No. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; AND ANTI-DEFAMATION LEAGUE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations with a shared commitment to defending religious freedom. Some of us have joined *amicus* briefs in previous litigation before the Court, at times on different sides of issues. See, *e.g.*, *Fulton* v. *Philadelphia*, 141 S. Ct. 1868 (2021); *Carson as next friend of O. C.* v. *Makin*, 142 S. Ct. 1987 (2022); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). But we are united in submitting this brief in support of petitioner's crucial effort to restore robust legal protection for the religious freedom of all employees.

SUMMARY OF ARGUMENT

Americans shouldn't have to choose between their jobs and their faith. Congress sought to shield employees from religious discrimination by requiring employers to accommodate their employees' religion—including "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). An employer can avoid this duty only when an accommodation would impose an "undue hardship on the conduct of the employer's business." *Id.* The questions presented seek to resolve the meaning and scope of that exception.

For decades, employees have been routinely denied religious accommodations because of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). There, this Court said *in dicta* that an employer may demonstrate "an undue hardship" by showing that a

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, besides *amici*, their members, and their counsel, made a monetary contribution toward the preparation or submission of this brief.

religious accommodation would result in "a de minimis cost." *Id.* at 84. That interpretation was wrong on the day *Hardison* was decided. Justice Marshall accurately forecast that the *de minimis* standard would strike a "fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Id.* at 86 (Marshall, J., dissenting). Like the petitioner, we urge the Court to overrule *Hardison*.

A sounder formulation for administering Title VII's "undue hardship" exception comes from the Americans with Disabilities Act (ADA), which also excuses an employer from accommodating an employee in a protected class (disability) when it would cause "an undue hardship." 42 U.S.C. § 12112(b)(5)(A). Under the ADA, a hardship is undue only when it imposes "significant difficulty or expense." *Id.* § 12111(10)(A). Using this proven standard for Title VII would align two of the Nation's leading civil rights laws on a point of law where Congress adopted the same phrase to express its intent.

Many reasons counsel in favor of abandoning *Hardison*. To us, its personal and societal costs are paramount. Sincere religious beliefs and practices often require observing a Sabbath day or other holy days, complying with particular dress standards, or wearing religious symbols. Accommodating religious beliefs and practices should not be left to an employer's discretion. Civil rights are not an issue of good manners only. Discriminating because of an employee's religion, including by refusing to reasonably accommodate religious practices without good cause, is unlawful—and this Court should say so. Sadly, *Hardison* falls heaviest on religious minorities and the economically vulnerable. For them, the right of exit—

the freedom to find another employer with a more generous outlook—often proves to be a chimera.

Even if *Hardison* is overruled, the Third Circuit's decision presents a separate reason for concern. That decision rests in part on the principle that an employer can establish an "undue hardship" by showing that a religious accommodation would affect other employees or reduce employee morale. See Pet. App. 22a. That principle strays from Title VII, which excuses an employer from accommodating an employee's religion only when it would create an "undue hardship on *the conduct of the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added). Coworkers may grumble when an employee gets time off on Saturday to observe her Sabbath. But denying a religious accommodation because of popular opposition is a dangerous principle that subverts the very purpose of a civil rights statute. The meaning of individual rights would shrivel if they depended on a show of hands. The Court should declare that—extreme situations aside—an employer cannot establish "an undue hardship" merely because it would affect an employee's coworkers.

ARGUMENT

I. TITLE VII'S "UNDUE HARDSHIP" EXCEPTION SHOULD APPLY ONLY WHEN AN EMPLOYER SHOWS "SIGNIFICANT DIFFICULTY OR EXPENSE."

A. *Hardison* Misconstrued Title VII's "Undue Hardship" Exception.

1. *Hardison*, 432 U.S. at 63, arose when an airline company (TWA) fired an employee for "insubordination" because he would not work on his Saturday Sabbath. *Id.* at 69. Several means of accommodating his religious practice were available and seemingly feasible. But the Court declared that "[t]o require TWA to bear more

than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Under that pinched reading of Title VII, no accommodation was required.

Justice Marshall dissented, accusing the majority of striking a "fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Id.* at 86 (Marshall, J., dissenting). He "question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost.'" *Id.* at 92 n.6. And he summed up the majority's interpretation as one where Title VII and an implementing regulation requiring employees to "make reasonable adjustments in [their] work demands to take account of religious observances * * * do not really mean what they say." *Id.* at 86–87.[2]

2. Justice Marshall's criticisms hit the mark. No party proposed that "de minimis cost" standard and it manifestly departs from the words adopted by Congress. See *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting). Title VII says employers must prove "undue hardship" to be excused from accommodating religion. 42 U.S.C. § 2000e(j). Usually this Court "interprets a statute in accord with the ordinary public meaning of its terms

