No. 18-107

In the Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CHRISTIAN EMPLOYERS ALLIANCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Christian Employers Alliance ("CEA") is a business trade association made up of employers who desire to operate their businesses in accordance with their Christian faith and deeply held convictions. CEA's mission is to unite and equip Christian employers with advocacy, practical resources, and collective impact opportunities for the well-being of employees, organizations, and communities for God's glory. Like the Petitioner, R.G. & G.R. Harris Funeral Homes, Inc., CEA members believe that their Christian calling is not limited to ceremonial rites but is intrinsic to all aspects of their lives. As such, they do not segment their lives into "secular" and "religious" compartments. Rather, they live out their faith in an all-encompassing manner, and their businesses and vocations are no exception.

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[1] Consistent with this Court's Rule 37.6, *Amicus Curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the *Amicus's* intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

SUMMARY OF ARGUMENT

Petitioner and Federal Respondent correctly explain that the Sixth Circuit grossly departed from standard canons of statutory interpretation and joined a minority of other circuits to misinterpret Title VII. Petitioner also rightly demonstrates that the Sixth Circuit intensifies a circuit conflict in a manner that will exacerbate confusion over the state of the law and provide citizens with little guidance regarding how to conduct their intimate lives in a variety of circumstances. This brief will not repeat those arguments.

This brief instead first foregrounds a common yet perhaps disregarded, or endangered, feature of our nation's pluralistic society: the fact that many people of faith understand that work and worship are not separate endeavors. For many like *Amicus*, business takes place as an elementally sacred activity. We therefore begin with a discussion regarding how business and worship overlap and how this fact is at odds with the unnecessary interpretation of Title VII adopted by the court of appeals.

Next *Amicus* discusses how the faith-based business practices previously covered may lawfully inform choices in business dress and grooming policies. While not repeating the arguments of Petitioner or Federal Respondents, *Amicus* notes that Title VII allows for such choices so long as dress and grooming policies do not unduly burden one sex over the other. *Amicus* concludes in section two that Title VII allows for such pluralistic practices, and that the law does not require employers to choose between those advocated by *Amici* in support of Employee Respondent and those promoted here, and that additionally and as a

consequence our pluralistic society flourishes. *Amicus* urges the Court to therefore refrain from interpreting Title VII to foreclose such pluralism and leave to our representatives in state and federal legislatures whether homogenizing legal policies should be sought through statutory amendment or initiative.

Finally, this brief also urges the Court to correct the Sixth Circuit's deviation from another judicial norm that is misapplied. That court also presumed to define religious orthodoxy for Petitioner's owner and then declare he did not run afoul of that judicially crafted "orthodoxy." Our Constitution prohibits the judiciary from such theologizing. So *Amicus* details the likely harm consequent to faithful persons should this Court neglect to correct the Sixth Circuit's error.

The court of appeals' decision not only presumes to tell the Petitioner that it can define what is valid in his creed better than he can determine for himself, but it compounds that presumption by informing the petitioner that following their mandate is permitted by their newly-minted religion. This Court should correct that error, and refrain from similar presumption by once again affirming that Title VII operates in a manner that allows for recognition of differences even as it guarantees protection from unequally burdensome discrimination.

ARGUMENT

I. Many Americans are Compelled by Their Sincerely Held Religious Beliefs to Conduct Their Business in Accordance With and As an Expression of Their Faith.

Millions of Americans belong to faith communities and conduct their affairs in reverence of their Creator. Our government has never felt it necessary to deny such citizens the ability to exercise their beliefs or to force them to be complicit in what they consider sin absent the most compelling of governmental needs. Yet that foundational principle of our pluralistic society is part of what is at stake in this case. It is near platitude to note that many of the world's major religions teach that their adherents' whole lives—especially their work—should reflect and bear witness to the values and truth claims of their religion. Their faithful work is not only integral to their vertical relationship with the divine but also critical to how they serve and communicate their religious values in their horizontal relationships with others.

