No. 23-3188

In the United States Court of Appeals for the Eighth Circuit

DANIEL SNYDER,

Plaintiff-Appellant,

v.

ARCONIC, CORP., a Delaware Corporation and ARCONIC DAVENPORT, LLC, a Delaware Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Iowa – Eastern, No. 3:22-cv-00027-SHL.
The Honorable Stephen H. Locher, Judge Presiding.

OPENING BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Defendants-Appellees Arconic, Corp., and Arconic Davenport, LLC ("Arconic"), a large aluminum manufacturer, fired Plaintiff-Appellant Daniel Snyder for making a single religious comment on the company's employee website opposing its use of the rainbow to promote "Pride Month." He explained that he thought he was responding to an anonymous company survey, although the statement appeared as a comment to an article *about* the survey. Arconic fired him anyway.

Snyder sued Arconic for religious discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and the Iowa Civil Rights Act ("ICRA"). He moved for summary judgment on the discrimination claims, and Arconic moved for summary judgment on all claims. The District Court granted Arconic's motion and denied Snyder's on the ground that he allegedly failed to establish a prima facie case.

This appeal raises important questions about Title VII's application to non-disruptive religious expression in the workplace, including under the Supreme Court's new "undue hardship" standard in *Groff v. DeJoy*, 600 U.S. 447 (2023). Thus, Snyder requests 15 minutes of oral argument.

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INTRODUCTION

In recent years, the Supreme Court has clarified that Title VII really means what it says—that its prohibition on firing employees "because of" protected characteristics is "straightforward" and "simple." *See infra*.

Here, that means an employee's "religion" cannot even be a "*factor* in employment decisions," *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015),[1] unless a reasonable accommodation would be an "undue hardship"—that is, a "burden [that] is *substantial* in the overall context of an employer's business," *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

This "straightforward" test makes the present appeal unusually simple.

Arconic is a multi-national widget company that fired Daniel Snyder for making a single religious statement on its employee website. The statement objected to Arconic's use of the rainbow symbol to promote "Pride Month," calling it an offense "to God."[2] Snyder, then 62

[1] Emphasis added here and throughout unless otherwise indicated.
[2] The full statement read: "Its [sic] a [sic] abomination to God. Rainbow is not meant to be displayed a sign for sexual gender."

years old, explained he had been attempting to respond to an anonymous company survey, though the statement appeared as a comment to an *article about* the survey. He said he would never attempt to respond to a company survey again, and reiterated that the statement reflected his deeply held religious convictions. *See infra*.

Arconic didn't care. It deemed the comment a per se violation of its "Diversity Policy" and concededly fired Snyder as a result. Snyder sued Arconic for religious discrimination and retaliation under Title VII and ICRA. *Infra*.

But at the summary judgment stage, the District Court held that Snyder failed to establish that he was fired "because of" religion as a prima facie matter. The Court opined that Snyder had to show that his Christian faith *required* him to make the comment; that Arconic required him to engage in affirmative conduct violating his faith; and that he notified Arconic of his religious objection *before* commenting. (Yet Arconic concededly knew Snyder's statement was religious *before firing him*.) The District Court thus granted summary judgment to Arconic without considering whether accommodating Snyder would have been an "undue hardship." *Infra*.

The District Court's decision is wrong. It ignores Title VII's broad definition of "religion" and the First Amendment strictures on probing an individual's theology. It also fails to apply Title VII's "favored treatment" for religious expression as against "otherwise-neutral" employment rules, a requirement triggered when an employer even "suspects"—*before the* "*employment decision*"—that the offending conduct is religious. *Abercrombie*, 575 U.S. at 773-75.

Under Title VII's "simple" test, Snyder has easily shown his religion was "a factor" in Arconic's firing decision.

Additionally, Arconic has failed to show that reasonably accommodating Snyder would have been an undue hardship. This Court has already held that a non-disruptive "isolated" religious expression in the workplace is not an undue hardship as a matter of law. *See Brown v. Polk Cnty., Iowa*, 61 F.3d 650 (8th Cir. 1995) (en banc). This is all the more true after *Groff*. Here, Arconic admits Snyder's comment caused no material disruption in the workplace and that its own distaste for Snyder's comment motivated its refusal to accomomdate.

Summary judgment should be entered for Snyder. At minimum, Arconic's summary judgment motion should be denied because a reasonable jury could find for Snyder.[3]

This Court's intervention is critical to correct the District Court's de facto workaround of the landmark ruling in *Groff*. By erroneously raising the bar for a prima facie showing of religious discrimination under Title VII, the District Court created an escape path for employers seeking to avoid *Groff*'s heightened burden for demonstrating "*undue* hardship." The Supreme Court hardly invited such an evasion. The District Court's judgment should be reversed.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction over Snyder's ICRA claims under 28 U.S.C. §1367.

The District Court granted summary judgment to Arconic and issued its final judgment on August 31, 2023. (App.431-451, Add.1-20, R.Doc.30, 31.) Snyder timely filed his notice of appeal on September 28,

[3] Snyder moved for summary judgment on his discrimination claim but not on his retaliation claim.

2023. (App.452, R.Doc.32.) This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in granting Arconic's motion for summary judgment, and denying Snyder's motion, on his claims that Arconic fired him "because of" "religion" in violation of Title VII and ICRA. Specifically:

   A. Whether Snyder established a prima facie case of religious discrimination. *Abercrombie,* 575 U.S. 768 (2015); *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020); and

   B. Whether Arconic demonstrated that reasonably accommodating Snyder would have been an undue hardship. *Brown*, 61 F.3d 650 (8th Cir. 1995); *Groff*, 600 U.S. 447 (2023);

   42 U.S.C. §2000e-2(a)(1); 42 U.S.C. §2000e(j); Iowa Code §216.6; U.S. Const. 1st. Amend.

2. Whether the District Court erred in granting Arconic's motion for summary judgment on Snyder's claim that Arconic retaliated against him for (a) opposing Arconic's use of the

rainbow symbol to promote "Pride Month," and (b) opposing Arconic's religious discrimination against him because of his lone religiously-motivated complaint about Arconic's use of the rainbow. *Ollis v. HearthStone Homes, Inc.*, 495 F.3d 570 (8th Cir. 2007).

42 U.S.C. § 2000e-3(a).

STATEMENT OF CASE

Snyder's Employment With Arconic

Arconic, an aluminum supply chain company, employs "tens of thousands of people" worldwide and approximately 2,500 people at its Davenport plant. (App.331-32, R.Doc.24-1, at 2.¶5.) Snyder worked for Arconic in Davenport, Iowa, for approximately ten years. By the time he was 62, Snyder had risen to the position of "lead operator." (App.331, R.Doc.24-1, at 2.¶4.)

Snyder's Religious Beliefs

Prior to the events at issue in this case, Arconic acknowledged Snyder's religious faith, having granted him a religious accommodation to not work on Sundays so he could preach at a local church and work with homeless men in his capacity as a part-time pastor. (App.341,

R.Doc.24-1, at 12.¶29). As part of Snyder's Christian faith, he believes the rainbow is a Judeo-Christian symbol of the Scriptural covenant between God and His people, dating back to the time of Noah and the Old Testament Book of Genesis. He also believes, as part of his sincerely held Christian faith, that the Bible teaches marriage is between one man and one woman. Because of these beliefs, he found Arconic's use of the rainbow to promote "Pride Month" and relationships and ideologies that he believes violate God's law to be sacrilegious. Snyder's beliefs further require him to respect all people regardless of their sexuality and he had previously worked at Arconic alongside a transgender person without any issues. (App.179, R.Doc.23-3, at 16.¶¶5-8; App.202, R.Doc.23-3, at 39-40.)

Snyder Mistakenly Posts a Statement Regarding His Religious Beliefs on Arconic's Intranet

On June 1, 2021, many Arconic employees, including Snyder, received an email from Arconic CEO Tim Myers with the subject line, "We'd like your input...," and inviting employees to respond to the company's first-ever "Engagement Survey," which sought employee feedback on "identifying areas where we can improve," allegedly because employees' "insights and ideas will help create a fulfilling work

environment, deliver on our shared Values and continue advancing our culture." The email stated that "responses would be anonymous." It was announced the survey would launch on June 2, when employees with email addresses would receive a link from the survey administrator. (App.211, R.Doc.23-3, at 48; App.332, R.Doc.24-1, at 3.¶6.)

On the same day, Arconic's "intranet"—"Arconnect"—posted an article, nearly identical in appearance to the email described above, by CEO Tim Myers about the Engagement Survey, with the large bold headline stating: "We'd like your input on building a great future together," and stating responses would be anonymous. The article contained a hyperlink at the bottom stating: "We'd like your input on building a great future together (sharepoint.com)." Employees accessed the article by clicking a "tile" on the Arconnect homepage with an image of CEO Tim Myers next to the words "We'd like your input on building a great future together." Immediately next to that tile were the following two tiles: one stating, "Arconic Inclusion and Diversity Efforts Highlighted by The Manufacturing Institute," and the other stating, "SPECTRUM: Arconic Employees for LGBTQ+ Equality" next to a rainbow-colored heart. "Spectrum" is an "Employee Resource Group,"

i.e., a support group, for employees who identify as LGBTQ. (App.209, R.Doc.23-3, at 46-47; App.332-33, R.Doc.24-1, at 3-4.¶¶7-8; App.396, R.Doc.25-3, at 3.)