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[2] We agree with Justice Thomas and petitioner that *Hardison*'s "de minimis cost" standard is "dictum." *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part). As such, *stare decisis* is at its weakest because this Court is not "bound by dicta [when] more complete argument demonstrates" the dicta is incorrect. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). See generally *Amicus* Br. of the Am. Ctr. for L. and Just. at 4–10, *Groff* v. *DeJoy* (No. 22-174) (arguing that *stare decisis* does not prevent the Court from overruling *Hardison*).

at the time of its enactment." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). At the time of Title VII's enactment *hardship* implied "pretty substantial costs." *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J., concurring). Contemporaneous dictionaries defined *hardship* as "*adversity*" or "*suffering*." *Id.* at 826–27 (quotations omitted). The same sources defined *undue* to mean "*excessive*" or "*exceed[ing] what is appropriate or normal*." *Id.* at 827. Putting together those definitions should render "undue hardship" as something like "excessive suffering" or "unusual adversity." But *Hardison* defied this plain meaning by interpreting "undue hardship" as anything more than a "de minimis cost." 432 U.S. at 84. Since *de minimis* denotes "*very small or trifling matters*," see *De Minimis Non Curat Lex*, Black's Law Dictionary (4th rev. ed. 1968), *Hardison* construed "undue hardship" to convey nearly the opposite of its ordinary meaning.

3. *Hardison* also flouts legislative history. In its original form, Title VII did not expressly require employers to accommodate employees' religious practices. But in 1972, Senator Randolph proposed an amendment "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. S705 (daily ed. Jan. 21, 1972). Congress agreed, adopting the provision codified at 42 U.S.C. § 2000e(j). See Pub. L. No. 92-261, 86 Stat. 103.

Senator Randolph explained that his amendment aimed to correct "court decisions" that had "clouded [Title VII] with some uncertainty." 118 Cong. Rec. at S705–06. Problematic decisions included *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689

(1971). See 118 Cong. Rec. S706–11 (appending *Dewey*). In *Dewey*, the Sixth Circuit denied that Title VII mandated religious accommodation, holding that "[t]he employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." 429 F.2d at 335.

By enacting Senator Randolph's amendment, Congress removed any doubt that Title VII requires employers to reasonably accommodate their employees' religion. But *Hardison* essentially nullified the amendment and returned Title VII to its meaning under decisions like *Dewey*. See 432 U.S. at 88 (Marshall, J., dissenting) (describing how the majority opinion was "oblivious" to the "legislative history of the 1972 amendments of Title VII").

With these many flaws, *Hardison* should be overruled and the plain meaning of Title VII restored.

B. "Undue Hardship" in Title VII Should Mean What It Does Under the ADA—"Significant Difficulty or Expense."

What standard should replace *Hardison*? Like scholars and other *amici*, we urge the Court to turn to the ADA. It uses the same "undue hardship" standard found in Title VII. See 42 U.S.C. § 12112(b)(5)(A). But unlike Title VII, the ADA contains an express definition of "undue hardship": "an action requiring significant difficulty or expense" considered in light of the (i) cost of the accommodation, (ii) resources of the facility, (iii) resources of the employer, and (iv) type and extent of employer's operation. See *id.* § 12111(10)(A).

1. Borrowing the ADA's definition of "undue hardship" is consistent with an established canon of statutory construction. "[L]aws dealing with the same

subject—being *in pari materia* * * * —should if possible be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, Reading Law 252 (2012). This Court has applied that canon in other instances of statutory resemblance. See *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534–35 (2015) (harmonizing a similar phrase found in Title VII and the Fair Housing Act). That is because by using "the same language in two statutes having similar purposes," Congress presumably "intended that text to have the same meaning in both statutes." *Smith* v. *Jackson*, 544 U.S. 228, 233 (2005).

Title VII and the ADA are highly similar. Both are civil rights statutes codified at Title 42 of the U.S. Code. They share identical statutory damage caps. See 42 U.S.C. § 1981a(b)(3). And both require employees to file a charge within 180 days of the last discriminatory act. Compare *id.* § 2000e-5(e)(1) with 28 C.F.R. § 35.170(b). The ADA and Title VII may not be identical twins, but their family resemblance is striking.

2. Using the ADA's "significant difficulty or expense" standard in Title VII religious accommodation cases holds significant advantages. Aligning Title VII and the ADA would reduce confusion for employers, employees, and courts. The current disparity between the controlling legal standards for these statutes is wide enough for the EEOC to warn that "undue hardship" has "different meanings, depending upon whether it is used with regard to reasonable accommodation of individuals with disabilities, or with regard to religious accommodation." See 29 C.F.R. § 37.4. The disparity is confusing and produces indefensible results. If a Seventh-day Adventist asks for Saturday off to worship and a recovering drug addict asks for

Saturday off for substance abuse treatment, as things now stand the employer must accommodate the addict but could terminate the Adventist. That makes no sense when Congress framed the employer's duty in the same words.

3. Experience teaches that the ADA's significant-difficulty-or-expense standard reasonably balances the interests of employers and employees.