Followers of Jesus are taught to conduct themselves and work in a manner fully pleasing to God. Colossians 1:9 (ESV). Indeed, "work has dignity because it is something that God does and because we do it in God's place, as his representatives … all kinds of work have dignity." Timothy Keller, *Every Good Endeavor: Connecting Your Work to God's Work* 36 (2014). Theologically, work was part of creation before the fall. Genesis 2:15 ("The Lord God took the man and put him in the garden of Eden to work it and keep it.").

Followers of Jesus are also commanded to let the light of their lives shine before others, so that others

may see their good works and give glory to God in heaven. Matthew 5:15 (ESV). Or as the Apostle Paul succinctly states in 1 Corinthians 7:17 (ESV): "Only let each person lead the life that the Lord has assigned to him, and to which God has called him." As a matter of conscience, Jesus taught that one day God will ask everyone to give an account for what they did with the business and resources with which they were entrusted. Luke 12:13-21 (ESV).

Jesus's commands and Paul's teaching were not new but harken back to God's original and good design for both man and work in creation. In Genesis 2:15 (ESV), the Bible teaches that God, who created all things, called man primarily into a co-laboring relationship with Him; a relationship in which the earth and everything in it could be cultivated and God would be glorified as a result.

As evidenced by the broad memberships and missions of *Amicus*, the cultivation to which men and women are called extends beyond working the ground to include numerous other spheres, including finance, education, the arts, medicine, science, architecture, and technology. According to the Scriptures, either these spheres will be cultivated in a manner that honors God by acknowledging His created order and purposes, or they will be cultivated in a manner that dishonors Him by neglecting His created and purposes.

Vocation comes from the Latin word *vocare*, "to call." The understanding of vocational calling for a follower of Jesus is that one is called to work in a manner that accords with God's will. This understanding of vocation is reflected in both Catholic and Protestant teaching.

The Catechism of the Catholic Church instructs that "[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will." *Catechism of the Catholic Church*, ¶ 898 (1997). More specifically, in Pastoral Constitution of the Church in the Modern World, one of four constitutions emerging from Vatican II, the Roman Catholic Church teaches with regard to work that Christians are:

> … as citizens of two cities, to strive to discharge their earthly duties conscientiously and in response to the Gospel spirit. … This split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age…. Therefore, let there be no false opposition between professional and social activities on the one part, and religious life on the other. ...

Pope Paul VI, *Gaudium et Spes*, ¶ 43 (Dec. 7, 1965).[2] Addressing Christians in all spheres of life, including business, to follow their consciences in their calling from God, it continues: "Laymen should also know that it is generally the function of their well-formed Christian conscience to see that the divine law is inscribed in the life of the earthly city…." *Id.*

Both Martin Luther[3] and John Calvin[4] also spoke of a Christian obligation to live out his or her faith vocationally. Specifically, Calvin taught:

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[2] goo.gl/sWizby

[3] Marc Kolden, *Luther on Vocation*, 3 Word & World 382 (Oct. 1, 2001).

> The last thing to be observed is, that the Lord enjoins every one of us, in all the actions of life, to have respect to our own calling…. And that no one may presume to overstep his proper limits, he has distinguished the different modes of life by the name of callings. Every man's mode of life, therefore, is a kind of station assigned him by the Lord, that he may not be always driven about at random…. [I]t is enough to know that in everything the call of the Lord is the foundation and beginning of right action. He who does not act with reference to it will never, in the discharge of duty, keep the right path. *John Calvin Institutes of the Christian Religion*, 3.10.6.[5]

For Christians, a life of integrity requires there to be a unity of thought, belief, and action under the Lordship of Christ which cannot in good conscience be compartmentalized between church, home, and work.

Similarly, Judaism and Islam also teach that faith is to shape one's whole life and include sets of laws or commands which are to govern all aspects of their adherents' lives. In Judaism, there are commandments which govern when and how work may be done. It is a central tenet of Judaism that throughout one's daily life one should accept and act upon the great multitude of opportunities to improve one's thoughts and behavior.[6] These opportunities are "mitzvot," or

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[4] Alister McGrath, *Calvin and the Christian Calling*, 1999 First Things 94 (July 1999).