At the same time, Arconic began promoting both the Engagement Survey and "Pride Month" on a large electronic sign outside the Davenport facility where Snyder worked. Snyder and other employees drove by the sign to enter the employee parking lot. The sign first displayed the message, "Happy Pride Month!" next to a color image of the rainbow, immediately followed by a second message stating, "Engagement Survey is Now Open." Arconic also promoted "Pride Month" with the use of the rainbow on its newsletter for the month of June that year. (App.333, R.Doc.24-1, at 4.¶10).

During his twelve-hour June 2-3, 2021, night shift, Snyder undertook to respond to what he thought was the anonymous Arconic survey of its employees launched on June 2, 2021. He clicked on a link, which he believed was in the email from CEO Tim Myers about an anonymous survey, and said he was directed to what he believed was a "survey about Gay Pride month" where he could "leave a comment." He believed it was about Pride Month because "it corresponded with the

sign coming into the company supporting that," and that sign also promoted the new survey; and "you click on the [rainbow] symbol," so "*it's all in close relationship*." (App.334, R.Doc.24-1, at 5.¶11). Snyder typed a comment in a box that said: "Add a comment." The URL at the top of the page was identical to the Sharepoint.com link in the Tim Myers Arconnect article on the Engagement Survey. (App.334-35, R.Doc.24-1, at 5-6.¶12; App.210, R.Doc.23-3, at 47; App.396, R.Doc.25-3, at 3.) The comment, which was actually posted on the Arconic intranet, rather than part of an anonymous survey as Snyder intended, stated, "Its [sic] a [sic] abomination to God. Rainbow is not meant to be displayed as a sign for sexual gender."[4] (App.212, R.Doc.23-3, at 49; App.336, R.Doc.24-1, at 7.¶14.)

[4] Arconic denied "Plaintiff had access to a link from an email. Plaintiff provided no email or link indicating a survey asked for his input on Gay Pride Month. Instead, Plaintiff posted to the Arconic intranet, Arconnect, for all employees to see his comments." (App.334,R.Doc.24-1 at 5.¶11; see also *Id.* at 5.¶14.) But Snyder has presented the CEO's identical article on the website that *contained a link* nearly identical to the URL above Snyder's comment.

Further, the survey itself actually *did* ask employees for a related opinion—i.e., whether they consider themselves a member or "identify as an ally" of the LGBTQ community. (App.398, R.Doc.25-3, at 5-6;

In a series of pre- and post-termination meetings with Arconic management and human-resources staff, Snyder stated repeatedly that he believed his expression had been in response to the anonymous survey and would be seen only by the sender of that survey. (App.337, R.Doc.24-1 at 8.¶18.)

Indeed, Gerald McNamara, Arconic's Senior Labor Relations Specialist, later admitted Snyder "might just be mistaken" (rather than lying) that he clicked a link in *an email*. (App.231, R.Doc.23-3, at 68.) And Arconic's HR representative admitted she still is not sure if Snyder was "making stuff up" or simply "mistaken" about whether he thought he was answering the survey.[5] (App.252, R.Doc.23-3, at 89.)

App.423.)

[5] Arconic inaccurately attempts to deny this testimony. (App.335; R.Doc.24-1, at 6.¶13.) But to sustain summary judgment for Arconic, this Court must view the facts in the light most favorable to Snyder. *Shanner v. United States*, 998 F.3d 822, 824 (8th Cir. 2021). Further, "unsupported self-serving allegations" are not evidence. *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531 (8th Cir. 2008).

Snyder's Comment is Quickly Removed

An Arconic manager, Paul Kopatich, saw Snyder's comment on the Arconic Intranet "very early that morning." Kopatich informed Jorge Rodriguez, Arconic's Labor Relations Director, about the comment, who in turn informed his manager at the time, Tracey Hustad. Rodriguez contacted Arconic's corporate offices to get the comment quickly removed. (App.168; R.Doc.23-3, at 5.) It was removed within minutes after it was called to Rodriguez's attention, sometime between 7:00 and 8:00 a.m. on June 3. (App.307; R.Doc.23-3, at 144.)

It is unclear whether anyone saw the post—in the dead of night—before it was flagged by Kopatich. The article itself (not necessarily Snyder's comment) had 240 views. (App.382; R.Doc. 25-1, at 4.¶8.) Arconic claimed that only the few aforementioned managers and members of the "team" that investigated the post saw the comment and were offended by it. (App.121, R.Doc.22-3, at 76; App.168, R.Doc.23-3, at 5; App.338-39, R.Doc.24-1, at 9-10.¶¶22-23.)

None of the Arconic representatives who investigated Snyder's comment had evidence that Snyder's comment negatively impacted the functioning of the company. (App.339, R.Doc.24-1, at 10-11.¶24.)

Rather, the investigators frequently reiterated in their depositions that they simply deemed Snyder's single religious comment "offensive." (App.345, R.Doc.24-1, at 16.¶43.)

Arconic Investigates Snyder's Comment and Discharges Him

The team investigating Snyder's comment included David Collier, Lead Area manager; Diana Foust, Human Resources official; and Rodriguez. It recommended as a "team" to suspend and then terminate Snyder's employment. Rodriguez was the final decisionmaker. (App.107, R.Doc.23-3, at 109-112; App.339-40, 346-47, R.Doc.24-1, at 10-11.¶¶23-25, and 17-18.¶¶46-49.)

Arconic deemed Snyder's comment a violation of its "Diversity Policy," which prohibits employee "conduct that denigrates or shows hostility or aversion towards someone because of" a protected characteristic. (App.386, R.Doc.25-1 at 8.¶¶17-22.) Arconic has "zero tolerance" for any violations. (App.127, R.Doc.22-3 at 82.)

Arconic says it considered that Snyder had been previously disciplined for two alleged violations of its Diversity Policy. (App.387, R.Doc.25-1, at 9.¶24.) The parties dispute (immaterially) the facts of those violations (*see* App.15, R.Doc.3 at 10.¶42.n.3), but Arconic asserts one

involved allegedly "yell[ing] at a nurse about getting his temperature checked on the COVID-19 screening station on his way to work," and another was for allegedly "yell[ing] and scream[ing] at his supervisor." (App.219 ,R.Doc.23-3, at 56.) Neither involved comments even arguably denigrating others based on a protected characteristic.

Arconic Did Not Consider Any Possible Accommodations, Despite Knowing Snyder's Comment Was Religiously Motivated

McNamara, who advised Arconic that Snyder's comment justified firing him, agreed that, on its face, Snyder's post had a religious component. (App.232, R.Doc.23-3, at 69; App.347, R.Doc.24-1, at 18.¶47.)

Snyder also communicated to investigators during two *pre*-termination meetings that his message was religiously motivated. He told them Arconic "was not considering his feelings and religious beliefs in using the rainbow to promote 'Gay Pride Month.'" He added: "If any one of you in this meeting believes in God, you know that my statement is true." (App.385, R.Doc.25-1 at 7.¶16.) He also mentioned his "religious right[s]"; that "God put [the rainbow] in the sky"; and that Arconic's use of the rainbow "offends me. I have my beliefs," according

to Foust's meeting notes. (App.350, R.Doc.24-2, at 2-3; App.261-62, R.Doc.23-3, at 98-99.)

Collier acknowledged that prior to the end of Arconic's June 8, 2021, meeting with Snyder, he understood that Snyder's comment was religious in nature. (App.340, R.Doc.24-1, at 11.¶26.) Foust did, also. (App.258-59, R.Doc.23-3 at 98-99.) On that day, Snyder was given a three-day suspension pending discharge and, on June 12, 2021, he was terminated. (App.229-30, R.Doc.23-3, at 66-67; App.213-14, R.Doc.23-3, at 50-51.)

In an adjudication of his grievance following discharge (i.e., the "Level 3 Grievance Hearing"), McNamara's letter disposing of the grievance acknowledged Snyder re-iterated his comment was based on his "religious beliefs," and "It's in the [B]ible." (App.218, R.Doc.23-3, at 55.)

Snyder was questioned at his deposition about his religious beliefs; he repeatedly explained that his comment was based on his deeply held beliefs based on the Bible and was directed against misuse of the rainbow symbol, not against LGBTQ individuals themselves. (App.67-68, R.Doc.22-3, at 22-23; App.76, R.Doc.22-3, at 31.)

Arconic made no attempt to engage with Snyder about reasonably accommodating him. It did not believe it had any obligation to do so. It asserted, "Arconic believes 'that an accommodation to state offensive comments to others would not be reasonable'"—a strawman that Snyder never requested (since he said he never intended his co-workers to see it in the first place), without considering any other options. (App.343, R.Doc.24-1, at 14.¶¶34-35.) Snyder did not suggest a "solution" such as a last-chance agreement because he was not given the chance to do so. (App.206, R.Doc.23-3, at 43.)

Yet, Arconic admits Snyder never insisted that his post be restored. (App.342, R.Doc.24-1, at 13.¶33.)

Moreover, prior to his firing, Snyder emailed his union representative and said that while he "would never take back what [he] said" (consistent with his religious convictions), "I will never take place [sic] in one of their surveys or give my opinion to their solicitations" again. (App.223, R.Doc.23-3, at 60; App.177, R.Doc.23-3 at 16.¶9.) Arconic never acknowledged this email, even though Snyder testified he had received his prior religious accommodation to preach at church by going "[t]hrough the union." (App.70, R.Doc.22-3, at 25.)

Rodriguez, as Arconic's 30(b)(6) witness, further testified, "We don't accommodate [] beliefs that are not related to our jobs." (App.343, R.Doc.24-1, at 14.¶36). Yet Rodriguez admitted Arconic has accommodated LGBTQ employees' beliefs by "giving them space on the marquee," and by giving them an "Employee Resource Group" (called Spectrum). (App.315, R.Doc.23-3, at 152.)