Under that standard some employees win. Consider *Reyazuddin* v. *Montgomery County*, 789 F.3d 407 (4th Cir. 2015), where an employer faced an ADA suit after refusing to buy software to accommodate a blind call-center employee. *Id.* at 410–11. The employer argued the cost was an undue hardship because it exceeded the employer's "line-item budget" of $15,000 for reasonable accommodations. *Id.* at 418. The Fourth Circuit declined to grant summary judgment for the employer because it had not shown that the cost of enabling the accessible software would be prohibitive given its nearly $4 billion annual budget. *Id.* Likewise, in *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999), the Ninth Circuit denied summary judgement when Wal-Mart encouraged an employee to go on medical leave to treat her fainting incidents, only to terminate her months later for allegedly violating its benefits policy. *Id.* at 1246–47. The employee had received "'above average' performance ratings" and taken "medical leave with the blessing of Wal-Mart, whose stated benefits policy included unpaid medical leave of up to one year." *Id.* at 1247. Wal-Mart could hardly maintain that it was an "undue hardship" to accommodate her temporary absence. *Id.*

But in other cases the ADA's significant-difficulty-or-expense standard means that employers prevail. Take *Vande Zande* v. *Wisconsin Department of*

Administration, 44 F.3d 538 (7th Cir. 1995). There, an employer provided "numerous accommodations" to a paraplegic employee, including paying to modify bathrooms, buying special furniture, and providing a laptop. *Id.* at 544. Yet the employee brought an ADA claim after being denied a desktop computer for use at home to preserve her sick leave. *Id.* at 544–45. The Seventh Circuit found this accommodation unreasonable. *Id.* Or consider *Cassidy* v. *Detroit Edison Company*, 138 F.3d 629 (6th Cir. 1998) where an employee suffered "exquisitely sensitive" asthma and demanded an "allergen-free workstation." *Id.* at 632, 635. The court found that it would be an undue hardship to provide "essentially an allergen-free workplace" *Id.* at 635.

C. Requiring Employers to Demonstrate "Significant Difficulty or Expense" Will Not Encourage Frivolous Litigation.

Critics will say that replacing *Hardison* with the ADA's more demanding "significant difficulty or expense" standard will lead to a flood of new and frivolous claims. Not so. A legal standard that more accurately reflects the statutory language will encourage employers to appropriately respect employees' religious needs.

Today, the ADA generates far more discrimination claims than the religious accommodation claims under Title VII. See *Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2021*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 (last visited Feb. 23, 2023) (reporting about 20,000 disability-related cases per year, compared with about 3,000 religion-related cases per year). There is no reason to believe that the proportion of religious accommodation claims will skyrocket if Title VII recaptures its natural meaning.

Demographics are against that prospect. Relatively few Americans belong to the faith communities that tend to generate religious discrimination claims. Other *amici* have studied religious accommodation cases decided on summary judgment between 2000 and 2018 and concluded that claimants overwhelmingly belong to small religious groups. See Brief for *Amici Curiae* Christian Legal Soc'y et al. at 23–25, *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349). For instance, "claims by members of non-Christian faiths (Muslims, idiosyncratic faiths, Jews, Hebrew Israelites, Rastafarians, Sikhs, and African religions) make up 34.3 percent of the accommodation cases * * * even though non-Christian faiths made up only 5.9 percent of the population." *Id.* at 24. During that period, Seventh-day Adventists brought nearly 22% of religious accommodation cases, *id.* at 23, despite accounting for less than half a percent of the American population. Michael Lipka, *A Closer Look at Seventh-day Adventists in America*, Pew Rsch. Ctr. (2015), https://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/ (last visited Feb. 23, 2023). The small pool of likely religious claimants will not overwhelm courts with frivolous litigation.

In addition, removing *Hardison* as an obstacle to religious accommodation would produce a positive feedback loop. Employers would learn to reasonably accommodate employees' religious practices. Growing familiarity and comfort with workplace accommodation would remove the stigma of favoritism from both employers and religious employees and, by example, encourage other businesses to carry out their responsibilities under the law. In time, accommodating the reasonable needs of religious employees would become no more controversial than accommodating the needs

of disabled employees. Decades of experience show that businesses are nimble enough to respect their employees' civil rights without substantial detriment to their operations when they have clear direction from the courts.[3]

D. This Court Should Overrule *Hardison* Rather Than Waiting for Congress to Amend Title VII.

The task of restoring Title VII's right to religious accommodation belongs to this Court.

First, the Court has said in similar instances that it should not "place on the shoulders of Congress the burden of the Court's own error." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978) (quotation omitted). The same approach is fitting when *Hardison* all but voided Congress's effort to solve the problems posed by decisions like *Dewey*. See 118 Cong. Rec. S705–06.

