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 THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
Counsel of Record
Executive Director, General Counsel
AMANDA KELLER
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] Pursuant to Supreme Court Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least 10-days' notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

Amici curiae support laws, policies, and practices that eliminate discrimination in the workplace and which require employers to make reasonable accommodations so that people can participate equally in all aspects of their community regardless of their religious beliefs or any other protected characteristics. And *amici* believe that communities cannot achieve true equality so long as stereotyping people in ways related to race, gender, national origin, religion, disability, age, sexual orientation, or any other protected characteristic continues. For these reasons, *amici* support the EEOC's long-standing policy of opposing the use of assumptions and stereotyping in an employment interview and hiring decision.

However, because the EEOC has now done an about-face on that long-standing policy, *amici* have a strong interest in apprising this Court of the significant adverse consequences facing the Nation's state and local governments if the Tenth Circuit's decision is reversed. As *amici* argue below, the EEOC's proposed change to the analytical framework of religious accommodation cases under Title VII, if adopted by this Court, interjects stereotyping into the hiring process and will have far-reaching consequences for state and local governments. Under the EEOC's rule, if employers ask about an applicant's religion they can avoid liability under Title VII's religious accommodation theory but may subject themselves to liability under Title VII's disparate treatment theory if they don't offer the applicant a job. Employers will therefore be left in a Catch-22 situation, facing potential liability regardless of the course of action they take.

For state and local governments, the issue is particularly problematic given the wide range of

government jobs that have policies that implicate potential religious accommodation issues. It is not difficult to foresee the litany of instances testing whether state and local governments must inquire into a prospective employee's religion if the EEOC's argument is adopted by this Court.

SUMMARY OF ARGUMENT

Under Title VII, a disparate treatment claim and a claim that an employer failed to accommodate an individual's religion are treated as separate and distinct avenues of liability. The EEOC could have brought a disparate treatment claim in this case but it chose not to. Perhaps sensing that it made a tactical mistake, the EEOC's argument now attempts to piggyback a disparate treatment claim onto its failure to accommodate claim, which is akin to attempting to fit a square peg into a round hole. In conflating the two types of liability, the EEOC would further muddy the Title VII waters and create liability not contemplated by that statute.[2]

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[2] By changing its argument, the EEOC obfuscates the decision of the Tenth Circuit to suggest an issue quite different from the one before the Tenth Circuit and an issue couched in terms so absolute that only one result ought to follow. The issue the EEOC set forth in its petition was:

> Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 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 applicant or employee. Pet'r's Cert. Pet. I.

Although the EEOC tries to re-frame this case as a disparate treatment case, the reality is that this case was prosecuted and decided below as a religious accommodation case. Consistent with the Tenth Circuit's decision, the majority of courts have held that an employer is not liable for failing to provide an employee with a religious accommodation where that employer has no actual notice of the need for an accommodation. Indeed, until it brought this case, the EEOC's guidance had plainly stated as much. Now, however, the EEOC seeks to require an employer to make assumptions about which candidates may need a religious accommodation even when the employer does not have any *actual knowledge* of the individual's religion or need for an accommodation. The EEOC urges this result, despite the fact that Title VII and various state and local anti-discrimination statutes prohibit employers from relying on such assumptions.

Further under the EEOC's proposed rule, employers will be squeezed between a disparate treatment claim and a failure to accommodate claim, facing potential liability regardless of the course of action they take. If the EEOC has its way, disparate treatment claims will surely increase because inquiries into protected status during the pre-employment stage can be used as evidence of discrimination. As a result, government

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Were the issue so simple, *amici* may have joined those in support of Petitioner, but that is not the case. Instead, the Tenth Circuit concluded that an employer who makes a decision not to hire a person, cannot be held liable for failing to offer that person a religious accommodation that has not been requested simply because the interviewer made an assumption about the applicant's religion. Rather than support the EEOC in this case, the *amici* support the EEOC's guidance and long held policy requiring prospective employers to avoid making and acting upon assumptions about an applicant's protected characteristics.

employers, who are already cash and resource strapped, will face an increase in lawsuits that could have been prevented by adhering to the current rule followed by the majority of circuit courts that requires actual notice of the need for a religious accommodation.