Rodriguez also admitted that "[i]f Mr. Snyder wanted to form a Christian ERG . . . we would take a look at that as long as it abides by . . . all relevant policies, but he did not step forward and ask for that." (Id.) Yet Rodriguez acknowledged he had previously suggested starting an employee resource group to another Arconic employee. (App.316, R.Doc.23-3, at 153; App.345, R.Doc.24-1, at 16.¶40.)

Rodriguez admitted Arconic did not consider any accommodation because it considered Snyder's comment to be "one of hatred"—allegedly unlike something "Mother Teresa" would ever say—and therefore "not religious" from *Arconic's perspective*, as an aluminum manufacturer. (App.312-13, R.Doc.23-3, at 149-50.)

Procedural History

As noted, Snyder filed claims for religious discrimination and retaliation under Title VII and ICRA. (App.15-20, R.Doc.3, at 10-15.¶¶46-72.) The parties filed cross-motions for summary judgment (Snyder limited his motion to the discrimination claims). (App.22, R.Doc.22; App.128-130, R.Doc.23.) After a hearing (App.454-494, R.Doc.36), the District Court granted Arconic's motion and denied Snyder's motion, for the incorrect reasons discussed below. (Add.1-29, App.431-450, R.Doc.30.)

SUMMARY OF ARGUMENT

1. Because Snyder's religious comment was "a factor" in Arconic's "decision" to fire him, he has established his prima facie case of religious discrimination (i.e., failure to accommodate) under Title VII and ICRA.

The Supreme Court clarified in *Abercrombie* that, as a prima facie matter, "[a]n employer cannot make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." 575 U.S. at 773; 42 U.S.C. §2000e-2(a)(1). Here, Arconic admits it fired Snyder in part because of his overtly religious statement on the Arconic "intranet"

objecting to its use of the rainbow to promote "Pride Month." It also admits he told the company before his termination he made the statement because of his religious beliefs. Thus Arconic "knew . . . that the [comment] was [made] for religious reasons," and fired him because of it. *Id.* at 774, n.3. That establishes Snyder's prima facie case.

The District Court relied on several wrong premises that require this Court's correction. It opined that Snyder failed to show his religion *compelled* him to post his single comment, or that Arconic mandated him to engage in conduct against his faith. But Title VII expressly defines "religion" to include "*all aspects* of" religious observance and belief, 42 U.S.C. §2000e(j), which numerous courts (including this one) and the Equal Employment Opportunity Commission ("EEOC") recognize includes even religious expression *not* mandated by one's religion. *See Altman v. Minnesota Dep't of Corr.*, 251 F.3d 1199, 1203-04 (8th Cir. 2001); EEOC, Section 12: Religious Discrimination, 12-1(A)(1) and nn.18 & 52. The First Amendment also bars courts from probing into such matters. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). And Title VII provides "favored treatment" to religious expression against

"otherwise-neutral policies" that effectively *forbid* religious conduct. *Abercrombie*, 575 U.S. at 775.

The District Court further opined that Snyder was merely seeking "one free pass" outside the scope of Title VII. But Title VII is a "starkly broad" rule that courts must apply by its terms. *Bostock*, 140 S. Ct. at 1753. And it would be absurd if Title VII applied only to religious practices that violate company policy every day, *see Abercrombie*, but not to a religious expression that violates an employer rule only one time.

Additionally, the District Court wrongly held that Snyder failed to provide Arconic with adequate notice that his comment was religiously motivated. It said he needed to notify Arconic before he posted his message, and that his explanations in pre-termination meetings were "too late." But *Abercrombie* held that an individual's *act of religious exercise itself* can provide adequate notice if the employer knows or at least suspects that the expression is religiously motivated. 575 U.S. at 773-775. The key is whether the employer has notice before the "employment decision." *Id.* at 774. Here Snyder's statement was

religious on its face, and Arconic admits he explained his religious motivation in pre-termination meetings, confirming notice.

Finally, Arconic does not dispute that it fired Snyder in essential part because of the religious comment, confirming but-for causation. Thus, Snyder has established his prima facie case of religious discrimination.

2. Arconic has not demonstrated that reasonably accommodating Snyder would have been an "undue hardship," and at minimum a reasonable jury could find as much. Arconic admits it made no attempt to reasonably accommodate Snyder, despite his explanation recounted above. Arconic's failure to engage Snyder in an interactive process is prima facie evidence of bad faith, *Fjellestad v. Pizza Hut of American, Inc.*, 188 F.3d 944, 952 (8th Cir. 1999), which it has failed to adequately rebut at this stage.

Indeed, Arconic has not shown that reasonably accommodating Snyder would have been a "substantial burden" "in the overall context of its business" under *Groff*. 600 U.S. at 468. Arconic admitted it had no evidence that Snyder's post negatively impacted the workplace. Its investigators merely claimed the post was "offensive," but mere

"offensiveness," without more, is not itself undue hardship. *Brown*, 61 F.3d at 659. Similarly, a single "offensive" religious comment does not give rise to hostile work environment liability under well-settled law. *Garagher v. City of Boca Raton*, 524 U.S. 775, 787 (1988). And under *Groff*, the "practical impact" of Snyder's statement "in light of the nature" and "size" of Arconic (a large aluminum manufacturer) was trifling at best. *Groff*, 600 U.S. 470-71.

Additionally, Arconic's corporate representative admitted Arconic's own hostility for Snyder's comment motivated its refusal to accommodate. But *Groff* clarified that mere "dislike" of religious expression is not an undue hardship. 600 U.S. at 472.

Further, this Court has held that non-disruptive "spontaneous" and "isolated" religious expression is not an undue hardship. *Brown*, 61 F.3d at 656. Snyder's comment was nothing more than that, given the context, including the unique circumstances in which Arconic was promoting both "Pride Month" and its first-ever "Engagement Survey" simultaneously.

Finally, Arconic admits it refused to consider "other options" short of termination. *Groff*, 600 U.S. at 473. Arconic could have allowed

Snyder a second chance given his explanation that he did not intend for the post to be public. It is not for employers or courts "to say the line [Snyder] drew" regarding what he could religiously accept "was an unreasonable one." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981). Arconic also admits it could have considered allowing a "Christian [Employee Resource Group]" for Snyder "but he did not step forward and ask for that." But the law requires *employers* to step forward and discuss possible "other options." *Groff*, 600 U.S. at 473. Arconic has thus failed to show undue hardship.

3. As to retaliation, a reasonable jury could find that Snyder's online comment (for which he was indisputably fired) reasonably opposed unlawful discrimination. 42 U.S.C. §2000e-3(a). An employee need only reasonably—not correctly—believe the complained-of conduct is illegal. *Gibson v. Concrete Equip. Co., Inc.*, 960 F.3d 1057, 1064 (8th Cir. 2020). A jury could find Snyder's belief reasonable given Title VII's "favored treatment" for religious expression, *Abercrombie*, 575 U.S. at 775, and its prohibition on intimidatory hostile work environments, *Singletary v. Missouri Dep't of Corr.*, 423 F.3d 886, 892 (8th Cir. 2005).

Second, a reasonable jury could find that Snyder was also fired because of statements during his pre- and post-termination meetings expressly opposing Arconic's religious discrimination against him. *Bostock*, 140 S. Ct. at 1739. McNamara's Level 3 Grievance Hearing Letter admitted Snyder's comments "at [that] hearing" allegedly "demean[ing]" LGBTQ individuals contributed to its decision to deny the grievance. Arconic's admitted hostility for Snyder's beliefs, which he further expressed in the meetings, is more evidence for the jury. *Ollis v. HearthStone Homes, Inc.*, 495 F.3d 570 (8th Cir. 2007). The District Court's ruling should be reversed.

ARGUMENT

I. Standard of Review

This Court "review[s] de novo the district court's resolution of cross-motions for summary judgment[,] viewing the evidence in the light most favorable to the nonmoving party and giving the nonmoving party the benefit of all reasonable inferences." *Feds. Ins. Co. v. Great Am. Ins. Co.*, 893 F.3d 1098, 1102 (8th Cir. 2018) (internal quotes omitted).

"Summary judgment is required if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." *Id.* (internal quotations omitted). "An issue of material fact is genuine if it has a real basis in the record," "or when a reasonable jury could return a verdict for the nonmoving party on the question." *Scott v. Milosevic*, 372 F. Supp. 758, 761 (N.D. Iowa 2019) (internal quotations omitted). On review of a district court's disposition of cross motions for summary judgment, "summary judgment is [] proper if either party is entitled to judgment as a matter of law." *Feds. Ins. Co.*, 893 F.3d at 1102.

Snyder is entitled to judgment as a matter of law on his discrimination claims. At minimum, Arconic's summary judgment motion should be denied because a reasonable jury could return a verdict in Snyder's favor on both his discrimination and retaliation claims.[6]

II. Arconic Fired Snyder "Because Of" His Religion.

Title VII prohibits firing an employee "because of" his or her "religion." 42 U.S.C. §2000e-2(a)(1). A claim for discrimination "because of" one's religion "is *synonymous* with refus[al] to accommodate the

[6] Notably, Iowa courts "apply the same framework to analyze claims brought under ICRA." *Garang v. Smithfield Farmland Corp.*, 439 F. Supp. 3d 1073, 1083 (N.D. Iowa 2020).

religious practice." *Abercrombie*, 575 U.S. at 772, n.2 (original emphasis).