Second, this Court cannot fairly read congressional silence as approval. See *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940) ("It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines."). Although Congress has not amended Title VII's religious accommodation provision since *Hardison*, later statutes take pains to distinguish *Hardison* when defining "undue hardship." For instance, Congress expressed its disapproval of *Hardison* when explaining the ADA's "undue hardship" standard: "a

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[3] Overruling *Hardison* would not generate conflicts between religious employers and their employees because religious organizations are exempt from Title VII when they seek to employ "individuals of a particular religion." 42 U.S.C. § 2000e-1(a).

definition was included in order to distinguish the duty to provide reasonable accommodation [from] *TWA v. Hardison* * * *. Thus, the definition of 'undue hardship' in the ADA is intended to convey a significant, as opposed to a *de minimis* or insignificant, obligation on the part of employers." H.R. Rep. No. 101-485, pt. 3, at 40 (1990) (footnote omitted).

Third, *Hardison* has injured religious Americans for more than four decades. Federal and state judicial reports are littered with cases where the lax "de minimis cost" standard has put honest men and women in the intolerable position of choosing between their jobs and their faith. During all this time, *Hardison* has operated as a kind of illicit tax on certain religious beliefs, especially the beliefs and practices of religious minorities. After waiting so long to reconsider its decision, this Court should retire *Hardison* and restore the religious freedom that Congress long ago enacted.

II. *HARDISON* DEMOTES THE RIGHT OF RELIGIOUS ACCOMMODATION TO SECOND-CLASS STATUS.

A. *Hardison* Severely Reduces Title VII's Protection Against Religious Discrimination in the Workplace.

The duty to accommodate religion in the workplace is integral to Title VII's basic prohibition on religious discrimination as "an unlawful employment practice." 42 U.S.C. § 2000e-2(a). Senator Randolph made that connection plain when explaining that the purpose of amending Title VII to include a right to religious accommodation was "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. S705. But *Hardison* abandons that guarantee. When

de minimis cost suffices to excuse a refusal to accommodate religion, an employer's economic self-interest inevitably prevails.

Consider two egregious examples. Citing *Hardison*, the Eighth Circuit held that paying $1,500 annually for a reduced benefit package counted as an undue hardship—for Chrysler Motors, no less. *Cook* v. *Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992). Also relying on *Hardison*, one federal district court ruled that paying another employee two hours of overtime to accommodate a religious practice exceeded a *de minimis* cost to the employer. *El-Amin* v. *First Transit, Inc.*, No. 1:04-cv-72, 2005 WL 1118175, *8 (S.D. Ohio May 11, 2005). Nor are these decisions a departure from *Hardison* itself. There, TWA's sole costs for accommodating religion amounted to "$150 for three months, at which time [Hardison] would have been eligible to transfer back to his previous department." *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). *De minimis* has come to mean virtually any expense, no matter how small the cost or how large the employer.

Hardison not only justifies an astounding level of employer stinginess, but it allows employers to prioritize minor infractions of workplace policy over employees' religious exercise. Consider *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 136–37 (1st Cir. 2004) where the First Circuit ruled it would be an undue hardship to allow a single religiously-inspired facial piercing in violation of the employer's dress-and-grooming policy. Or *Brown* v. *F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7, 19 (D. Mass. 2006) where the District of Massachusetts ruled it would be an undue hardship to allow a Rastafarian beard in violation of employer's "appearance policy." (The employee in

question was a lube technician who worked on car undercarriages). *Id.*[4]

These cases illustrate how *Hardison* fosters an environment where employers treat even the most reasonable religious accommodations with contempt. Contempt taints the litigation process, as well. EEOC data shows that employers settle about 40% of disability-based cases. *Data Visualization: Disability Charges*, EEOC, https://www.eeoc.gov/data/data-visualization-disability-charges (last visited Feb. 1, 2023). But employers over the last decade have settled less than 8% of religious-based cases. *Religion-Based Charges (Charges Filed with EEOC) FY 1997 – FY 2021*, EEOC, https://www.eeoc.gov/data/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2021 (last visited Feb. 1, 2023). Employers have clearly drawn the lesson that settling disability claims avoids meaningful litigation risks whereas settling religious claims is unnecessary. That assessment of comparative risk is perfectly sensible. Under *Hardison*, employers win in court nearly every time.

And that's if the aggrieved employee can even find a lawyer. Thanks to *Hardison*, employment lawyers are often unwilling to represent religious employees. One church testified before the EEOC that *Hardison* has caused religious employees "a great deal of difficulty to find attorneys throughout the country to represent [them]." Hearings Before the United States Equal Employment Opportunity Commission on Religious Accommodation 149, EEOC (1978). Before *Hardison*,

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[4] *Brown* is inconsistent with this Court's later precedent. See *Abercrombie*, 575 U.S. 768 at 775 (reversing summary judgment for an employer that cited its "Look Policy" to deny an accommodation for a female Muslim job candidate who wished to wear a headscarf).

employment attorneys were frequently willing to represent religious employees on a contingency basis. *Id.* But "after Hardison, they look the case over and, rightfully, they say, 'Look, pal, you just don't have too much of a case. I have to back out of it.' So, it is hard to find representation." *Id.* Sentiments like this explain why the EEOC now receives fewer religious discrimination claims than any other category protected under Title VII. See *Charge Statistics*, EEOC, (showing that religious claims comprise only 3.7% of charges filed over the last five years of available data).

