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

BRIEF OF MEMBERS OF THE UNITED STATES SENATE AND UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SARAH E. CHILD
NELSON MADDEN BLACK LLP
475 Park Avenue South
Suite 2800
New York, NY 10016
(212) 382-4306
schild@nelsonmaddenblack.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Regulatory Materials

Legislative History

Briefs

Other

INTEREST OF *AMICI CURIAE*[1]

Amici[2] are 15 members of Congress who implore this Court to reject the atextual definition of "undue hardship" it adopted in the 1977 decision of *TWA v. Hardison*. That definition blatantly contradicted both the words Congress unanimously[3] enacted in the 1972 amendments to Title VII and the Congressional purpose stated in the legislative record.

The 1972 amendments required that an employer accommodate its religious employees unless it demonstrated an "undue hardship" on the conduct of its business, which the Court in *Hardison* puzzlingly defined as "more than a de minimis cost."[4] This interpretation is nowhere to be found in the statute and has severely impacted the very individuals the 1972 amendments were intended to protect.

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*'s counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, counsel of record received timely notice of *amici*'s intent to file this brief, and the parties have consented to its filing.

[2] A full listing of *amici* appears in the Appendix.

[3] *TWA v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting) (explaining that the 1972 amendments were "unaminously [sic] approved by the Senate on a roll-call vote, [*Dewey v. Reynolds*, 402 U.S. 689, 731 (1971)], and [were] accepted by the Conference Committee, H.R. Rep. No. 92-899, p. 15 (1972); S. Rep. No. 92-681, p. 15 (1972), whose report was approved by both Houses, 118 Cong. Rec. 7169, 7573 (1972).").

[4] *Id.* at 84.

As United States Senators and Representatives, *amici* have a strong interest in the proper interpretation of federal laws and in ensuring "that freedom from religious discrimination in the employment of workers is for all time guaranteed by law[,]"[5] as heralded by Congress in the amendments' legislative record. *Amici* are also uniquely positioned to explain that the standard the Supreme Court adopted in *Hardison* contradicted the text Congress enacted, flouted Congress' intent to robustly protect the religious freedom of employees, and has been explicitly rejected by Congress in subsequent legislation. As such, *amici* submit this brief to ask this Court to correct its error before any more persons of faith, like Gerald Groff, are forced to decide between their job and their God.

[5] 118 Cong. Rec. 705 (1972).

INTRODUTION AND SUMMARY OF ARGUMENT

Since it was decided 45 years ago, *Hardison* has been a thorn in the side of religious adherents seeking to honor their religious convictions while also maintaining gainful employment. This case continues *Hardison*'s disastrous legacy, stripping a devout Christian of his job for observing the Sabbath while leaving his employer unscathed, contrary to the text and Congressional purpose of the 1972 amendments to Title VII of the Civil Rights Act of 1964.

Hardison gutted the then newly added section 701(j) of that act—which made it unlawful for an employer to fail to accommodate a religious employee unless it demonstrated "undue hardship" on the conduct of its business—by defining "undue hardship" as merely "more than a de minimis cost." *TWA v. Hardison*, 432 U.S. 63, 84 (1977). While this reasoning was merely dicta, lower courts have continuously applied it to the severe detriment of religious individuals of all kinds. Furthermore, the standard suffers from multiple deficiencies, requiring this Court to act.

First, the standard completely contravenes the plain text of the statute, as "more than a de minimis cost" is not a natural or ordinary definition of the phrase "undue hardship." Second, the standard is irreconcilable with the Congressional purpose of Title VII. Indeed, the legislative history of the 1972 amendments clearly shows that Congress aimed to do away with harmful lower court precedents eviscerating the accommodation requirement, to

provide statutory authority for the 1967 EEOC guidelines that required accommodation absent an "undue hardship," and to provide robust protections for religious freedom in accordance with constitutional standards. Each of these purposes is thwarted by the Court's reasoning in *Hardison*. Moreover, the "more than a de minimis cost" standard has been further eroded by subsequent legislation such as the Americans with Disabilities Act ("ADA"), in which Congress deliberately rejected *Hardison*'s "undue hardship" definition. These flaws require an explicit course correction by this Court making clear that the "more than a de minimis cost" standard, which no party advanced[6] and which the *Hardison* Court did not even attempt to justify, is overruled once and for all.