Title VII also expressly defines "religion" to mean "*all aspects* of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to any employee's [] religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

This Court, following other Circuits, has construed these provisions to first require a plaintiff to "establish a prima facie case of religious discrimination" by showing: "(1) he had a bona fide religious belief that conflicted with an employment requirement; (2) [he] informed defendants of his belief; and (3) defendants [fired] [him] *because* he did not comply with the requirement." *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (citing *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989)). Then, "[o]nce a plaintiff establishes a prima facie case, the burden shifts to the employer to show that accommodation would result in undue hardship to the employer." *Seaworth*, 203 F.3d at 1057.

Snyder has plainly shown prima facie discrimination as a matter of law under these standards.

The District Court deemed Snyder's argument that he was manifestly fired "because of" his religion too "simple[]," even though Arconic fired him based on a statement it admittedly *knew* was religiously motivated. (Add.7, App.437, R.Doc.30, at 7.) Instead, the District Court pointed to the allegedly more complex prima facie framework as requiring a different outcome. But the Supreme Court recently confirmed that the prima facie test *boils down to* Title VII's "straightforward" plain meaning. *Abercrombie*, 575 U.S. at 773. Under that test, Snyder's religion was indisputably "a factor" in Arconic's "employment decision[]." *Id.*

A. The traditional prima facie framework must be applied based on Title VII's "straightforward" rule.

As the Supreme Court recently explained regarding Title VII: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. The District Court, however, applied the

three-part prima facie framework in isolation from Title VII's plain text and controlling decisions in *Abercrombie* and *Bostock*. That error was fatal.

In *Abercrombie*, the Supreme Court reversed the Tenth Circuit's holding that the plaintiff (Samantha Elauf) failed to provide her prospective employer with adequate notice that she wore a headscarf (in violation of its "Look Policy") for religious reasons. 575 U.S. at 774; *see E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122 (10th Cir. 2013) ("[T]he EEOC cannot establish the second element of its prima facie case."). The Supreme Court never recited the tripartite prima facie framework. Rather, it explained that the ultimate question was whether "she was not hired [] 'because of' her religious practice." *Abercrombie*, 575 U.S. at 772 (quoting 42 U.S.C .§ 2000e-2(a)(1)).

The Supreme Court clarified that an employer discriminates "because of" religion "if avoiding" a reasonable religious "accommodation is [] his *motive*" for hiring or firing the person, "even if he has *no more than an unsubstantiated suspicion* that accommodation would be needed." *Id.* at 773 (emphasis in original). And this motive

exists where the employer knows or suspects the offending *conduct* occurs "*for religious reasons*." *Id.* at 774, n.3.

The Court summarized as follows: "[T]he rule for disparate-treatment claims based on failure to accommodate a religious practice is *straightforward*: An employer may not make an applicant's *religious practice*, confirmed or otherwise, *a factor* in *employment decisions*." *Id.* The Supreme Court intentionally "omit[ted] reference to the § 2000e(j) 'undue hardship' defense," *id.* at 772 n.2—confirming that the "straightforward" rule is what a plaintiff must show as a prima facie matter.

As the Supreme Court recently put it elsewhere: Title VII ensures that its list of protected characteristics, including religion, cannot even be "*relevant* to the *selection* . . . of employees" or "*play[] a* . . . *role*" in hiring or firing decisions (as a prima facie matter). *Bostock*, 140 S. Ct. at 1731, 1737 (emphasis added); *see also id.* at 1739 (Title VII's "'because of' test incorporates the *simple* . . . standard of but-for causation") (internal quotes omitted); *and* at 1741 ("Title VII's message is *simple but momentous*") (internal quotes omitted). Put simply, "[i]f the employer intentionally *relies* in part on an individual employee's

[protected characteristic] when *deciding to discharge* the employee . . . a statutory violation has occurred." *Id.* at 1731.

The lower courts' three-part prima facie framework simply enforces this "straightforward" test. As then-Solicitor General Donald Verrilli explained in *Abercrombie*, "the burden-shifting method that courts of appeals have employed in assessing religious accommodation claims at the summary judgment stage" is "modeled on the framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)."[7] In turn, the *McDonnell Douglas* framework shifts the burden of proof to determine whether an employee "was denied employment . . . *because of*" a prohibited factor. *McDonnell Douglas*, 511 U.S. at 801-02.[8]

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[7] Petition for Writ of Certiorari, *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (2014), at 5-6, https://www.justice.gov/sites/default/files/osg/briefs/2014/01/01/2014-0086.pet.aa.pdf.

[8] Notably, the original *McDonnell Douglas* test applies only where a plaintiff lacks *direct* evidence of discrimination and must establish an "inference of unlawful discrimination"; otherwise, "[a] plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury." *Griffith v. City of Des Moines*, 387 F.3d 733, 736-37 (8th Cir. 2004). Here, Snyder (like many failure-to-accommodate plaintiffs) has such direct evidence: Arconic admits it fired him in part *because* of his religious statement. (cont'd)

Snyder's burden to show prima facie discrimination must be understood in light of this "simple" "because of" test: the three prima facie criteria work together to ensure a plaintiff's religion was "a factor" in the defendant's "employment decision[]," *Abercrombie*, 575 U.S. at 773, before the employer must show undue hardship in accommodating. The District Court's express refusal to view Snyder's prima facie burden through this lens was erroneous.

B. The District Court's "one free pass" concept clashes with Title VII's text and logic.

Ignoring Title VII's "straightforward" test, the District Court opined that Title VII is not meant to apply to alleged requests for "one free pass," i.e., *single* instances of religious expression that violate company policy. (Add.8, App.438, R.Doc.30, at 8.) But that rule violates Title VII's plain text and reduces to the absurd.

First, Title VII's "because of" test "is written in starkly broad terms" and "has repeatedly produced unexpected applications." *Bostock*,

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Still, Title VII's unique requirements for "religion" claims requires a prima facie/undue-hardship burden-shifting test "*modeled on*," but not identical to, the *McDonnell Douglas* test. *Supra* n.2; 42 U.S.C. §2000e(j); *Bhuiyan v. PNC Bank, Nat'l Assoc.*, No. 19-14265, 2023 WL 2733510, at *3 (11th Cir. 2023) (unpublished) (failure-to-accommodate burden-shifting is "*akin to* that articulated in *McDonnell Douglas*")

140 U.S. at 1753. And "unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" *Bostock*, 140 S. Ct. at 1749 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal texts 101 (2012)). The District Court's contrary rule effectively applies "a canon of donut holes," i.e., construing "Congress's failure to speak directly to a specific case that falls within a more general statutory rule [to] create[] a tacit exception"; rather, "when Congress chooses not to include any exceptions to a broad rule, courts *apply the broad rule*." *Id.* at 1747.

The District Court failed to do so here. Snyder's single religious expression was plainly "a factor" in Arconic's firing decision, period.

Second, the District Court's "one free pass" rule produces absurd results: While employees who seek to violate a neutral company policy *every day* for religious reasons can establish a prima facie case, *see Abercrombie*, 575 U.S. at 770, an employee whose religion violates company policy only *once* has no case. Obviously, that cannot be—and is not—the law. *See, e.g.*, *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (plaintiff established prima facie case when fired for seeking

two hours off work to attend wife's one-time Jewish conversion ceremony). The District Court's sui generis "one free pass" analysis flouts Title VII.

For similar reasons, the District Court erred in relying on this Court's longstanding principle that courts do not "sit as a super-personnel department that reexamines an entity's business decisions." (Add.18, App.448, R.Doc.30, at 18); *see Wilking v. Cnty. of Ramsey*, 153 F.3d 869, 873 (1998). That principle hardly applies where, as here, an employer "honest[ly] expla[i]n[s]" it terminated an employee for religiously motivated expression. *Wilking*, 153 F.3d at 873. There is nothing to reexamine: Snyder's prima facie case is virtually stipulated.

C. Snyder did not need to show his theology *compelled* him to make the statement.

The District Court opined that because Snyder failed to show "his religion *requires* him to send messages objecting to the use of the rainbow imagery," it "follows that there is no 'conflict' in the legally relevant sense between his religious practices and Arconic's anti-harassment policy." (Add.10, App.440, R.Doc.30, at 10.) But that reasoning ignored Title VII's definition of religion and the First Amendment's bar on probing into one's theology.

1. Title VII broadly defines religion.

As noted, Title VII expressly defines "religion" to include "*all aspects* of religious observance and practice as well as belief." §2000e(j). The EEOC's Guidance on Religious Discrimination accordingly recognizes that "religion" is not limited to "practices that are *mandated* or prohibited by a tenet of the individual's faith." EEOC, Section 12: Religious Discrimination, 12-1(A)(1) and nn.18 & 52.[9]

While the District Court stated that most reported Title VII cases involve employees whose "religion compels them to do [something]" (Add.7, App.437, R.Doc.30, at 7), courts have recognized that "the very words of the statute . . . leave little room for such a limited interpretation." *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (finding prima facie religious discrimination even where "Saturday work per se is not prohibited by plaintiff's religion"); *Heller*, 8 F.3d at 1438 (9th Cir. 1993) ("Title VII protects more than the observances of Sabbath or practices specifically mandated by an employee's religion."); *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 342

[9] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref18.

(6th Cir. 1978) (Title VII "is not limited to claims of discrimination based on *requirements* of Sabbath work"); *Cooper v. General Dynamics*, 533 F.2d 163, 168 (5th Cir. 1976) ("The language chosen is broad . . . and entirely extravagant to a mere concern for Sabbatarianism or any other particular doctrine or observance.").