B. *Hardison* Imposes Heavy Burdens on the Exercise of Religion.

But the costs are reflected in more than bare statistics. Whether faith requires observance of a holy day, wearing religious apparel, or display of a religious symbol, millions of devout Americans feel the burden of *Hardison* every workday of their lives.

Take holy days. The Catechism of the Catholic Church teaches that "[o]n Sundays and other holy days of obligation, the faithful are to refrain from engaging in work or activities that hinder the worship owed to God." U.S. Conf. of Cath. Bishops, Catechism of the Catholic Church § 2185 (2d ed. 2000). Members of The Church of Jesus Christ of Latter-day Saints believe that the Lord has set aside Sunday as "a day appointed unto you to rest from your labors, and to pay thy devotions unto the Most High." Doctrine and Covenants 59:10. Many adherents of Orthodox Judaism feel obligated to accept termination rather than work on their Sabbath, which extends from sundown Friday to sundown Saturday. See generally Rabbi Yosef Karo, *Shulchan Aruch Orach Chayim* 242–365 (Sabbath prohibitions); 3 Karo, *Shulchan Aruch Orach Chayim*, at 308. And many

faithful Muslim men consider it a serious violation of Islamic law to miss attending the noonday *Jumua'h* prayer at the local mosque. See Caesar E. Farah, Islam: Beliefs and Observances 136 (7th ed. 2003).

Or consider religious apparel and grooming. Many women among both the Muslim and Jewish faiths believe that scripture instructs them to cover their heads in public as a sign of modesty. See, *e.g.*, Al-Qur'an 24:31; 33:59; Aaron Moss, *Why Do Jewish Women Cover their Hair*, Chabad.org, https://www.chabad.org/theJewishWoman/article_cdo/aid/336035/jewish/Why-Do-Jewish-Women-Cover-Their-Hair.htm (last visited Feb. 7, 2023). Both women and men within the Sikh religion commit to wearing the *kanga* (a hair comb) after undergoing the Amrit Ceremony and promising to observe the Sikh code of conduct. See Santokh Singh, Fundamentals of Sikhism 67, 91 (1991). And men of the Orthodox Jewish, Islamic, and Sikhist communities frequently observe special religious rules on the care of their hair or beards. See Leviticus 19:27 ("You shall not round off the edge of your scalp and you shall not destroy the edge of your beard."); Muhammed al-Jibaly, *The Beard Between the Salaf & Kalaf*, ch. 1 (1999); 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001). Violation of these religious rules on appearance can be akin to "direct apostasy." See, *e.g.*, 2 *The Encyclopaedia of Sikhism*.

Or consider religious symbols. Sikhs wear the blunted dagger called the *kirpan* and the steel band called the *karaa* as part of their dedication to the Amrit Ceremony. See Santokh Singh, Fundamentals of Sikhism 91–97 (1991). Many Christian believers wear a cross or crucifix to symbolize their devotion to Christ. See, *e.g.*, *Daniels* v. *Arlington*, 246 F.3d 500,

500 (5th Cir. 2001) (plaintiff fired for refusing to remove a gold cross pin from his uniform). And members of The Church of Jesus Christ of Latter-day Saints who have participated in temple ceremonies wear a sacred temple garment beneath their clothes as an "outward expression of an inner commitment to follow the Savior Jesus Christ." *General Handbook*, The Church of Jesus Christ of Latter-day Saints § 38.5.5 (August 2022). Faithful members believe the garment should "not be removed for activities that can reasonably be done while wearing the garment"—an injunction that most interpret to include wearing the garment at work. See *id.*

Whether persons of faith seek to live their religion through holy days, religious apparel, or sacred symbols, *Hardison* makes it too easy for employers to deny an accommodation. See *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982) (Orthodox Jew seeking accommodation for Saturday worship); *Abercrombie*, 575 U.S. at 768 (Muslim woman seeking accommodation to wear head veil); *Tagore* v. *United States*, 735 F.3d 324 (5th Cir. 2013) (Sikh believer seeking to wear a *kirpan*). As Justice Marshall predicted, *Hardison* "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

C. *Hardison* Harms Religious Minorities and Economically Disadvantaged Employees.

Whether religious employees seek to observe their holy days, wear religious apparel, or display sacred symbols, *Hardison* falls on them all. But *Hardison*'s burdens are not distributed equally. They fall with particular force on religious minorities and the economically vulnerable.

Regarding religious minorities, *amici* before this Court have shown a disproportionately large share of religious accommodation cases are filed by a very small minority of America's religious believers.