If employers are forced to make assumptions about an individual's religion based on religious stereotypes, where should employers draw the line? A woman wearing a head scarf might do so for fashion,[3] cultural, or religious reasons. Yet the EEOC wants an employer and this Court to assume the applicant required a religious accommodation due to her head covering and Abercrombie's conflicting policy (despite the EEOC's own expert's testimony indicating that such a head covering may be worn for either cultural *or* religious reasons). There are other examples that are just as problematic but far less obvious. Following the EEOC's logic, an employer may have to inquire into a prospective employee's religion based on everything from tattoos and jewelry to facial hair and dreadlocks.

State and local governments are collectively the Nation's largest employer and there are a myriad of situations where the question of the need for a religious accommodation is implicated–from staffing needs under a twenty four hour a day, seven day a week requirement to dress code requirements

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[3] A google search of head scarves coupled with "fashion" leads to a number of results; some include head scarves worn for religious reasons and others for fashion as in the following example. Natasha Krezic, *Style Guide: How to wear head scarves?*, FABFASHIONFIX (Apr. 22, 2013), http://fabfashionfix.com/style-guide-how-to-wear-head-scarves/. To assume that a woman wearing a head covering does so for religious reasons ought to be seen for what it is—religious stereotyping.

involving everything from uniforms to grooming policies.

For public employers, First Amendment issues also intersect with individual rights under Title VII. Public employers have a unique interest in remaining secular as even the appearance of religious coercion or behavior that could be deemed to be endorsing a particular religion can create tension in their communities and potential liability. In some cases, public employers have implemented policies which have the effect of prohibiting employees in certain professions from wearing any overt religious garb or symbols, and courts have upheld those policies. *See Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009); *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001). Public employers utilize these policies in order to stave off Establishment Clause claims and in order to foster the public's trust in the government's ability to remain impartial.[4] Given public employers' strong interest in remaining secular and religion neutral, requiring a public employer to inquire into an applicant's religion based on stereotypes about that religion violates principled behavior.

Amici therefore respectfully request that this Court uphold the Tenth Circuit's decision and hold that an employer may not be liable for a religious accommodation claim under Title VII unless the

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[4] The recent tragedy in Ferguson, Missouri and its aftermath confirms a government's desire to serve the residents it represents both actually and perceptually. Where a community believes that its law enforcement unjustly target individuals based on protected characteristics, the community loses faith in its government. Hiring a diverse workforce that does not seemingly show partiality to segments of the community helps maintain a community's faith in its government.

employer has actual knowledge of the need for a religious accommodation. The rule we urge this Court to adopt resembles the bright line rule in cases brought under the Americans with Disabilities Act. At the interview stage an employer should not make assumptions and inquire into a person's religion. Upon being asked either at the interview or upon hiring about necessary accommodations, the employer must offer reasonable accommodations that do not pose an undue hardship on its business operations. By so holding, this Court will provide a workable standard for employers and employees alike that is consistent with current employer best practices and avoids needless stereotyping in the workplace.

I. AN EMPLOYER SHOULD NOT BE LIABLE UNDER TITLE VII FOR FAILING TO ACCOMMODATE AN EMPLOYEE OR PROSPECTIVE EMPLOYEE'S RELIGION UNLESS THE EMPLOYER HAS ACTUAL KNOWLEDGE OF THE NEED FOR THE ACCOMMODATION

Under Title VII, it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . . " 42 U.S.C. § 2000e-2(a) The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Thus, an employer's failure to reasonably accommodate an

employee's religious practice is a separate and distinct claim from a disparate treatment claim. *See, e.g.*, *Morales v. McKesson Health Solutions, LLC*, 136 Fed. Appx. 115, 118 (10th Cir. 2005) (providing that "a religious accommodation claim is distinct from a 'straightforward disparate treatment' claim"); *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 562 (7th Cir. 2003) (noting reasonable accommodation theory is "a theory of liability separate from intentional discrimination"); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1017 (4th Cir. 1996) (accord).