The District Court relied to the contrary on this Court's decision in *Altman*, which rejected plaintiffs' *First Amendment* claims because they did "not suggest that their religion requires them to read the Bible while working" (and thus failed to show a requisite *substantial burden*). 251 F.3d at 1204. (Add.10, App.440, R.Doc.30, at 10). But *Altman* specifically held those same plaintiffs had triable *Title VII claims* given evidence that their Bible reading (i.e., "their religion") caused their discipline. *Id.* at 1203. Thus, *Altman* squarely supports Snyder, and affirming the District Court's contrary conclusion would create a disfavored intra- and extra-Circuit split.[10]

[10] The District Court's reliance on *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (9th Cir. 2004) was also erroneous (Add.9, App.439, R.Doc.30, at 9), because *Peterson* ultimately assumed the existence of a prima facie case, rendering its (erroneous) intimation that a religious expression must be theologically compelled pure dicta. *Id.*

As the Sixth Circuit once put it, "[t]he question is not one of compulsion, but of motivation." *Jones v. First Kentucky Nat'l Corp.*, No. 84-5067, 1986 WL 398289, at *4 (6th Cir. July 17, 1986) (unpublished) (employee demonstrated bona fide religious belief when fired for refusing to resign from leadership in religiously-motivated *pro-homosexual advocacy group*). Indeed, in the First Amendment context the Supreme Court has defined a "bona fide" religious belief to mean one that is "sincerely held" and "religious" "in [one's] *own scheme of things*." *United States v. Seeger*, 380 U.S. 163, 185 (1965). The EEOC has expressly adopted that standard in its regulatory interpretation of Title VII. *See* 29 C.F.R. § 1605.1. The District Court simply ignored this broad, plain-text definition.

2. First Amendment strictures on defining "religion."

Moreover, the First Amendment *prohibits* courts from delving into an individual's theology. "Repeatedly and in many different contexts, [the Supreme Court] ha[s] warned that courts must not presume to determine the place of a particular religious belief in a religion." *Emp't Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 887 (1990); *see also Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to

question the centrality of particular beliefs or practices to a faith."). As the Seventh Circuit has stated in the Title VII context, "a judicial determination" that "a particular practice is or is not required by the tenets of the religion" is "irreconcilable with the warning issued by the Supreme Court in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953), '(I)t is no business of courts to say . . . what is a religious practice or activity.'" *Redmond*, 574 F.2d at 900; *accord E.E.O.C. v. GEO Grp., Inc.*, 616 F.3d 265, 271 (3d Cir. 2010) ("We are unwilling to delve into any matters of theology.").

Thus, courts recognize that "all forms and aspects of religion, however eccentric" are protected (prima facie), *Cooper*, 533 F.2d at 168, and "the burden to allege a conflict with religious beliefs is fairly minimal," *Bolden-Hardge v. Off. of California State Controller*, 63 F.4th 1215, 1223 (9th Cir. 2023). Snyder has met that burden.

3. Snyder's expression was manifestly "religious."

As the District Court noted, "Arconic concedes that Snyder's message on the intranet page was religiously motivated." (Add.4, App.434, R.Doc.30, at 4.) Indeed, Arconic never disputed Snyder's religious sincerity, and there is no reasonable dispute that Snyder's

statement was other than "religious" in his "own scheme of things." *Seeger*, 380 U.S. at 185. Snyder's comment that using the rainbow to promote "Pride Month" is an "abomination *to God*" is religious on its face. *See Welsh v. United States*, 398 U.S. 333, 339-40 (1970) ("religious" means "moral, ethical, or religious beliefs about *what is right and wrong* . . . held with the strength of traditional religious convictions," including "the idea of…a God…who communicates … what is wrong"); *accord* 29 C.F.R. § 1605.1 (interpreting Title VII and incorporating *Welsh*).

Further, notes by Arconic's HR representative during Snyder's pre-termination meetings confirm that he insisted his comment flowed from his religious beliefs: specifically, that "the rainbow" was "put in the sky" by "God"; that the company was "degrad[ing] [his] beliefs"; and that he "ha[s] to stand before God for [his] beliefs and be accountable." (App.350, R.Doc.24-2, at 2-3; App.108, R.Doc.22-3, at 63.) And Arconic's letter disposing of Snyder's "Level 3 Grievance" petition noted that Snyder said his statement was based on his "religious beliefs in the [B]ible." (App.219, R.Doc.22-3, at 56.)

Snyder confirmed as much in his deposition: "The Bible's pretty clear on abomination and what it is"; "God remembered Noah when the

rainbow was put in the sky. God remembers us . . . when we see that rainbow today, and these are exact [sic] from the Bible"; and the Bible "does state about gay relationships" being wrong. (App.202, R.Doc.23-3, at 39-40.) *Accord, e.g., Callahan v. Woods*, 658 F.2d 679, 686 (9th Cir. 1981) (bona fide religious belief derived from Book of Revelation, which "[Plaintiff's] church, and indeed most churches, consider holy").

Thus, Snyder's expression was indisputably religious.

D. Snyder's religious expression conflicted with an employment requirement.

Echoing Arconic's primary argument below (App.29-31, R.Doc.22-1 at 6-8; App.320-23, R.Doc.24, at 2-5), the District Court also held that Snyder's statement did not conflict with an "employment requirement." (Add.7-12, App.437-442, Roc.30, at 7-12.) That conclusion was likewise erroneous.

Arconic admits it fired Snyder *because* his "post . . . violated its policies" (App.27, R.Doc. 22-1, at 4), and that Arconic "does not tolerate" expression that violates its Diversity Policy. (Id.) Snyder's Notices of Suspension and Discharge expressly claimed his statement "violat[ed] Arconic's Diversity Policy." (App.23-3, R.Doc.23-3 at 50-51.) If that is not a "conflict" with an "employment requirement," nothing would be.

But the District Court instead found that "Arconic did not require Snyder to do anything," such as "compel[ling] him" to engage in overt action that violates his religion" (Add.7, App.437, R.Doc.30, at 7), but rather "Arconic simply *forbade* Snyder (and all other employees) from making statements expressing hostility towards others." (Id. (emphasis in original).) Title VII's protections are not nearly so limited.

In *Abercrombie*, the Supreme Court confirmed that Title VII applies even when a company *forbids* an employee from engaging in religious expression (e.g., wearing a headscarf) that violates a *generally applicable* policy (e.g., Abercrombie's "Look Policy"). *Abercrombie*, 575 U.S. at 770, 775. That's because "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices"; "[r]ather, it gives them *favored* treatment," such that "it is no response that the . . . [discharge] was due to an otherwise-neutral policy." *Id.* at 775.

The District Court opined that "Snyder is taking [*Abercrombie*'s] language out of context," because "favored treatment" allegedly applies only "when there is a conflict between religious practices and employment requirements." (Add.8, App.438, R.Doc.30, at 8.) But that

reasoning begs the question. *Abercrombie*'s "favored treatment" rule *illuminates* when a conflict exists in the first place—i.e., when an employee's religious expression violates a *generally applicable* company policy that *forbids* religiously-motivated conduct.

Indeed, the Supreme Court already recognized that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). So, while Title VII requires "favored treatment" for religious employees in a formal sense, "[i]t does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer" (as a prima facie matter). *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 454 (7th Cir. 1981).

Courts have thus had little trouble finding prima facie religious discrimination where an employer applied a *neutral* rule to *forbid* religious expression—especially after *Abercrombie*. For instance, in *Carter v. Transp. Workers Union of Am. Loc. 556*, 353 F. Supp. 3d 556, 563 (N.D. Tex. 2019), the Court denied the employer's motion to dismiss plaintiff's Title VII claim where she was fired for "violat[ing] the

Southwest Airlines Mission Statement and Company policies and rules" by sending religiously-motivated Facebook messages to her union president complaining about the union's participation in the Women's March in Washington, D.C. *Id.* at 563-565. The Court found she had sufficiently pled that "her religious beliefs and practice were a *factor* in Southwest's *decision* to fire her." *Id.* at 578. Recently, renowned religion law scholar Eugune Volokh observed that *Carter* reflects "that religiously motivated speech . . . is treated more favorably" and "is *well within the mainstream of currently existing Title VII law*."[11]

Volokh's observation is well-grounded. *See, e.g.*, *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (prima facie "failure-to-accommodate claim" where plaintiff reprimanded for communicating with clients about religion);[12] *Anderson v. U.S.F. Logistics (IMS), Inc.*,

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[11] Eugune Volokh, The Volokh Conspiracy, "May a Judge Sanction Lawyers…," Sept. 5, 2023, https://reason.com/volokh/2023/09/05/may-a-judge-sanction-lawyers-by-requiring-them-to-get-remedial-training-from-a-particular-ideological-organization/ (emphasis added) (citing Eugene Volokh, "Should the Law Limit Private-Employer-Imposed Speech Restrictions, 2 Journal of Free Speech Law 269, 275-76 (2022)), https://www.journaloffreespeechlaw.org/volokh2.pdf.

[12] *Abercrombie* clarified that a "failure-to-accommodate claim" (which Snyder brings here) *is a type of* disparate treatment claim. *Abercrombie*, 575 U.S. at 772 n.2, 774. Thus, the District Court further erred in faulting Snyder for "not present[ing] evidence that other employees

274 F.3d 470, 475-76 (7th Cir. 2001) (valid Title VII claim where employer forbade plaintiff from stating "Have a Blessed Day" in correspondence with a customer); *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337, 1340 (8th Cir. 1995) (prima facie case where employer forbade plaintiff from publicly displaying religiously motivated pro-life pin depicting fetus); *Brown*, 61 F.3d 650 (prima facie claim where employee fired for religious speech at work); *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1011-12 (D. Ariz. 2006) (prima facie case where employer forbade wearing religiously motivated head scarf under "Dress Smart Policy").