- Seventh-day Adventists file 21.5% of religious accommodation claims, while representing 0.5% percent of the population.
- Muslims file 18.6% of religious accommodation claims, while representing 0.9% percent of the population.
- Jehovah's Witnesses file 4.9% of religious accommodation claims, while representing 0.8% percent of the population.
- Other Groups (including Jews, Hebrew Israelites, Rastafarians, Sikhs, and African Religions) filed 13.7% of religious accommodation claims, while all together representing about 3% of the population.

See Brief for *Amici Curiae* Christian Legal Soc'y et al. at 23–25, *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349); *Religious Landscape Study*, Pew Rsch. Ctr., Feb. 2, 2023, https://www.pewresearch.org/religion/religious-landscape-study/ (last visited Feb. 7, 2023); Lipka, *A Closer Look at Seventh-day Adventists in America*.

These numbers show that *Hardison* especially harms religious minorities. Because their sincere beliefs and practices differ from the majority, employers are often unfamiliar with them. And when employers encounter unique religious needs, it can be easier to terminate than accommodate—a calculated denial of religious freedom that *Hardison* allows. This disincentive to respect diverse religious beliefs and practices is

particularly worrisome, given America's increasing secularity. *Modeling the Future of Religion in America*, Pew Rsch. Ctr., Sep. 13, 2022, https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/ (projecting that religious believers are likely to occupy a diminishing percentage of the American population). As religious employees make up a dwindling share of America's workforce, discrimination against them is likely to worsen unless *Hardison*'s perverse incentives are removed.

Hardison also falls with disproportionate impact on the economically vulnerable. Federal cases rarely mention plaintiffs' income. But the job descriptions in these representative cases highlight the relative socioeconomic position of employees seeking to vindicate their right to religious accommodation:

- Satellite TV wire technician, see *Sutton* v. *DirecTV LLC*, No. 2:19-cv-00330-MHH, 2022 WL 808692 (N.D. Ala. Mar. 16, 2022);
- Hot bar cook, see *Logan* v. *Organic Harvest, LLC*, No. 2:18-cv-00362-SGC, 2020 WL 1547985 (N.D. Ala. Apr. 1, 2020);
- Produce delivery driver, see *James* v. *Get Fresh Produce, Inc.*, No. 18 C 4788, 2019 WL 1382076 (N.D. Ill. Mar. 27, 2019);
- Immigrant pet food factory production workers, see *Mohamed* v. *1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017);
- Nursing home activity aide, see *Nobach* v. *Woodland Vill. Nursing Home Ctr., Inc.*, No. 1:11CV346-HSO-RHW, 2012 WL 3811748 (S.D. Miss. Sept. 4, 2012);

- Juvenile detention center officer, see *Finnie* v. *Lee Cnty.*, 907 F. Supp. 2d 750 (N.D. Miss. 2012).

Even this small sample of job titles demonstrates that employees who request religious accommodation tend to come from positions toward the bottom of the economic ladder. With limited clout in the labor market, they cannot negotiate the flexible schedules enjoyed by upper-class managers or executives. And with limited financial resources, they can seldom afford the cost of a long legal battle to vindicate their civil rights. *Hardison*'s effects are particularly harsh on such workers. For them, the choice between their faith and their job is even more devastating than for workers with superior resources or marketable skills.

III. AN EMPLOYER DOES NOT SATISFY TITLE VII BY SHOWING THAT A RELIGIOUS ACCOMMODATION WOULD BURDEN OTHER EMPLOYEES.

A. Under Title VII, an "Undue Hardship" Occurs Only If a Religious Accommodation Burdens the Employer's *Business*.

The second question presented asks "whether an employer may demonstrate 'undue hardship on the conduct of the employer's business' under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself." Pet. i. No, it cannot.

The Third Circuit panel held that "[e]xamples of undue hardships include * * * increased workload on other employees, and reduced employee morale." Pet. App. 22a. The court then quoted with approval a Seventh Circuit decision declaring that "Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *Id.*

(quoting *EEOC* v. *Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021)). Armed with that misconception, the panel below concluded that USPS deserved a statutory exception. "Exempting Groff from working on Sundays caused more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." *Id.* 24a.

Whatever its superficial appeal, the panel's conclusion was based on a faulty premise, as Judge Hardiman rightly explained: "Simply put, a burden on coworkers isn't the same thing as a burden on the employer's business." *Id.* 28a (Hardiman, J., dissenting). The panel's reliance on an "atextual rule" departs from this Court's decisions, which have never held that "impact on coworkers alone—without showing business harm—establishes undue hardship." *Id.* 27a.

Consider the language of Title VII. It requires employers to "reasonably accommodate" an employee's religion where possible "without undue hardship *on the conduct of the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added). The italicized phrase leaves no doubt that what matters is how an accommodation affects "the conduct of the employer's business"—not only how it affects other employees. See Pet. App. 22a. Focusing on the latter will predictably lead many business managers to embrace "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

Treating every employee the same—even if that means denying individual exemptions for everyone—

may be a convenient management policy. Yet neutrality alone does not satisfy Title VII.

