-mandated grooming and dress standards because the explicit notice rule would allow more employers to engage in facial discrimination against religious employees and applicants without any legal consequences. Such results are deeply troubling because religious employees and applicants already face disproportionate obstacles in the job market. The effects will be particularly negative for the American Muslim community. The significant levels of anti-Muslim bias prevalent in the United States[38] are

[38] *See How Americans Feel About Religious Groups*, PEW RESEARCH CENTER (July 16, 2014), at 1-2, http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf (showing that, among eight different religious groups, American public has coldest feelings towards Muslims); *American Attitudes Toward Arabs and Muslims*, ARAB AMERICAN INSTITUTE at 3 (July 29, 2014), http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf

manifested in underemployment and high rates of employment discrimination. This would only be exacerbated by the explicit notice rule.

There is evidence that simply learning that a job candidate has a religious affiliation deters employers from giving them a second look. Two studies have shown that job candidates with any religious affiliation betrayed on their resume are about a quarter less likely to receive a job interview callback by phone than candidates with no apparent religious affiliation.[39] The result is even more extreme for job candidates belonging to particular minority groups. In New England, Catholics are 29% less likely to get a phone callback, and Muslims are 25% less likely to get a callback by either phone or

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(noting that only 27% of Americans have a favorable view of Muslims in 2014). *See also* Louise Cainkar, *No longer invisible: Arab and Muslim exclusion after September 11,* 224 MIDDLE EAST REPORT, 22-29 (2002). *See also,* Peter Gottschalk & Gabriel Greenberg, MAKING MUSLIMS THE ENEMY. BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11 (Rowman & Littlefield, 2008).

[39] *See, e.g.,* Bradley R.E. Wright, Michael Wallace, John Bailey, & Allen Hyde, *Religious affiliation and hiring discrimination in New England: A field experiment*, 34 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 111, 119 (2013) (showing that religious candidates are 24% less likely to receive a phone callback); Michael Wallace, Bradley R.E. Wright, & Allen Hyde, *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1(2) SOCIAL CURRENTS 189, 198 (2014) (showing that religious candidates are 26% less likely to get either a phone or an email callback, and that they are 30% less likely to get a phone callback).

email.[40] And in the South, Muslims, Catholics, and atheists receive significantly fewer callbacks than other religious groups.[41] Unfortunately, the explicit notice rule gives employers infected with this kind of animus against those with disfavored minority religious views room to discriminate against employees and job candidates who outwardly signal their religion.

Several studies have demonstrated the unique obstacles faced by Muslim job candidates. One study has shown that if a job candidate can be identified as Muslim on social media, they are significantly less likely to receive a callback than a Christian job candidate in certain states.[42] A similar study found an even larger detrimental effect on callbacks for Muslim job candidates.[43] In addition, as previously discussed, Muslim women wearing a hijab are also

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[40] *Religious affiliation and hiring discrimination in New England: A field experiment, supra* note 39. In fact, the study also notes that if rote responses by employers are reclassified as non-responses by employers, Muslim job candidates are 47% less likely to get phone callbacks than other candidates. *Id.* at 120.

[41] *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, *supra* note 39 at 198-200 (showing that religious candidates are 26% less likely to get either a phone or an email callback, and that they are 30% less likely to get a phone callback).

[42] Alessandro Acquisti & Christina M. Fong, *An Experiment in Hiring Discrimination Via Online Social Networks*, at 32, 36, 28-39 (Oct. 26, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979

[43] *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, *supra* note 39.

subject to a strikingly high rate of employment discrimination due to an increase in negative perceptions about their religion as well as increased recognition of them as Muslim because of their hijabs. Muslim women who wear hijabs are more likely to face discrimination from employers; one study has shown that 69% of hijab-wearing women have faced discrimination, as opposed to 29% of non-hijab wearing women.[44] Furthermore, yet another study found that job candidates who wear hijabs and applied to retail stores and restaurants suffered from fewer job callbacks and permissions to complete job applications, and interpersonal discrimination.[45] But despite this demonstrable anti-hijab animus in the employment context, the explicit notice rule shifts the burden onto applicants like Ms. Elauf to trigger their Title VII protections by announcing that their dress or grooming practices are religiously-based and requesting an accommodation, whether or not one is actually necessary.

Adoption of the explicit notice rule would likely have a disastrous effect on the Muslim community's overall employment rate. Muslims and EEOC offices have reported a "shocking" spike in anti-Muslim employment discrimination since September 2001.[46] Despite the fact that Muslims

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[44] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8.

[45] Ghumman & Ryan, *supra* note 21.

[46] Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NEW YORK TIMES (Sep. 23, 2010), http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=all&_r=0

make up only 0.8% of the country's population,[47] around 20% of the religious discrimination complaints received by the EEOC were from Muslims.[48] Moreover, any further increase in employment discrimination against Muslims is particularly troubling given the fact that the community already suffers from underemployment. According to the Pew Center, 29% of Muslims are underemployed. This is even worse for Muslims under 30, of whom 37% are underemployed.[49]

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[47] *America's Muslim Population 2030*, PEW RESEARCH CENTER (Mar. 2, 2011), http://www.pewresearch.org/daily-number/americas-muslim-population-2030/. The Muslim population is projected to increase to 1.7% of the total population by 2030. *Id.*

[48] *Religion-Based Charges Filed from 10/01/2000 through 9/30/2011 Showing Percentage Filed on the Basis of Religion-Muslim*, U.S. EQUAL EMPLOYMENT OPPORTUNITY http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm.

[49] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, *supra* note 7.

## CONCLUSION

For these reasons, this Court should reject and overturn the Tenth Circuit's ruling and its articulation of an "explicit notice" rule to trigger Title VII's religious accommodation protections.

Respectfully submitted.

JENIFER WICKS
*Counsel of Record*
*Litigation Director*
*Council on American-Islamic Relations*
*453 New Jersey Ave SE*
*Washington, DC 20003*
*CivilRights@CAIR.com*
*(202) 488-8787*

MUNIA JABBAR
*400 7th St NW Suite 202*
*Washington, DC 20004*