In order to make out a prima facie case of discrimination based on an employer's failure to provide a religious accommodation, the employee/applicant must show that she "held a bona fide religious belief conflicting with an employment requirement; (2) *informed her employer of her belief*; and (3) faced an adverse employment action [i.e., was not hired] due to her failure to comply with the conflicting employment requirement." *See Francis v. Perez*, 970 F. Supp. 2d 48, 60 (D.D.C. 2013) (internal quotations omitted) (emphasis added); *see also EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De P.R.*, 279 F.3d 49, 55 (1st Cir. 2002), *citing EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *Knight v. State Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001). Despite the EEOC's arguments to the contrary, the overwhelming authority from the courts of appeals requires actual notice of the employee's religion in order to establish a prima facie case of a failure to accommodate claim. *See* Resp't's Resp. to Pet. 14-16 (detailing case law from each Circuit Court of Appeals requiring actual notice of an employee's religion in order to find liability under Title VII for failure to accommodate).

Furthermore, the EEOC's contention that it did not change its guidance regarding the notice requirement is contradicted by the facts.[5] Until this case was pending, the EEOC's guidance had been consistent and clear.[6] In its guidance and in numerous other places, the EEOC repeatedly stated that an employee must provide *actual notice* to his or her employer

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[5] As outlined below, until it brought this case, the EEOC's guidance consistently indicated that the employee must provide the employer with notice regarding the need for a religious accommodation. However, after this case was pending, the EEOC changed its guidance on dress and grooming practices, and now states: "In some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm#_ftnref10 (last visited Jan. 16, 2015). In its new guidance, the EEOC even uses a self-serving example of an "obvious" situation that is modeled on the facts of this case. *See id*., Example 7.

[6] The EEOC reframed its guidance as this case proceeded through the courts using a factual scenario markedly similar to the facts in this case, without providing any notice and comment period prior to making the change. Doing so violates the rule set forth in *Paralyzed Veterans of America v. D.C. Arena Limited Partnership*, which provides that the Administrative Procedure Act requires that regulators provide a notice and comment period whenever an agency amends existing "definitive" interpretive rules / guidance. 117 F.3d 579, 586 (D.C. Cir. 1997). Doing so also suggests EEOC's recognition that its previous guidance to employers differed vastly from what it would like this Court to adopt. By changing its guidance, the EEOC has also created conflicts with state and local laws, which have their own parallel anti-discrimination statutes, without affording state and local governments the opportunity to weigh in on the EEOC's change.

regarding the need for a religious accommodation. Specifically, the EEOC stated the following:

- Employers must provide "reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices *when requested* . . . ." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Religious Discrimination, in* EEOC COMPLIANCE MANUAL, No. 915.003 §12 (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html#_ftn135 ("EEOC Compliance Manual") (emphasis added);
- "In addition *to placing the employer on notice* of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted." *Id*. (emphasis added);
- Investigators must "[a]scertain whether [the charging party] *actually notified* [respondent] of the need for a religious accommodation . . . ." *Id*. (emphasis added);
- "Notice of the Conflict Between Religion and Work: An applicant or employee who seeks religious accommodation *must make the employer aware* both of the need for accommodation and that it is being requested due to a conflict between religion and work. *The employee is obligated to explain* the religious nature of the belief or practice at issue, *and cannot assume that the employer will already know or understand it*." *Id*. (emphasis added); and
- "When an employee or applicant needs a dress or grooming accommodation for religious reasons, *he should notify the employer* that

> he needs such an accommodation for religious reasons." *Religious Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/religion.cfm (last visited Jan. 9, 2015) (emphasis added).