In finding otherwise, the District Court pointed only to pre-*Abercrombie* cases holding that application of general policies is not discriminatory. (Add.11, App.441, R.Doc.30, at 11; *e.g.*, *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977).) But that is no longer arguable after *Abercrombie*.

The District Court also distinguished this Court's en banc decision in *Brown*, noted above, as having somehow "dispens[ed] with the

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were disciplined less harshly (or not at all) for inadvertently posting messages on the company intranet in violation of company policy." (Add.16, App.446, R.Doc.30, at 16.)

elements of a prima facie case" where there was allegedly post-hoc targeting of the employee's religion. (Add.12, App.442, R.Doc.30, at 12.) But in *Brown*, a government employee was formally reprimanded for on-site religious speech *almost immediately after* his co-workers complained about it, based on concerns that the County "[w]ould be perceived to be supporting a religious activity or religious organization" in violation of the generally applicable First Amendment. *Brown v. Polk Cnty., Iowa*, 832 F. Supp. 1305, 1309, n.6 (S.D. Iowa 1993). And the District Court there specifically found that "*Plaintiff established a prima facie case*" by showing that his discipline "for religious on-the-job activity . . . *played a role* in his termination." *Id.* at 1313-14. The District Court then held that reasonably accommodating Brown's religion would have been an undue hardship, and that he would have been fired anyway for other reasons. *Id.* at 1314.

Thus, *prima facie discrimination was not even at issue in the appeal in Brown*. This Court ultimately reversed on the issues of undue hardship and causation—and it correctly anticipated *Abercrombie*'s "straightforward" rule, noting the employer admitted Brown's

reprimand for religious activities "was 'a factor' in [its] decision to fire" him. *See Brown*, 61 F.3d at 657.

Accordingly, Snyder has indisputably established that his religious expression conflicted with an "employment requirement."[13]

E. Arconic had adequate notice that Snyder's statement was religious.

The District Court also held that Snyder failed to provide Arconic sufficient notice "prior to posting his message." (Add.12, App.442, R.Doc.30, at 12.) But that conclusion wrongly assumed that notice cannot be established "in the process of violating the policy," and that notice by the time of firing is "too late." (Id.) That is wrong on both counts.

1. Snyder's overtly religious post itself provided notice.

In *Abercrombie*, the Tenth Circuit had similarly ruled against Elauf on the ground that she never *told* Abercrombie that her headscarf was religiously motivated. *Abercrombie & Fitch*, 731 F.3d at 1123-24. As noted, the Supreme Court held that an employer need have only "an

[13] The District Court also wrongly opined that Snyder invoked *Abercrombie* as dispositive of his entire case, rather than as merely supporting his prima facie case. (Add.18, App.448, R.Doc.30, at 18.)

unsubstantiated suspicion that accommodation would be needed," which was the case there because the employer at least suspected Elauf *wore the scarf "for religious reasons*." *Abercrombie*, 575 U.S. at 773, 774 n.3.

The District Court here believed *Abercrombie* merely held that one "need not explicitly ask for an accommodation" *before* violating a company policy. (Add.14, App.444, R.Doc.30, at 14.) But, again, *Abercrombie* clarified that making an "employment decision[]" "because of" one's "religious practice" "is *synonymous* with refusing to accommodate the religious practice." *Abercrombie*, 575 U.S. at 772 n.2, 773. Therefore, even a suspicion that an employee's *expression itself is religiously motivated* triggers *Abercrombie*'s rule. *Id.* at 774 ("A request for accommodation, *or the employer's certainty that the practice exists*, . . . is not a necessary condition of liability." *See also id.* at 770 (noting job interviewer "believed Elauf wore her headscarf because of her faith").

This Court likewise already recognized that an employee's religious expression itself can put the employer on notice. *See Brown*, 61 F.3d at 654.

Critically important here is that *Abercrombie*'s holding did not turn on the fact Abercrombie had notice *before* Elauf (as an applicant)

violated its policy, but on her act of wearing the headscarf as giving rise to suspicion of a *religiously-motivated practice*. *Id.* at 774 n.3. That reasoning applies to both applicants and employees.

Once again, this Court already recognized a similar rule: "Because the first *reprimand* related directly to the religious activities by Mr. Brown, . . . the defendants were well aware of *the potential for conflict* between their expectations and Mr. Brown's religious activities." *Brown*, 51 F.3d at 654.

Here, Snyder's post stated explicitly that using the rainbow to promote Pride Month is "a [sic] abomination *to God*." McNamara admitted that the statement *appeared religious on its face*. (App.232, R.Doc.23-3, at 69.) And Arconic admits it already knew Snyder was a devout Christian, having previously granted him an accommodation to miss Sunday work to preach at a local church. (App.341, R.Doc.24-1, at 12.¶29) *See Heller*, 8 F.3d at 1439 (employer already "knew that Heller was Jewish"). Thus, Snyder's overtly religious statement itself provided notice.

2. Snyder *told* Arconic *before it fired him* that the statement was religious, confirming notice.

Moreover, *Abercrombie*, 575 U.S. at 773, also makes clear that the employer need only have notice before the adverse "*employment decision*"—per Title VII's plain text, §2000e-2(a)(1)—which Snyder explicitly provided here.

Arconic admits that Snyder told its decision-making representatives during *pre-termination* meetings that his statement was religiously-motivated. (App.340, R.Doc.24-1, at 11.¶26.) Thus, Arconic *knew* as much before firing him, plainly rendering his religious expression "a factor" in its decision to terminate. *Brown*, 61 F.3d at 657.

The District Court wrongly found otherwise by relying on this Court's inapposite decision in *Johnson v. Angelica Uniform Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985). (Add.12-13, App.442-43, R.Doc.30, at 12-13.) There the plaintiff, fired for excessive absenteeism, claimed her absences were due to religious obligations; but she failed to "mention her religious affiliation" even after receiving an initial warning for missing 10 work days without explanation; and she made only "vague references" to her religious requirements after receiving a written

warning for continued absences; the only other notice she provided was in a letter the plant manager received "*after* [she] was discharged." *Id.* at 672-74.

Here, on the contrary, Snyder *explicitly* informed Arconic in ***pre***-termination meetings that his statement was religiously-motivated. *See supra*. Snyder was hardly silent or "vague" about the religious nature of his statement pre-termination. *Accord Redmond*, 574 F.2d at 902 ("Whatever confusion or misunderstanding that may have existed" as to employee's "inability to work on Saturday… were clearly eliminated during [pre-termination] meeting" when he explained "I cannot work Saturdays . . . I have a religious obligation.").

The District Court also heavily (and erroneously) relied on *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). There the plaintiff was fired for sending expressly religious letters to two co-workers. *Id.* By a 2-1 vote, the Fourth Circuit held she failed to provide adequate notice before sending the letters, and that "giving notice . . . at the same time as an employee violates employment requirements is insufficient." *Id.* at 1020.

That holding was wrong and is now outdated. As Judge Niemeyer explained in his *Chalmers* dissent, the notice requirement "is merely a recognition that Title VII's 'because of' requirement cannot be satisfied where the employer has no knowledge that the conduct warranting *discharge* was religious in nature." *Chalmers*, 101 F.3d at 1025 (Niemeyer, J., dissenting). In other words, notice by the time of "discharge" (or other discriminatory decision) is what counts, which can occur by an initial reprimand. Indeed, Judge Niemeyer relied on this Court's decision in *Brown* for that very proposition. *Id.* at 1025-26 (Niemeyer, J., dissenting) (citing *Brown*, 61 F.3d at 654, 657). He also observed that under the majority's rule, an employer would be automatically exonerated for, among other things, firing an employee who arrived to work on Ash Wednesday with an ash cross on her forehead in violation of a neutral company policy against face markings. *Id.* at 1025-26. "The irrationality of such a rule is readily apparent." *Id.* at 1025.

The Supreme Court effectively adopted this logic in *Abercrombie*, clarifying that an employer has sufficient notice where it "at least

suspected[]" a religious motivation for "*the practice*" that resulted in termination. *Abercrombie*, 575 U.S. at 773, 774 n.3.

Here, Arconic *admits* it *knew* Snyder's statement was religiously motivated before firing him. That is enough under *Abercrombie*.

F. Arconic admits Snyder's statement resulted in his firing.

Finally, as the District Court acknowledged, "[t]he parties agree that Snyder was fired *because of* the message" as an alleged violation of Arconic's Diversity Policy. (Add.4, App.434, R.Doc.30, at 4.) Thus, there is no dispute that Snyder satisfied the third prong of his prima facie case.

