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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.

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]

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?*, FABFASHIONFIXor

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.

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

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.

he needs such an accommodation for religious reasons." *Religious Discrimination*, EQUAL EMPLOYMENT O

Cir. 1995) (finding employer had notice of employee's

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]

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

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

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 strito

> 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 si

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