Despite the preponderance of case law and its own guidance to the contrary, the EEOC argues that instead of relying on actual notice of an employee's religion, an employer can be held liable under Title VII for failing to accommodate an employee's religion if the employer correctly "assumes," "infers," or "understands" that the employee or applicant has a particular religious observance.[7] *See* Pet'r's Br. 11, 15, 19. The case law that the EEOC relies on does not support its argument. Indeed, many of the cases the EEOC cites find liability for the employer because the employer had *actual knowledge* of an employee's need for an accommodation without direct notice from the employee, which is radically different from an employer making assumptions about an employee's religion. *See e.g.*, *Adeyeye v. Heartland Sweeteners*, LLC, 721 F.3d 444, 447 (7th Cir. 2013) (finding notice was adequate where employee requested time off for his father's funeral, which he explained involved "compulsory" burial rites and that he and his family would "suffer at least spiritual death" if he did not attend); *Brown v. Polk County*, 61 F.3d 650, 652 (8th

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[7] In its brief, the EEOC uses deposition testimony that the hiring manager "assumed" the applicant was Muslim to argue for a rule that an employer can be liable under Title VII based on its "correct understanding" or "correct inference" of that person's religion. Regardless of these linguistic gymnastics, the EEOC is proposing to hold employers liable for failing to provide unsolicited religious accommodations based on assumptions and stereotypes regarding an applicant's religion.

Cir. 1995) (finding employer had notice of employee's religion based on his affirmation of his Christianity throughout his employment and the fact that he referred to Bible passages); *Heller v. EBB Auto Co*., 8 F.3d 1433, 1439 (9th Cir. 1993) (noting that employer "knew" plaintiff was Jewish and that his wife was studying for her conversion); *Hellinger v. Eckerd Corp*., 67 F. Supp. 2d 1359, 1360 (S.D. Fla. 1999) (finding employer had "actual knowledge" of the applicant's religious beliefs from the applicant's reference).

Further, the EEOC's suggestion that a rule requiring actual notice would erode the purpose of Title VII is unfounded. The applicant in this case was not necessarily without redress. She could have pled either a disparate treatment or disparate impact claim against the Respondent; however, the EEOC chose to only pursue a failure to accommodate claim on her behalf. If it is true in this case that the Respondent did not hire the applicant because the hiring manager believed she was Muslim, a jury could have concluded that the Respondent was liable for intentional discrimination under a disparate treatment theory of liability. Similarly, the EEOC could have challenged the Respondent's Look Policy by claiming it had a disparate impact on certain religions. The religious accommodation framework should not be changed because the EEOC made a tactical mistake in litigating a case.

II. IF THE TENTH CIRCUIT'S DECISION IS REVERSED, EMPLOYERS WILL BE FORCED TO RELY ON STEREOTYPES IN ORDER TO ASCERTAIN AN EMPLOYEE'S OR PROSPECTIVE EMPLOYEE'S RELIGION

A. THE PURPOSE OF TITLE VII IS TO AVOID STEREOTYPING INDIVIDUALS BASED ON TRAITS ASSOCIATED WITH PROTECTED CLASSES

It is well-settled that Title VII seeks to prevent employers from categorizing employees based on stereotypes and assumptions about protected classes. As this Court has stated:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (U.S. 1989) (internal quotation marks and citations omitted). This Court has explained that it is clear under Title VII both from the statutory language and its underlying policy that the employer's focus should be on the individual, not on generalizations and assumptions about protected characteristics. *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702, 708-09 (1978); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 606 (1993) (concluding that Congress enacted the parallel Age Discrimination in Employment Act based on its "concern that older

workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes"); *Butt v. Board of Trustees*, 83 F. Supp. 2d 962, 972 (C.D. Ill. 1999) (noting that "Title VII protects employees from employment decisions that are predicated on stereotyped impressions involving protected characteristics").[8]

The EEOC's Guidance is similarly unequivocal that employers should not rely on stereotypes when making employment decisions. "An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information." *See Prohibited Employment Policies/Practices*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/ (last visited Jan. 8, 2015); *see also Best Practices for Eradicating Religious Discrimination in the Workplace*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan. 9, 2015) (noting that in order to "avoid allegations of intentional discrimination, employers have been cautioned by the EEOC to avoid assumptions or stereotypes about what constitutes a religious belief or practice").

Despite its well reasoned and principled guidance upon which a disparate treatment case against the

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[8] In *Butt v. Board of Trustees*, the court noted that an employer "cannot rely on national origin or race or religion as a proxy for an employee's personal characteristics," explaining that, for example, an employer that bases an employment decision on the employer's belief that Pakistani males have a "patronizing attitude toward women" would violate Title VII. 83 F. Supp. 2d at 972.