ARGUMENT

I. The *Hardison* Standard Is Irreconcilable with the Text of Title VII

The "more than a de minimis cost" definition the Court assigned to the term "undue hardship" in *Hardison* stretches credulity, as it contradicts "simple English." *Hardison*, 432 U.S. at 92 n.6. (Marshall, J.,

---

[6] *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Gorsuch, J., and Thomas, J., concurring in the denial of certiorari) (explaining that "no party in [*Hardison*] advanced the de minimis position"); Brief for Pet'r at 41, 47, *TWA v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126); Brief for Resp't at 8, 21, *TWA v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126).

dissenting). This Court must reject this interpretation and return to the text Congress originally enacted. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018) (Sotomayor, J.) (rejecting statutory interpretation that is "completely unmoored from the statutory text.").

In statutory construction cases, this Court always "[s]tart[s] . . . with the statutory language[.]" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017) (Kagan, J.). The statutory text of Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion[.]" 42 U.S.C. § 2000e-2(a)(1). The phrase "undue hardship" was added to the statute when Congress defined "religion" in its 1972 amendments:

> [t]he term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Id. § 2000e(j). "Undue hardship" was undefined.

"Where Congress does not furnish a definition of its own, [the Supreme Court] generally seek[s] to

afford a statutory term 'its ordinary or natural meaning[,]'" *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021) (quoting *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994)), as understood from "the time Congress enacted the statute[,]" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The inquiry thus becomes how dictionaries defined "undue hardship" at the time Congress enacted these amendments in 1972.

"Any definition of a word that is absent from many dictionaries . . . is hardly a common or ordinary meaning." *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012); *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (Kagan, J.) (declining to adopt a definition that was "foreign to any dictionary" in the Court's awareness).

In *MCI Telecommunications Corporation v. AT&T Corporation*, Justice Scalia rejected the proffered definition of the word "modify" as making a fundamental change when "[v]irtually every dictionary [the Court was] aware of says that 'to modify' means to change moderately or in minor fashion." *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 225 (1994) (superseded by statute on other grounds). There, only one dictionary supported the suggested definition. *Id.* Had there been an "accepted alternative meaning[] shown . . . by <u>many</u> dictionaries[,]" *id.* at 227 (emphasis added), such an alternative definition would "indicate[] that the statute is open to interpretation[,]" *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992).

Here, the "more than a de minimis cost" definition that the Court gave to the phrase "undue hardship" in *Hardison* is not supported by the definition set forth in even one dictionary (like the discarded definition in *MCI Telecommunications*), let alone "many" of them, and is in fact in conflict with the common or ordinary meaning of the terms "undue" and "hardship."

In 1972, the word "undue" was ordinarily defined as "unwarranted" or "excessive," *The Random House Dictionary of the English Language* 1433 (1968), while "hardship" was ordinarily defined as "a condition that is difficult to endure; suffering; deprivation; oppression," *id.* at 602. The American Heritage Dictionary of the English Language,[7] The Concise Oxford Dictionary of Current English,[8] and Webster's New Illustrated Dictionary[9] all concur.

"De minimis" on the other hand, was defined by Black's Law Dictionary at the time as, "very small or trifling," tantamount to a "fractional part of a penny." *Black's Law Dictionary* 482 (4th ed. 1968).

---

[7] *The American Heritage Dictionary of the English Language* 1398 (1969) (defining "undue" as "exceeding what is appropriate or normal; excessive"); *Id.* at 601 (defining "hardship" as "[e]xtreme privation; adversity; suffering").

[8] *The Concise Oxford Dictionary of Current English* 1268 (6th ed. 1976) (defining "undue" as, *inter alia*, "excessive"); *Id.* at 489 (defining "hardship" as "severe suffering or privation").

[9] *Webster's New Illustrated Dictionary* 723 (1968) (defining "undue" as "improper, excessive, more than is reasonable"); *Id.* at 279 (defining "hardship" as "privation, anything hard to bear").

It cannot seriously be contended that a "very small" or "trifling" cost is the same as one that causes "excessive suffering" and "deprivation." In fact, "more than a de minimis" cost may not even cause suffering, let alone "excessive suffering." Yet that is what the Court in *Hardison* held, setting a destructive precedent that Congress does not mean what it says it means, even in the clearest of cases.

"Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.). Yet the *Hardison* majority acts as if Congress did exactly this, hiding an alternate definition within the text of "undue hardship." It is "past time for the Court to correct it." *Small v. Memphis Light, Gas & Water,* 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., joined by Alito, J, dissenting from the denial of certiorari).