[5] goo.gl/CBSsvd

[6] Talmud, Makkos 23b; see also Rabbi Moshe Chaim Luzzato, Derech Ha-Shem §§ 1:2:1–5.

commandments, constituting a complete set of civil and criminal laws that govern all aspects of Jewish life. In Islam, everyday business activities, including finance, must be in accordance with and submitted to Allah.[7]

As evidenced by the broad memberships and missions of the *Amicus*, one need not preach or perform sacraments to be engaged in faithful work. *Amicus* represents members and workers in many spheres, including finance, education, retail, the arts, medicine, science, architecture, and technology. As a theological matter, these spheres are to be engaged a manner that honors God and acknowledges the created order. It is not just the individual at work who lives out faith; businesses also seek to act consistent with the religious convictions of the leaders of the company. "Business in itself—not just the ways business can contribute to the work of the church" glorifies God. Wayne Grudem, *Business for the Glory of God: The Bible's Teaching on the Moral Goodness of Business* 12 (2003).

As we learned in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 121 S.Ct. 1719 (2018), it is easy to imagine everyday instances where the freedom to operate one's business in accordance with one's religious beliefs and yet also find one's vocation and, as in the present case, one's client base, threatened. Here, in Petitioner's company we have a faith-based business whose service is tailored to the faith that the owners and many of their customers hold dear. Does our pluralistic society allow such a business to exist without running awry of employment regulations such as Title VII? Prior to the Sixth

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[7] See generally Muhammad Ayub, *Understanding Islamic Finance* (2007).

Circuit's decision it seemed possible. Now those freedoms are in question. As discussed below, such policy questions should be left to Congress, or the states, to address rather than mandating through a novel interpretation of Title VII a one-size fits all rule.

The freedom to operate in business according to religious beliefs has been under attack. Recently the attacks have come against businesses that prominently feature creative expression, or which communicate a message for a client as the primary service. *E.g.*, *Masterpiece Cake*; *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018). In this case, Petitioner is burdened with government regulations requiring Petitioner to express a message that is diametrically opposed to the primary message the owners wish to convey and their customers wish to receive. Title VII imposed in the manner framed by the Sixth Circuit may be (mistakenly) seen as Employee Respondent suggests—a form of sex discrimination. But given the message intended to be conveyed by Petitioner and apparently wished to be received by Petitioner's customers, application of Title VII under these facts also threatens a highly burdensome form of government compelled expression. The expression of faith conveyed and sought to be received, in some of the most vulnerable times in life, is forfeited under such circumstances and is a necessary consequence of the court of appeal's interpretation of Title VII.

As explained by Petitioner and Federal Respondent, and for the reasons briefly outlined below, Title VII does not mandate such costly forfeiture and this Court should not interpret it in a manner that necessitate such loss.

II. Sex Specific Dress Codes and Grooming Policies Do Not Violate Title VII Unless They Impose Unequal Burdens on the Basis of Sex.

Businesses operate well according to thoughtful planning. And part of planning depends on law's certainty, as fair notice and certainty are primary qualities in any system respecting the rule of law. "Vague laws invite arbitrary power [indeed]." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). And "[p]erhaps the most basic of due process's customary protections is the demand for fair notice." *Id*. at 1225 (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) and Note, Textualism as Fair Notice, 123 HARV. L. REV. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law.")). Given this Court's and lower court's prior jurisprudence, as well as EEOC guidance, *Amicus* finds it questionable whether Petitioner could have anticipated liability in this case on account of its dress code policy.

In any event, perhaps particularly for business efficiency, clarity and certainty in legal standards are helpful in the employment context and a particular interest to those who would efficiently order their business affairs. For this reason, *Amicus* respects and values the clarity of this Court's precedent, which requires proving discrimination because of sex under Title VII and requires showing that an employer treated members of one sex less favorably than similarly situated members of the other sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Accord *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675 (1983) (policy

that treated a male employee with dependents less favorably than a similarly situated female employee with dependents was a Title VII violation); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (a prima facie Title VII case must maintain that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of sex). In other words, the challenged business policy must have an unequal burden on the basis of sex.