Respondent might have been brought, the EEOC wants to change the requirement that a prospective employee must first request an accommodation before an employer is held to have denied an accommodation. The EEOC wants employers to make assumptions about religious practices and to use those assumptions to inquire into a prospective employee's protected status.

Further, while this case is linked to assumptions based on religion, assumptions based on gender, race, color, national origin, and disability fall into the same trap. An employer may be tempted to make assumptions based upon a person's appearance. However, case law, the EEOC, and state and local governments have demanded those assumptions be suppressed in the hiring process to prevent discrimination. Now, however, the EEOC wants to require an employer to use assumptions to inquire into a person's religion. Tomorrow, will it demand that employers use assumptions to inquire into a person's gender, national origin, race, color, or disability? The EEOC may urge this deviation from its own standards, but *amici* urge this Court to provide a more just result. The rule requiring an employer to have actual notice of the need for an accommodation must be preserved.

B. IF THE EEOC'S RULE IS ADOPTED EMPLOYERS WILL BE FORCED TO INQUIRE INTO EMPLOYEES' AND PROSPECTIVE EMPLOYEES' RELIGIONS BASED ON STEREOTYPES, WHICH WILL LEAD TO AN INCREASE IN DISCRIMINATION SUITS AGAINST EMPLOYERS

If the Court reverses the Tenth Circuit's decision, thereby requiring employers to inquire into prospective employees' religions, employers will be placed in a Catch-22 situation. Employers may either be sued under the failure to accommodate theory of liability for failing to ask about an employee or prospective employee's need for a religious accommodation. Or, employers may face potential liability under Title VII's disparate treatment theory for making pre-employment inquiries about an employee or prospective employee's religion based on assumptions and stereotypes. A disparate treatment claim is likely viable in the latter instance because in its guidance on pre-employment inquiries, the EEOC provides: "Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, *such inquiries may be used as evidence of an employer's intent to discriminate* unless the questions asked can be justified by some business purpose."[9] *See*

[9] A number of states also indicate, through laws, regulations, and guidance, that pre-employment inquiries into religion and other protected characteristics are unacceptable and in some instances expressly prohibited. *See, e.g.*, WASH. ADMIN. CODE § 162-12-140 (2014) (providing that "[a]ll preemployment

Prohibited Employment Policies/Practices, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/#pre-employment_inquiries (last visited Jan. 9, 2015) (emphasis added); *see also Pre-Employment Inquiries and Religious Affiliation or Beliefs*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Jan. 9, 2015) (noting that "[q]uestions about an applicant's religious

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inquiries that unnecessarily elicit the protected status of a job applicant are prohibited . . . ." and noting that there are no "fair preemployment inquiries" into religion); 804 MASS REGS. CODE 03.01(9) (2014), *available at* http://www.mass.gov/mcad/regs804cmr0300.html (providing that "[a]s a general rule, an employer may not make inquiries, the response to which would likely disclose the applicant's protected status" and noting that there are no questions that an employer may ask regarding religion at the pre-employment stage); *Discrimination in Pre-Employment Inquiries*, MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, http://labor.mo.gov/mohumanrights/Discrimination/pre_employ_inquiries (last visited Jan. 22, 2015) (noting that "[i]nappropriate pre-employment inquiries may be used as evidence of employment discrimination" and "[e]mployers may not inquire directly about an applicant's religious beliefs or practices"); *Pre-Employment Inquiries – Discrimination Pitfalls*, IDAHO COMMISSION ON HUMAN RIGHTS, http://human rights.idaho.gov/discrimination/pre_employment.html (last visited Jan. 22, 2015) (providing that employers should not "ask applicants to state their race, sex, age, color, national origin, religious preference, or medical problems"); *Guidelines on Equal Employment Practices: Preventing Discrimination in Hiring*, KANSAS HUMAN RIGHTS COMMISSION, http://www.khrc.net/hiring.html (last visited Jan. 22, 2015) (stating that "[a]ny inquiry that might indicate the applicant's religious practices or customs" is an "inadvisable inquiry"); UTAH LABOR COMMISSION, UTAH LABOR COMMISSION ANTIDISCRIMINATION AND LABOR DIVISION (2010), http://laborcommission.utah.gov/media/pdfs/uald/pubs/STATELAWPACKET.pdf (indicating that there are no proper pre-employment inquiries regarding an applicant's religion).

affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non-job related and problematic under federal law").