To be sure, Arconic also asserted that Snyder's two prior violations of its Diversity Policy also played a role in its decision to fire him. (App.219, R.Doc.23-3, at 56.) But "[o]ften, events have multiple but-for causes," and "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Bostock*, 140 S. Ct. at 1739. "So long as the plaintiff's [protected characteristic] was *one* but-for cause of that decision, that is enough to trigger the law." *Id.*

Accordingly, Snyder was plainly fired "because of" his religion, which establishes his prima facie case.[14]

III. Arconic Has Not Shown that Reasonably Accommodating Snyder Would Have Been an Undue Hardship.

Not all firings "because of" an individual's religion are illegal. Title VII makes clear that if an employer demonstrates that reasonably accommodating an individual's religion would be an "undue hardship," it is not actually a firing because of "religion." § 2000e(j). But the *employer* has the "burden of making a reasonable accommodation or proving undue hardship." *Nottelson*, 643 F.2d at 452. Of course, an "employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer," within the bounds of "his religious beliefs." *Brener v. Niagnostic Ctr. Hospital*, 671 F.2d 141, 146, n.4 (5th Cir. 1982); *accord Ansonia Bd. of Educ. v. Philbrook*, 479

[14] The District Court also observed that it "is not sure what accommodation Snyder even wants" as a reason for finding no prima facie case. (Add.19-20, App.449-50, R.Doc.30, at 19-20.) But it is *Arconic's burden* to disprove the availability of any reasonable accommodations (which Snyder has indeed proposed) as a *defense* to liability under §2000e(j). The District Court erred by relying on the reasonable-accommodation side of the ledger to find that Snyder allegedly failed his prima facie burden.

U.S. 60, 70-71 (1986). But Arconic completely failed to meet its burden here—especially under *Groff*'s clarified standard.

A. Arconic's refusal to cooperate with Snyder is prima facie evidence of bad faith.

As the EEOC's employer guidelines provide: "Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether a reasonable accommodation is available without posing an undue hardship on the operation of the business."[15] *See Ansonia*, 479 U.S. at 69 ("[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."). This Court has recognized that, under the Americans with Disabilities Act, "failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith." *Fjellestad*, 188 F.3d at 952. The same conclusion follows in the Title VII context. *See, e.g.*, *Thomas*

[15] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination, at n.221 and accompanying text.

v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1155 n.5 (10th Cir. 2000) (ADA's interactive-process requirement inherent to Title VII).

Arconic admits it never considered reasonably accommodating Snyder. (App.343, R.Doc.24-1, at 14.¶34.) At the same time, Snyder told Arconic's representatives that his overtly religious statement was indeed religious and that he believed he was responding to the company survey. He also emailed his union representative before termination, stating that he would "never take place [sic] in one of their surveys or give [his] opinion to their solicitations" again. (App.223, R.Doc.23-3 at 60.)

In short, Arconic's representatives did not lift a finger to engage in "bilateral cooperation" with Snyder, despite his good-faith attempts to cooperate with them. This fact alone is prima facie evidence of bad faith, which it has failed to rebut at this stage. *See infra*.

B. Arconic has also failed as a matter of law to show undue hardship.

In *Groff* the Supreme Court clarified that "undue hardship" "means what it says." *Groff*, 600 U.S. at 471. Refusing to accommodate employees because of dislike of their religious beliefs, with no "substantial" "burden" on business operations—and before even

considering alternative "options"—doesn't cut it. But that's exactly what happened to Snyder here.

1. The clarified "undue hardship" test requires employers to bear tangible burdens.

Before *Groff*, many courts (including this one) interpreted "undue hardship" to mean "anything more than a *de minimis* cost" according to the decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). *See, e.g.*, *Brown*, 61 F.3d at 655. Last term, however, the Supreme Court clarified that "undue hardship" must be interpreted according to its plain meaning. *Groff*, 600 U.S. at 471. The Court explained that "[i]n common parlance, a 'hardship' is, at a minimum, 'something hard to bear.'" *Id.* (quoting Random House Dictionary of the English Language 646 (1966)). And the "modifier 'undue' means that" only "excessive" or "unjustifiable" "hardships" are a basis for denying a religious accommodation. *Id.* (quoting *Random House* 1547). The Supreme Court thus held "that an employer must show that the burden of granting an accommodation would result in "*substantial* increased costs"—or "*substantial*" "burden[s]"—"in relation to the conduct of its particular business," considering "the particular accommodations at

issue and their "practical impact in light of the nature, size[,] and operating cost of [an] employer." *Id.* at 468, 470-71.[16]

Further, this Court itself previously held that "[u]ndue hardship requires more than proof of some fellow-worker's grumbling . . . An employer would have to show . . . *actual imposition on co-workers* or *disruption* of the work routine." *Brown*, 61 F.3d at 655 (internal quotes omitted). And this "cannot be proved by assumptions nor by opinions based on hypothetical facts." *Id.* Therefore, "spontaneous" and "isolated" religious expression not causing disruption or imposition on others is not undue hardship as a matter of law. *Id.* at 656-57 (reversing bench trial judgment and finding no undue hardship where employee's irregular allowance of prayers in his office and reference to Biblical teaching against slothfulness in "only one meeting" did not cause workplace disruption).

[16] Because the Supreme Court remanded for the lower courts to apply the clarified standard to the parties in that case, *Groff*, 600 U.S. at 473, the same standard governs here. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

2. Snyder's isolated and non-disruptive religious comment was not an "undue burden" as a matter of law.

Arconic representatives admit they had no evidence that Snyder's statement negatively impacted the functioning of the company. (App.339, R.Doc.24-1, at 10.¶24.) As Collier testified, however: "I just recall it was offensive to someone." (App.294, R.Doc.23-3, at 131; *accord* App.345, R.Doc.24-1, at 16.¶43.) But as noted, an employee's personal offense at an isolated religious expression, absent a tangible substantial burden to the business, is not an undue hardship. *See Groff*, 600 U.S. at 472 ("coworker's dislike of religious . . . expression in the workplace" "is off the table for consideration") (internal quotes omitted).

And here, McNamara was asked if it is "fair to say that at the Level 3 hearing"—involving a comprehensive review of Snyder's comment (App.219, R.Doc.23-3 at 56)—"nobody suggested that the company had been put *in any kind of difficulty* by the post itself," he responded: "Correct." (App.234, R.Doc.23-3 at 71).

It is exactly this sort of evidence—or lack thereof—which flunks the undue hardship test. As this Court held in *Brown*, 61 F.3d at 657,

"[t]he defendants showed no actual imposition on co-workers or disruption of the work routine . . . generated by occasional and spontaneous prayers and isolated reference to Christian belief."

Groff makes this even more clear, explaining that "undue hardship" depends on the "practical impact" of possible accommodations "in light of the nature" and "size" of a business. *Groff*, 600 U.S. at 470-71. Here, Arconic is an aluminum supply chain company that employs "tens of thousands of people" across the world, and 2,500 people at its Davenport, Iowa plant. (App.331, R.Doc.24-1, at 2-3.¶5.) Arconic has not shown that Snyder's single (and short-lived) online comment had even a "trifling" impact, *see Brown*, 61 F.3d at 657, "in the overall context" of its secular and sprawling operations, *Groff*, 600 U.S. at 468.

While Arconic's corporate representative testified that Snyder's comment was "very much" "divisive" (App.23-3, R.Doc. 23-3, at 155), in *Brown* this Court recognized that "division" and "potential" "polariz[ation]" resulting from "isolated" religious expression are not grounds for terminating an employee because of his religious expression. *Brown*, 61 F.3d at 657.

Other courts have recognized that judgment should issue for plaintiffs in unique circumstances like these. *See U.S. Equal Emp. Opp. Comm'n v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949, 963-65 (N.D. Cal. 2013) (summary judgment for plaintiff terminated for wearing hijab where employer "failed to proffer any evidence" that it caused decline in sales, customer complaints or confusion, brand damage, or disruption and admittedly acted "without consideration" of these factors"); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011) (similar), *rev'd and remanded*, 731 F.3d 1106 (10th Cir. 2013), *rev'd and remanded*, 575 U.S. 767 (2015); *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F. Supp. 1006 (D. Ariz. 2006) (similar).

Arconic utterly failed to show undue hardship under these standards.

3. Arconic's hostility to Snyder's religious expression was likewise not an undue hardship as a matter of law.

Groff also clarified that "dislike" or "animosity to a particular religion" "is not cognizable to factor into the undue hardship inquiry." 600 U.S. at 472. Indeed, "[i]f bias or hostility to a religious practice or a

religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Id.*

Here, Arconic *admitted* that its dislike of Snyder's religious expression motivated its refusal to accommodate him. Asked during depositions why the "overtly religious" nature of Snyder's comment did not trigger a discussion about reasonable accommodations, Arconic's corporate representative responded:

> I don't see it as religious. I think . . . Snyder's expression was one of hatred. I have my personal beliefs about what it is to be religious. . . . I am an admirer, for example . . . of Mother Teresa. I don't know that Mother Teresa ever called anybody an abomination to God. . . To me, that's not religious.

(App.312-13, R.Doc.23-3, at 150-51.)

This admission is fatal. It is exactly the sort of "animosity" and "bias" towards a religious belief that per se fails Title VII's clarified test. *See Groff*, 600 U.S. at 472. This Court, too, has explained that the alleged "offensiveness" of an employee's religious expression—absent a "well-grounded apprehension among employees of discriminatory treatment by [the religious employee]" or tangible disruption in the

workplace—is not a cognizable hardship, but rather is merely "taking sides in a religious dispute." *Brown*, 61 F.3d at 659.[17]

Further, it is impermissible to "[d]eny[] an individual a religious accommodation based on someone else's publicly expressed views," because it "runs afoul of the Supreme Court's teaching that '[i]t is not within the judicial ken to question . . . the validity of particular litigants' interpretation of [their] creeds.'" *Kane v. De Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (quoting *Hernandez*, 490 U.S. at 699 (1989)). Otherwise, courts would be involved in theological judgments rather than determining whether an employer has shown a "substantial" "burden" "in the overall context of [its] business." *Groff*, 600 U.S. at 468. Arconic's pitting of Snyder against Mother Teresa was itself a violation of Title VII.