Petitioner and the Federal Respondents have comprehensively covered why the traditional reading of the unequal burden component of Title VII is the correct interpretation of the statute, and *Amicus* will not add to the voluminous material before the Court on that issue.

However, *Amicus* notes that the vast weight of authority, on which businesses rely, uniformly holds that dress and grooming requirements regarding workers are "permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ." *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985), overruled on other grounds by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Accord *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc). This remains true even where an employer does not have a written dress code or policy. *Bellissimo*, 764 F.3d at 181. Moreover, even if a grooming policy has different requirements or standards for men and women, there is no cognizable disparate treatment claim where the policy is equally enforced and applied, and where the requirements for one sex are not more

burdensome than for the other. *Id*.; see also *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.").

Nearly until this case and its companions, courts had long recognized that businesses may differentiate between men and women in appearance and grooming policies if they do not unequally burden because of sex. *E.g*, *Harper v. Blockbuster*, 139 F.3d 1385 (11th Cir. 1998) (employer's grooming policy, which prohibited men, but not women, from wearing long hair, did not violate Title VII); *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996) (employer's policy which required male employees to have short hair, but which did not impose similar restriction on female employees, did not violate sex discrimination provisions of Title VII); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (same); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (same); *Earwood v. Cont'l Southeastern Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976) (same); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) (same); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (same); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (same); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (same).

These cases collectively demonstrate that employers may distinguish between men and women in certain instances without running afoul of Title VII. They also evidence that distinctions between men and

women may be made for relevant business reasons and debunk the idea that sex must be irrelevant in the workplace; instead what matters, and what should matter, for the Title VII inquiry is whether such policies create an "unequal burden" between the sexes. *Jespersen*, 444 F.3d at 1110 (citations omitted). Petitioner and Federal Respondents have thoroughly covered why such policies do not rest on sex stereotyping and *Amicus* will not repeat those observations. But considered treatment by federal courts of appeal agree. *Id*. at at 1111-13.

Considered guidance offered by the EEOC also agrees: "[A] dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times. So long as these requirements are suitable and are equally enforced and so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose, there is no violation of Title VII." *EEOC Compliance Manual*: Uniforms and Other Dress Codes in Charges Based on Sex § 619.4(d).

Such policies do not, as in *Price Waterhouse*, single out a particular employee because of sex and treat the employee unequally to opposite-sex employees who similarly exhibit, say aggressiveness. Instead, sex-specific dress codes and appearance policies do not single out or disadvantage any employee because of their sex, as they apply to all employees. *E.g.*, *Jespersen*, 444 F.3d at 1111 ("Harrah's . . . policy does not single out Jespersen. It applies to all of the bartenders, male and female.").

Amicus also acknowledges the common-sense business policies advanced by other *Amici* who support Employee Respondent. Of course, some business and

company policies and goals will be accomplished by the policy decisions they catalogue. But those dress policy decisions and uniform business practices are not mandated by Title VII. As described above, there are faith-based business reasons for requiring some dress codes, both because owners may express their faith through their businesses, and because many customers may choose those businesses, as Petitioner's, precisely because the message conveyed by the dress code is what they desire as consumers. The market treats each of these decisions—by *Amici* who support and and all parties—accordingly, and businesses may flourish or fail accordingly. Title VII presently allows for such distinctions and pluralism.

Affirming the Sixth Circuit's decision here would work otherwise and impose a one-size-fits all federal mandate that would disallow faith-based business expressions explained earlier, and mandate that a single message be carried by all companies and served up to all customers. Our nation's faith in pluralism does not flourish under such conditions. And as our representatives in Congress—or in the legislatures of the several states—have not yet found the wisdom of changing our national policies to mandate such homogeneity, our judiciary should also refrain from taking that step here.

Taking such a step would almost certainly cause the unintended consequences Petitioner catalogues. *Amicus* here share those concerns and will not repeat them. However, *Amicus* affirms that our nation's precious pluralism would not be fostered by affirmance of the court of appeal's decision. There is ample evidence in the briefing before the Court that businesses, and perhaps state legislatures, will

respond in various ways to the issues raised by this case. This is as it should be, and the Court should refrain from mandating by judicially amending Title VII that such pluralism be homogenized. Such judicial activism in the service of homogeneity is not necessary or desirable given the pluralism present in the market and allowed under Title VII.