There is no way to reconcile this Court's admonishment against stereotyping and the EEOC's consistent guidance providing that employers should refrain from asking about prospective employees' religion with the EEOC's argument in this case. Anytime an employer assumes someone might adhere to a certain religion, based on their appearance, dress, or other physical characteristics (including potentially their race or color), the EEOC would now have that employer put an awkward and deeply personal question to the applicant about his or her religion or else face liability despite the fact that the applicant could use such questioning as evidence of pretext in an intentional discrimination suit.

Instead of placing employers in an untenable situation, the ADA's general rule prohibiting employers from inquiring into an applicant's disability at the pre-offer stage provides a better model for this Court to follow regarding religious accommodation inquiries.[10] Although the ADA contains no qualifying

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[10] Under the ADA, disability related inquiries are reviewed differently depending on whether the person is an applicant or an employee. *See* 42 U.S.C. §12112(d)(1994). Employers are prohibited from making inquiries regarding an applicant's disability at the pre-offer stage and *amici* urge this Court to adopt a similar rule for religious accommodation inquiries. 42 U.S.C. §12112(d)(2)(A)(1994). Regarding employees, although the ADA allows inquiries into an employee's medical condition under limited circumstances, the EEOC's guidance is clear that it must be made on "objective evidence" and "[s]uch a belief requires an assessment of the employee and his/her position and *cannot be based on general assumptions.*" 42 U.S.C. §12112(d)(4)(1994); 42

language, the EEOC's guidance indicates that an employer may make pre-offer disability inquiries where the disability is "obvious." *See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/medfin5.pdf (last visited Jan. 19, 2015). Even if such a reading is correct, unlike under the ADA where an applicant's disability may be "obvious," where for example, the applicant uses a wheelchair, for religious accommodation cases, a bright line rule prohibiting inquiries into an applicant's religion at the pre-employment stage is a far more workable standard. After all, there are almost no similarly "obvious" religious attributes. Even in this case where the EEOC believes that the head covering worn by the applicant made it obvious that she was Muslim, the EEOC's own expert testified that head coverings can be worn by some women for cultural reasons too. And, as discussed earlier, some women may wear them as a fashion statement.

Further, subjecting an employer to a possible intentional discrimination lawsuit by forcing the employer to ask a candidate about the need for a religious accommodation is especially unfair if the employer realizes during the interview that the applicant is not qualified for the job. Imagine Ms.

U.S.C. §12112(d)(1994); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), No. 915.002 (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_12_ (emphasis added). A rule prohibiting employers from relying on stereotypes and assumptions is particularly important in the religious accommodation context because indicia of religion do not lend themselves well to an objective test.

Elauf had a sister who applied at Abercrombie also wearing a headscarf. Imagine it was obvious to the interviewer that the sister was not attractive enough to be an Abercrombie "model." Few would feel sorry for Abercrombie if the sister sued Abercrombie for intentional discrimination after the interviewer asked her about her need for a religious accommodation but then did not hire her based on her lack of attractiveness. However, for the majority of employers who may find out during an interview that candidates lack essential qualifications, the issue of an accommodation should not be interjected into and allowed to compromise the interview process. Instead, it ought to arise only once a decision to hire has been made just as employers do for ADA related accommodations.