4. Arconic's "potential liability" argument is erroneous.

Arconic also argued it faced the prospect of hostile work environment liability if it did not fire Snyder. (App.339, R.Doc.24-1, at

[17] This portion of *Brown* concerned plaintiff's separate Free Exercise claim (as defendant was a government agency), but Title VII likewise forbids private (non-religious) employers from taking sides in religious disputes, *see supra*, and thus *Brown*'s logic applies.

10.¶24; App.484-85, R.Doc.36 at 31-32.) It further asserted "that an accommodation to state offensive comments to others would not be reasonable." (App.343, R.Doc.24-1, at 14.¶35.) These arguments rely on two fundamentally flawed premises.

First, it is blackletter law that mere "utterance of" even "an ethnic or racial epithet which engenders offensive feelings in an employee" does not create a hostile work environment, "unless so severe or pervasive as to constitute an objective change in the conditions of employment." *Garagher*, 524 U.S. at 787. But Snyder's statement was not a racial or ethnic slur, and there is no evidence that it created such an objective change at Arconic, as Arconic's own officials admitted. And as noted, Snyder had previously worked alongside a transgender individual without incident. (App.179, R.Doc.23-3, at 16.¶¶5-8; App.202, R.Doc.23-3, at 39-40.)

Second, "[a]ny hardship asserted . . . must be real rather than speculative, merely conceivable, or hypothetical." *Brown*, 61 F.3d at 655 (internal citations and quotes omitted). "An employer stands on weak ground when advancing hypothetical hardships in a factual vacuum," and "[u]ndue hardship cannot be proved by assumptions nor by opinions

based on hypothetical facts." *Id.* (internal quotes omitted). But that is just what Arconic attempts here—contrary to the actual context:

First, Arconic admits Snyder never asked that his post be restored. (App.342, R.Doc.24-1, at 13.¶33.)

Second, Snyder told his union representative he would never again respond to the company's solicitations of his opinions (App.223, R.Doc.23-3, at 60; App.177, R.Doc.23-3 at 16.¶9). Notably, a "reasonable accommodation" is one that "eliminates the conflict" between the *employee*'s religious beliefs and the policy. *Ansonia*, 479 U.S. at 70. It is not for courts (or employers) "to say the line [an employee] drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

Finally, as noted, "the[] context" shows that Snyder's comment was "spontaneous" and "isolated." *Brown*, 61 F.3d at 656. Snyder commented on an *article* about the survey as Arconic was promoting both the survey and "Pride Month" (with the rainbow symbol) simultaneously; and the article appeared on the company's intranet page directly adjacent to a promotion of an "Employee Resource Group" ("ERG") for LGBTQ+ employees, again using the rainbow symbol. *See supra*. And Arconic investigators acknowledged Snyder might merely be

mistaken (i.e., not lying) about having clicked a link in an email (App.231, R.Doc.23-3, at 68) and thinking he was answering the survey. (App.252, R.Doc.23-3, at 89.)

In other words, the comment occurred in this very specific and isolated context, and thus it is pure conjecture for Arconic to assert that it was reasonably likely to recur. While Arconic says it also considered that Snyder had been charged with violating its Diversity Policy on two prior occasions, it admits those instances "were certainly *not religiously based*," (App.474, R.Doc.36 at 21), confirming that Snyder's comment was an isolated religious utterance (while the other two instances were entirely unrelated to alleged discrimination based on protected characteristics). *See supra.*

Accordingly, Arconic's assertions of hostile workplace liability also fail.

5. Arconic failed to consider other available options.

Finally, in *Groff* the Supreme Court also clarified that it is not enough that an employer "merely [] assess the reasonableness of a particular possible accommodation," but it must also

"[c]onsider[] [] other options." 600 U.S. at 473. There were at least two here that Arconic refused to consider.

First, Arconic could have simply allowed Snyder a second chance, given his explanation for the comment. *Accord Brown*, 61 F.3d at 656. That's what the employer did in *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)—a case Arconic has erroneously invoked (App.33, R.Doc.22-1, at 10)—where an employee was fired after he *refused to remove* Scriptural verses rebuking homosexual conduct that he posted in his office, visible to others. The company did not automatically fire him. Rather, he "was given time off with pay to reconsider his position," and "[w]hen he returned to work, he *again* posted the scriptural passages and refused to remove them." *Id.* at 602. The Court, pre-*Groff*, found his persistent religious expression to be an undue hardship. 358 F.3d at 607-08.

Snyder was not given a similar second chance, despite his explanation that he never intended to post the comment publicly, unlike the employee in *Peterson*.

Second, Arconic acknowledges it has an "Employee Resource Group" for LGBTQ+ employees to discuss their views. (App.315, R.Doc.23-3, at 152.) Arconic's corporate representative admitted that "[i]f Mr. Snyder wanted to form a Christian ERG . . . we would take a look at that as long as it abides by . . . all relevant policies, but he did not step forward and ask for that." (Id.) But, again, Title VII places the burden on *employers* to "consider[] [] other options." *Groff*, 600 U.S. at 473. Any suspicion that Snyder would not abide Arconic's policies for ERG's is "based on assumptions about accommodations which have never been put into place." *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978). That sort of speculation must be ignored.

For all these reasons, Snyder is entitled to judgment as a matter of law on his discrimination claim. And, at minimum, a reasonable jury could find for Snyder on these facts.

IV. Snyder's Retaliation Claim Should Be Decided By a Jury.

The District Court's grant of summary judgment to Arconic on Snyder's retaliation claim was also erroneous. A reasonable jury could find that Snyder's online comment was oppositional conduct, and also

that his pre-termination statements expressly opposing Arconic's religious discrimination against him were a but-for cause of his termination.

Title VII prohibits discrimination against an employee "because he has opposed any practice made an unlawful employment practice by" Title VII. 42 U.S.C. §2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show (1) he "engaged in protected conduct," (2) he "suffered a materially adverse employment act," and (3) "the adverse act was causally linked to the protected conduct." *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 978 (8th Cir. 2012). "Protected conduct" includes "opposition to employment practices prohibited under Title VII." *Gibson*, 960 F.3d at 1064.

The complained-of conduct need not actually violate Title VII so long as the employee has an objectively reasonable belief that it does. *Id.* at 1064. "If the plaintiff establishes a prima facie case, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action." *Ollis*, 495 F.3d at 576. The plaintiff can then show that reason is pretextual. *Id.*

A reasonable jury could find that Snyder was terminated for protected activity in two ways:

First, there is sufficient evidence that Snyder's online comment reflected an objectively reasonable belief that Arconic's ubiquitous use of the rainbow to promote "Pride Month" was discriminatory under Title VII. "Th[e] reasonableness assessment is made in light of the applicable substantive law." *Gibson*, 960 F.3d at 1065. As noted, Title VII requires "favored treatment" for religious beliefs in the workplace. *See supra*. It also forbids employers from creating hostile work environments, i.e., workplaces "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive workplace environment." *Singletary*, 423 F.3d at 892 (internal quotes omitted).

Here, a reasonable jury could find that Snyder reasonably believed Arconic's rainbow/"Pride Month" promotions created an abusive working environment for Christians like him who believe the rainbow is a sacred symbol of God's Covenant with mankind, not to be used to promote same-sex marriage. This is especially true given the Supreme Court's recognition that "those who adhere to religious doctrines[] may

continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015). Even if Snyder's belief was legally erroneous, a jury could deem it a reasonable belief under the above facts and law. *See Ollis*, 495 F.3d at 576 (holding reasonable jury could find protected activity where plaintiff complained to employer "about a conflict between the subject matter of its [Mind Body Energy] sessions and his religious beliefs").

Second, a reasonable jury could find Snyder's express complaints of religious discrimination during pre-termination meetings were a but-for cause of his termination. After all, Snyder was terminated just days *after* he complained of religious discrimination during pre-termination meetings. *See Wierman v. Casey's General Stores*, 638 F.3d 984, 994 (8th Cir. 2011) ("[T]emporal proximity of four days is sufficient to make a prima facie case."). Moreover, McNamara Level 3 Hearing Letter stated that one reason Snyder remained terminated was because of his "comments . . . ***at the hearing***," which allegedly "demean[ed] persons who identify as LGBTQ+." (App.220, R.Doc.23-3, at 57.) *See Bostock*, 140 S. Ct. at 1739 ("Often, events have multiple but-for causes.").

Arconic contends that it fired Snyder only for his online comment and past violations, not for his express complaints about religious discrimination. (App.37, R.Doc.22-1, at 14.) But there is "genuine doubt as to the legitimacy" of that claim here, *Wierman*, 638 F.3d at 995, given the Level 3 Hearing Letter's admission that Snyder's intra-hearing comments were a basis for his termination, *and* given Arconic's admitted hostility towards Snyder's religious beliefs (which he affirmed during the pre-termination meetings). *See supra*. That is more than sufficient evidence to get to a jury. *Accord Ollis*, 495 F.3d at 576 (reasonable jury could find plaintiff's "complaints about attending" employer's mind-body-energy meetings and "failure to attend the [] sessions" resulted in termination, and that employer's proffered reason of sexual harassment was pretextual).

Accordingly, Snyder's retaliation claim should go to a jury.[18]

CONCLUSION

For the foregoing reasons, this Court should REVERSE the District Court and hold that Snyder is entitled to summary judgment on

[18] However, a trial would be unnecessary should this Court require summary judgment for Snyder on his discrimination claim.

his discrimination claims. At minimum, it should remand Snyder's discrimination and retaliation claims for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: November 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, a true and accurate copy of the foregoing was electronically filed with the Court using the CM/ECF system, which will send notice of such filing to the following:

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