III. Federal Courts Have Neither the Authority nor the Qualifications to Determine the Validity of Religious Practices.

In addition to its incorrect interpretation of Title VII, the court of appeals below also erred in determining the religious convictions of the Petitioner's owner. This Court's precedent establishes that while a court may sometimes inquire into the sincerity of a religious adherent's beliefs, *e.g.*, *United States v. Ballard*, 322 U.S. 78, 86 (1944), our judiciary has no business evaluating the ultimate validity or verity of any religious creed. *E.g.*. *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

Eschewing these bedrock principles, the Sixth Circuit unconstitutionally determined the validity of Petitioner's religious practices "as a matter of law." *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018). Analyzing the owner's claims under the Religious Freedom Restoration Act (RFRA), the Sixth Circuit recognized his "honest conviction" that permitting and facilitating his biologically male employee to dress as a female would cause petitioner to "violate God's commands because it would make him directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift[.]" *Id.* (internal quotation marks

omitted). Nonetheless, the Sixth Circuit held "as a matter of law" that "tolerating [petitioner's employee's] understanding of her sex and gender identity is not tantamount to supporting it." *Id.* Placing itself in the position of inquisitor, the Sixth Circuit held as a matter of law held that "a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged." *Id.*

Right there, the court of appeals engaged in constitutionally impermissible conduct: it made itself the arbiter of orthodoxy concerning petitioner's religion. It decided as a matter of law the content of petitioner's religion and declared that as a matter of law the petitioner was not in conflict with that orthodoxy even though petitioner's unchallenged sincere belief told him that he was.

Two hundred and thirty-four years ago James Madison denied that "the Civil Magistrate is a competent Judge of Religious Truth." See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in 8 *The Papers of James Madison* 295, 301 (Robert A. Rutland et al. eds., 1973). With his customary dry wit, Madison continued that the delusion that a judge ought engage in theological investigation "is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world[.]" *Id.* In this Madison was echoing his hero, John Locke, who over a century previous to Madison's declaration presaged: "The one only narrow way which leads to Heaven is not better known to the Magistrate than to private Persons, and therefore I cannot safely take him for my Guide, who may probably be as ignorant of the way as myself, and

who certainly is less concerned for my Salvation than I myself am." John Locke, *A Letter Concerning Toleration* 37 (James H. Tully ed., 1983) (1689).

American constitutional jurisprudence agrees with Madison and Locke. Under what is colloquially known as the religious-question doctrine, this Court holds that as a constitutional matter our judiciary is prohibited from adjudicating issues of theology, doctrine, or belief. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2278-79 (2014).

Madison and Locke were correct that the judiciary is not competent to determine such theological matters. They were also correct that such presumptions of judicial officers were a creature of arrogant pretention, unlikely to offer clear guidance to citizens and protections to believers. Courts ought to be content with their role in the American legal system; they do not need to control the gates of Heaven as well. The Sixth Circuit ignored Madison's wisdom and this Court's precedent by taking a different tack. This Court should correct that error and the others identified previously.

Nearly two hundred and fifty years ago while moderating a proposal by George Mason, Madison also professed in the 1776 Virginia Declaration of Rights: "That Religion, or the duty which we owe the Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to free exercise of religion, according to the dictates of conscience[.]" Two precepts in this provision remain foundational in constitutional law, as they informed the Bill of Rights: first, that individual conscience determines the quality of any "duty" owed in devotion; and, second, that

government has no place in the determination of belief's character as creeds are "directed only by reason and conviction, not by force or violence."

These two concepts have endured as bedrock principles of constitutional law – so much so that this Court finds them beyond debate. In *Masterpiece Cakeshop*, this Court without pause observed that the government in general, and the judiciary in particular, has no authority or qualification to determine the validity of citizens' religious practices: "It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a citizen's] conscience-based objection is legitimate or illegitimate." 121 S.Ct. at 1731.