III. STATE AND LOCAL GOVERNMENT EMPLOYERS WILL BE SIGNIFICANTLY IMPACTED BY ANY CHANGE TO THE TITLE VII RELIGIOUS ACCOMMODATION FRAMEWORK

A. THE EEOC'S CHANGE TO THE RELIGIOUS ACCOMMODATION FRAMEWORK CONFOUNDS HIRING PRACTICES FOR PUBLIC EMPLOYERS

As discussed above, if the EEOC's argument is adopted, employers will be forced to rely on religious stereotypes and inquire into applicants' religious practices, despite the fact that Title VII seeks to prevent this type of behavior. Because state and local governments are collectively the Nation's largest employer, have the greatest variety of staffing requirements, grooming and dress policies, and must rigorously operate within the confines of the First

Amendment, the sheer volume of situations involving issues of religious accommodation affects them more than any other employer. State and local governments have a multitude of policies that implicate potential religious accommodation issues. Government operations include services that must be provided on a twenty four hour a day, seven day a week basis and which must balance accommodation needs with public service requirements. Similarly, state and local governments adopt dress code policies for many jobs based on specific operational requirements that can prohibit facial hair, head coverings, tattoos, long hair, and other expressions of non-conformity. Still other public employment jobs have policies that effectively prohibit employees from displaying any visible religious symbols.

It is not difficult to imagine the slippery slope that the EEOC has proposed. Public employers will have a difficult time ascertaining when it is appropriate to make an inquiry into someone's religion given the complexities and diversity of modern religions coupled with the sheer volume of public jobs that have dress codes, uniform requirements, prohibit facial hair or long hair, or prohibit visible tattoos. For example, many police departments prohibit facial hair and some require personnel to wear their hair short, both for safety and uniformity purposes. If a person with dreadlocks applies for a position within the police force, under the EEOC's proposed rule, it is unclear whether the government employer would be required to ask if the hairstyle is a religious requirement or a grooming choice. Contrary to the EEOC's arguments, there would be nothing problematic about the employer in this scenario choosing to hire or not hire this individual solely based on his merit without taking his dreadlocks into account. If he was not

already aware of the police department's short hair policy and he did not raise the need for an accommodation. The interview, once he was hired and became aware of the policy he could request an accommodation. The police department could determine whether providing it would be an undue hardship.

It is not difficult to imagine other problems that would stem from the EEOC's proposed rule in this case, including situations where an employer would have to rely on stereotypes about the applicant's race or national origin in order to guess the person's religion. For instance, many fire departments use Self Contained Breathing Apparatuses and therefore prohibit facial hair because it prevents a proper seal for the breathing device. Under the EEOC's proposed rule, it is unclear whether a public employer would have to ask every male applicant with a beard about his religion and if he required an accommodation. Alternatively, and more problematically, would the rule only require a public employer to ask an applicant with a beard about his religion if the interviewer made assumptions about his religion based on other characteristics such as the person's race? Thus, an employer could face an intentional discrimination suit for asking a male applicant who the employer believes is Muslim based on his facial hair and skin color whether he needs an accommodation for his religion but does not ask fairer skinned male applicants with beards if they need an accommodation.

Similarly, some religions encourage adherents to get tattoos. If an employer interviews someone with a visible tattoo and the employer, like many public employers, has a policy prohibiting visible tattoos, is the employer required to ask if the person needs a

religious accommodation? Again, in deciding whether to ask, should the employer rely on the person's race or national origin to guess whether the tattoos are based on the person's religion?

As the foregoing demonstrates, if the Court reverses the Tenth Circuit's decision and requires public employers to inquire into a prospective employee's religious practices based on stereotypes, there is no clear point at which those inquiries will stop. Instead of suppressing their perceptions regarding race, religion, and national origin, employers will need to guess whether their now unsuppressed stereotypes about an applicant rise to a level that requires an inquiry into the applicant's religion. More problematic will be the ensuing litigation that pries into an employer's subconscious to discern whether the employer allowed certain physical characteristics or the person's dress or appearance to influence its assumption concerning the likelihood that the applicant practices a certain religion that might conflict with one of the employer's policies. The result will almost certainly lead to increased discrimination, undercutting the very purpose of Title VII. The current rule, requiring an employee to provide actual notice to his or her employer or prospective employer before any liability for a failure to accommodate claim can attach is far more practical and keeps with the purpose and intent of Title VII.