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment * * *. Title VII requires otherwise-neutral policies to give way to the need for accommodation.

Abercrombie, 575 U.S. at 775.

To be sure, extreme circumstances could make a burden on coworkers "an undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). That can occur not because other workers dislike the accommodation or have to make unwanted adjustments like a change in work schedules, but because the accommodation materially disrupts the operation of the business, such as by exposing it to the risk of legal liability. Suppose a Jewish employee's request for Saturdays off would deprive another employee of seniority rights (arising from a union agreement or other contract) or make certain work impossible to complete. Those sorts of consequences could pose a hardship on "the conduct of the employer's business." *Id.* That's why the EEOC distinguishes between "general disgruntlement, resentment, or jealousy of coworkers" and an accommodation that "would actually infringe on the rights of coworkers or cause disruption to the work." EEOC Compliance Manual on Religious Discrimination § 12-IV(B)(4) (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_255006745363916107498-67844.[5]

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[5] Although some requested accommodations would impose a bona fide "undue hardship," an employer is not justified in adopting a take-it-or-leave-it approach. Rather, Title VII pre-

Fortunately, extreme situations like that are rare. Few judicial decisions involve a religious accommodation that would deprive coworkers of legal rights or incur a concrete loss of operational effectiveness for the employer's business. See, *e.g.*, *Virts* v. *Consol. Freightways Corp. of Del.*, 285 F.3d 508, 518–20 (6th Cir. 2002) (denying a religious accommodation that would deprive coworkers of contractual seniority rights); *E.E.O.C.* v. *BJ Servs. Co.*, 921 F. Supp. 1509, 1514 (N.D. Tex. 1995) (an equipment operator's request for all Saturdays off would create an undue hardship for the employer when untrained coworkers would be exposed to safety risks and his absence would "result in decreased production"). When that kind of situation arises, Title VII is flexible. It does not demand that an employer approve time off or another exception "that he is unable to reasonably accommodate * * * without undue hardship on [his] business." 42 U.S.C. § 2000e(j).

The decision below strayed from these principles by holding up as "[e]xamples of undue hardships" flimsy complaints like "increased workload on other employees, and reduced employee morale." Pet. App. 22a. If an employer can reject a request for religious accommodation whenever it "comes at the expense of other workers," however trivial the burden and irrelevant to business operations, Title VII's guarantee of religious accommodation becomes a dead letter. *Id.* (quoting *Walmart Stores*, 992 F.3d at 659). That the

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scribes an interactive process where employee and employer are supposed to cooperate "in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (quotation omitted).

Third Circuit applied such a misconstruction of "undue burden" is an error that should be corrected.

B. Decisions Under the ADA Disavow that Inconvenience to Other Employees Counts as an "Undue Burden" on the Employer.

Turning again to the ADA, regulatory guidance and precedents deny that minor burdens on coworkers or their dissatisfaction constitute an undue hardship.

Regulatory guidance on the duty to accommodate disabled employees is instructive. The EEOC explains that "'[u]ndue hardship' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." *Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. § 1630, app'x. But the EEOC rejects the notion that employee morale qualifies as an undue hardship. *Id.* ("Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs."). The gulf between this standard and the decision below could hardly be wider. See Pet. App. 22a (accepting "reduced employee morale" as an undue hardship).

Following that logic, courts applying the ADA have resisted treating insignificant burdens on coworkers as an undue hardship. See, *e.g.*, *Cripe* v. *San Jose*, 261 F.3d 877, 892–93 (9th Cir. 2001) ("[R]esentment by other employees who are concerned about 'special treatment' for disabled co-workers is *not* a factor that may be considered in an 'undue hardship' analysis.") (emphasis in original); *Rascon* v. *US W. Commc'ns,*

Inc., 143 F.3d 1324, 1335 (10th Cir. 1998) (denying that an employer would suffer undue hardship when the employee's "duties were covered by co-workers while he was on leave").

This approach under the ADA ought to be the model for applying Title VII. The *in pari materia* canon suggests that Title VII should follow the ADA's framework for determining which burdens on coworkers rise to the level of an undue burden. See *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 534. No religious employee should be denied a reasonable accommodation because her coworkers resent her "special treatment," *Rascon*, 143 F.3d at 1335, or because, more obscurely, an accommodation will cause "reduced employee morale." Pet. App. 22a. Congress's protection of religious freedom holds greater importance than that.

C. Requiring Others to Respect Civil Rights and Constitutional Rights Is Basic to Any Legal Regime Promising Such Rights.

The Third Circuit's decision equating burdens on coworkers with burdens on an employer's business is not only a glaring misreading of Title VII—it is dangerous in principle. Denying a religious accommodation merely because it affects other employees effectively puts that accommodation to a vote. Asking to wear a discreet cross on a necklace might win consensus. A request for time off on Saturdays to observe one's Sabbath might not.