This Court has rejected the idea that the federal judiciary has any business speculating on the validity of a given religious belief. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2778 ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.") (internal parentheses omitted); *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-87 (1990) ("It is [not] appropriate for judges to determine the 'centrality' of religious beliefs … [or] the place of a particular belief in a religion or the plausibility of a religious claim."); *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Ballard*, 322 U.S. at 86 (People "may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) ("In this

country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

Justice Alito has summed up the principle succinctly:

> The argument that a plaintiff's own interpretation of his or her religion must yield to the government's interpretation is foreclosed by our precedents. This Court has consistently refused to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

Ben-Levi v. Brown, 136 S.Ct. 930, 934 (2016) (Alito, J., dissenting from denial of certiorari), quoting *Smith*, 494 U.S. at 887.

Two recent cases reaffirm this principle. In *Hobby Lobby*, the Court observed in exasperation: "This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." 134 S.Ct. at 2778.

In *Holt v. Hobbs*, the Court refused to consider various theological arguments attempting to justify why requiring a Muslim prisoner to shave his beard

did not constitute a substantial burden on his religious exercise. 135 S.Ct. 853, 862–63 (2015). In *Holt*, the lower court had found that the prisoner's religious exercise was not substantially burdened by the prison's beard policy because, "his religion would 'credit' him for attempting to follow his religious beliefs," he exercised his religion in other manners, and other Muslim men were willing to shave. *Id*. This Court rejected this amateur theologizing, noting that the burden was substantial because "if petitioner contravenes that policy and grows his beard, he will face serious disciplinary action." *Id*. at 862. In other words, the Court accepted the petitioner's statement of his faith and only considered surrounding legal issues.

The Court's point is clear, as Madison and Locke warned: even well-intentioned judicial officers simply cannot be expected to understand the intricacies of religious practices. For instance, in *Ben-Levi* the lower court determined that a prison did not discriminate against a Jewish prisoner when it denied Jews, and only Jews, the right to engage in bible study. Like the Sixth Circuit here, the lower court in *Ben-Levi* exhibited the well-intentioned hubris that it was protecting "the purity of the doctrinal message and teaching." 136 S.Ct. at 934 (quoting district court decision). In his dissent from the denial of certiorari, Justice Alito noted that "Because NCDPS's policy rests on its understanding of Jewish doctrine, the policy does not apply to other religions. In fact, NCDPS intentionally treats different religions differently based on its perception of the importance of their various tenets." *Id*. at 931. Justice Alito further noted that:

> In essence, respondent's argument—which was accepted by the courts below—is that Ben-

> Levi's religious exercise was not burdened because he misunderstands his own religion. If Ben-Levi truly understood Judaism, respondent implies, he would recognize that his proposed study group was not consistent with Jewish practice and that respondent's refusal to authorize the group "was in line with the tenets of that faith."

Id. at 933 (quoting district court decision). In fact, as a matter of Jewish law, there is absolutely no such requirement. The district court probably confused the obligation to have ten men for certain parts of a prayer service and communal Torah reading with a nonexistent obligation to have ten men for bible study.[8] This mistake may be understandable and made in good-faith, but it highlights why the judiciary has no capacity to act as theologians and parse religious law.

The basis for the religious-question doctrine is made clear with this plain example, and the Sixth Circuit's decision rests on a gross error in the doctrine's breach. The Court should correct that error, as to refrain from so doing could facilitate and multiply the possible errors and harms attendant to the substitution of judicial estimation of a citizen's faith and its validity. Affirming the court of appeal's ruling has the potential to make America a less tolerant and less welcoming home for religious practitioners of all faiths and those of no faith. As with the court of appeal's homogenizing reading of Title VII, this error

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[8] Rabbi Abraham Millgram, *Minyan: The Congregational Quorum*, MYJEWISHLEARNING.COM, https://goo.gl/P4yigw (discussing instances that require a quorum of 10 Jewish men, bible study is not included).

too threatens to substitute a possible judicial impulse toward homogeneity for our nation's sacred pluralism of faiths and no faith.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AUGUST 2019

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