B. PUBLIC EMPLOYERS MUST CONSIDER THE ESTABLISHMENT CLAUSE IF THE REQUIREMENTS FOR RELIGIOUS ACCOMMODATION CASES ARE CHANGED

The EEOC's proposed rule shifting the burden onto employers to inquire into a prospective employee's

religion based on assumptions and stereotypes would apply with equal force to both public and private employers. Whenever issues of religion in the workplace arise, however, public employers must take into account additional considerations beyond those of a private employer. Specifically, government employers must consider constraints under the Establishment Clause of the First Amendment, which has been interpreted to mean that a government may not: "(1) promote or affiliate itself with any religious doctrine or organization, (2) discriminate among persons on the basis of their religious beliefs and practices, (3) delegate a governmental power to a religious institution, or (4) involve itself too deeply in such an institution's affairs." *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989). At a minimum, what this means for a government employer is that it may not endorse religion. *See Larson v. Valente*, 456 U. S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As Justice Kagan noted in her dissent in the *Town of Greece v. Galloway*:

> W]hen a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials . . . . participate in the business of

> government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose.
>
> 133 S. Ct. 2388 (2013) (Kagan, J., dissenting) (citation omitted).

As a result of First Amendment concerns, governments as employers have a strong interest in remaining secular and religion neutral. Many of their policies reflect those concerns and some policies go so far as to effectively prohibit certain categories of employees from wearing any overt religious symbols or garb. For example, in *Webb v. City of Philadelphia*, the city's police department denied a Muslim woman's request to wear a head covering based on the city's strict dress code policy, which essentially prohibited police officers from wearing anything other than the department issued uniform. 562 F.3d 256, 258 (3d Cir. 2009). In upholding the city's decision, the Third Circuit credited the police commissioner's testimony that:

> [what is] at stake is the police department's impartiality, or more precisely, the perception of its impartiality by citizens of all races and religions whom the police are charged to serve and protect. If not for the strict enforcement of Directive 78, the City contends, the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the proper functioning of the police department. In the words of Police Commissioner Sylvester Johnson, uniformity "encourages the subordination of personal preferences in favor of the overall policing mission" and conveys "a sense of authority and competence to other officers

> inside the Department, as well as to the general public."

Id.; *see also Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) (upholding police chief's denial of police officer's request to wear a pin of a cross on his uniform, concluding: "the city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias. The city's interest in conveying neutral authority through that uniform far outweighs an officer's interest in wearing any non-department-related symbol on it.").[11]

The foregoing helps illustrate that public employers often go to great lengths to prevent any appearance that the government is endorsing a particular religion (and courts have upheld those policy decisions). As the court explained in *Webb*, what is at stake for public employers is their appearance of religious neutrality and impartiality. Indeed, as Justice Kagan noted, "religious favoritism [is] anathema to the First Amendment" and public employers must therefore proceed with caution whenever issues of religion arise in the workplace. *See Town of Greece*, 133 S. Ct. 2388 (2013) (Kagan, J., dissenting).

Public employers consider the Establishment Clause in every aspect of governance, from their

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[11] The EEOC similarly notes that "there may be limited situations in which the need for uniformity of appearance [for government employers] is so important that modifying the dress or grooming code would pose an undue hardship." *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm#_ftnref10 (last visited Jan. 16, 2015).

interactions with the public to their role as an employer. Because the EEOC's proposed rule in this case would apply with equal force to both public and private employers, any rule adopted by this Court regarding the notice provision for religious accommodation cases should take into account the limitations public employers face as a result of the Establishment Clause. If forced to rely on stereotypes about someone's religion during the interview process, the public's trust in a public employer's impartiality and ability to remain religious neutral will be eroded. Accordingly, any change to the notice requirement for religious accommodation cases under Title VII should take into account the fact that public employers must weigh Establishment Clause considerations whenever dealing with religion in the workplace. Requiring a public employer to inquire into a potential employee's religion is inconsistent with government employers' strong interest in remaining religion neutral.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court uphold the Tenth Circuit's decision requiring an employee to provide notice to his or her employer regarding the need for a religious accommodation.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
Counsel of Record
Executive Director,
General Counsel
AMANDA KELLER
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amici Curiae

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