Granting the right to a religious accommodation only when it secures popular support would grant coworkers something like a heckler's veto. Cf. *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134–35 (1992). Even worse, that conception of personal rights

would profoundly undermine civil and constitutional rights across the breadth of federal law.

1. Take laws prohibiting discrimination. These often burden rights of property, contract, and association. Yet no one credibly argues that such laws should apply only when they affect no one else. Imagine if the Third Circuit's understanding of religious accommodation were extended to other federal civil rights. Disabled employees could be fired if coworkers resent the late arrival, the longer lunch break, or the intermittent leave granted as a reasonable accommodation. See *Petrosky* v. *N.Y. State Dep't of Motor Vehicles*, 72 F. Supp. 2d 39, 60 (N.D.N.Y. 1999) (ruling that a diabetic employee was terminated for her disability, based on evidence that her "supervisors and coworkers were upset by realignments made in the work schedule to accommodate [her]"). Withholding a right whenever it affects others would even reverse one of the generative events of the modern civil rights era. Sit-in demonstrators at lunch counters in the Jim Crow South could be removed for trespass if serving them provoked other customers to object. Cf. *Hamm* v. *Rock Hill*, 379 U.S. 306, 308–09 (1964). That can't be right.

The damage to civil rights law would not end there. Denying the protection of federal law whenever its exercise might impose a burden on someone else (however trivial) could cripple or nullify multiple federal laws protecting religious people and institutions. Otherwise, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, would allow "the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014). By the same

principle, religious exemptions in the Fair Housing Act, 42 U.S.C. § 3607, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(3), and the ADA, 42 U.S.C. § 12187, would all be vulnerable.[6]

2. First Amendment rights would likewise suffer under such a principle. The implication is that an employee can exercise religion only if it affects no one else. Even the *Smith* decision—hardly a high-water mark for religious freedom—invites lawmakers to exempt religious people and institutions from the incidental effects of general laws, even if doing so somewhat undermines laws that benefit others. See *Emp't Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 890 (1990) (recognizing that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well").

3. Nor does the Establishment Clause condemn legislative measures to protect the exercise of religion. Rather, it "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), does not detract from that principle. *Caldor's* invalidation of a state law granting employees an unqualified right not to work on their preferred Sabbath does not put in question Title VII's religious accommodation requirement. *Id.* at 710–11. *Caldor* turned on a determination that the Establishment Clause could not tolerate an unyielding law that

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[6] The same logic would undermine religious exemptions under state law. See, *e.g.*, Conn. Gen. Stat. § 52-571b (state RFRA); Fla. Stat. § 761.01 *et seq.* (same); 775 Ill. Comp. Stat. 35/1 *et seq.* (same).

disregarded the "interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. By contrast, Title VII prescribes a balancing test under which an employer need not accommodate religion when it would cause an "undue hardship." 42 U.S.C. § 2000e(j). See also Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Kty. L.J. 603, 616 (2018) (explaining that "the statute in *Caldor* favored the religious claimant absolutely * * * making it unconstitutional").

Besides, *Hardison's* "de minimis cost" standard cannot be justified as an exercise in constitutional avoidance based on the Establishment Clause doctrine of its day. See 432 U.S. at 89 (Marshall, J., dissenting). The test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), on which *Hardison* and *Caldor* depend, has been retired. See *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022). In its place is a "focus[ ] on original meaning and history." *Id.* at 2428. Taking that perspective reveals that laws accommodating religion reflect "a national heritage with roots in the Revolution itself." *Walz* v. *Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970). Laws safeguarding the exercise of religion "follow[ ] the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Decades ago, in fact, this Court sustained a companion provision of Title VII in the face of an Establishment Clause challenge: "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 338 (1987). The same principle applies here.

4. Indeed, none of our other cherished constitutional and civil rights become impotent whenever their exercise would "detrimentally affect others." *Holt* v. *Hobbs*, 574 U.S. 352, 370 (2015) (Ginsburg, J., concurring). That principle would sharply curtail the right of free speech, among many others. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 458–61 (2011) (demonstration near serviceman's funeral protected); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (unfavorable press coverage protected).

* * *

Correctly interpreted, Title VII's mandate to accommodate employees' religion affirms this Nation's fundamental commitment to religious freedom. That mandate embodies a careful balance between the right of workers to practice their religion without sacrificing their jobs and the ability of employers to maintain an effective workplace. *Hardison* destroyed that balance by creating a legal standard at war with the statutory text and so undemanding in practice that employers nearly always win. At long last, *Hardison* should be retired. The ADA's familiar standard should be the measure to discern when Title VII excuses an employer from accommodating an employee's religion. See 42 U.S.C. § 12112(b)(5)(A). That duty is assuredly not satisfied merely because accommodating religion causes other employees to grumble about inconvenience or favoritism. A right that exists only when it bothers no one else is no right at all.

CONCLUSION

For these reasons, the Court should reverse the decision of the Third Circuit.

Respectfully submitted,

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