II. The *Hardison* Standard is Irreconcilable with the Congressional Purpose of Title VII

Not only did *Hardison* dismiss the plain language of Title VII's enacted text—which is considered the "best indicator" of Congressional intent[10]—but it also "adopt[ed] the very position that Congress expressly rejected in 1972, as if [it was] free to disregard [C]ongressional choices that a majority of th[e] Court thinks unwise." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). This Court should therefore

[10] *Nixon v. United States*, 506 U.S. 224, 232 (1993).

overturn *Hardison* and return Title VII to the purpose Congress expressly stated in the legislative history: protecting the very individuals that the *Hardison* standard harms the most.

As a preliminary matter, much has been said about whether legislative history should have any use in the interpretation of a statute. Justice Scalia once said that the use of legislative history has been "describe[d] . . . as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

While it is true that legislative history may be selectively used to support a preferred statutory interpretation, the distinguishing feature of the "cocktail party" that is the short legislative history of the 1972 amendments is this: there were only "friends" in attendance. Indeed, there is nothing to be found in the legislative history of Title VII's 1972 amendments that supports the interpretation of undue hardship that *Hardison* espoused.

Additionally, while legislative history should generally only be used to "illuminate ambiguous text[,]" *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011)—which is unequivocally not the case here—the legislative record of Title VII is nevertheless another unavoidable crack in the foundation of *Hardison* that cannot be overlooked.

The record is clear that Congress intended the Title VII amendments to reject precedents that did

not require accommodation under Title VII, to validate the 1967 EEOC guidelines containing the original "undue hardship" language, and to champion constitutional standards. Furthermore, when the *Hardison* Court foiled these objectives, Congress specifically defined "undue hardship" in later legislation to avoid the consequences of the "more than a de minimis cost" standard. *Hardison* must therefore be overturned to comport with Congressional intent.

A. *Hardison* Erroneously Embraced Precedents That Congress Expressly Rejected

The legislative history of the 1972 amendments to Title VII, dismissed by the majority in *Hardison* as "of little assistance" in "determining the degree of accommodation that is required of an employer[,]" *Hardison*, 432 U.S. at 74, is actually "far more instructive than the Court allow[ed]," *id.* at 88 (Marshall, J., dissenting). The sponsor, Senator Jennings Randolph, after making preliminary remarks about the purpose of the amendment (which themselves showed that Congress' intention was to expand and not reduce protections for religious employees), made it clear that the amendments were meant to reject specific precedents promulgating a flawed understanding of Title VII. *Hardison*'s resurrection of these precedents and subsequent adoption of the "more than a de minimis cost" standard completely contravenes this legislative record.

Notably, Senator Randolph, himself a Seventh Day Baptist, began by stating that the purpose of the amendment was "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972). Then, despite the *Hardison* Court's unsubstantiated assertion that Congress "made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied[,]" *Hardison*, 432 U.S. at 75, Senator Randolph asserted he was particularly concerned for employees who were faced with precisely the situation as Hardison and Groff: the "refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days[,]" 118 Cong. Rec. 705 (1972).

The Senator went on to explain that court decisions had "clouded the matter with uncertainty" and that the amendments were "intended . . . to resolve by legislation . . . that which the courts have apparently not resolved." *Id.* at 705-06. The cases to which Senator Randolph referred were the Sixth Circuit's decision (and the Supreme Court's equally divided affirmance)[11] in *Dewey v. Reynolds Metals Company*,[12] and the Middle District of Florida's decision in *Riley v. Bendix Corporation*,[13] both of which were included in the Congressional record. *Id.*

---

[11] *Dewey v. Reynolds Metals Co.,* 402 U.S. 689 (1971).

[12] *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 336 (6th Cir. 1970).

[13] *Riley v. Bendix Corp*., 330 F. Supp. 583, 591 (M.D. Fla. 1971).

at 706, 711. The 1972 amendments were meant to reject the reasoning of these cases.

Dewey and *Riley*—which both dealt with religious employees seeking to be excused from work to observe the Sabbath—stood for the principle that Title VII prevented intentional discrimination on the basis of religious beliefs but did not require accommodation of religious practices.

In *Dewey,* the Sixth Circuit maintained that Mr. Dewey's employer did not discriminate against him by requiring him to work overtime on Sundays pursuant to a collective bargaining agreement because that agreement "was equal in its application to all employees and was uniformly applied, discriminating against no one." *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 336 (1970). The Court specifically stated that an "employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." *Id.* at 335 (emphasis added).

In *Riley*, the federal district court found that no discrimination under Title VII occurred when a Seventh Day Adventist was terminated for his refusal to work on Saturdays because the shift assignment "came in the usual and normal conduct of the [employer]'s business" and the policy applied equally to all employees. *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971).

Put simply, under these precedents, neutral employment practices that applied across the board did not constitute religious discrimination, and giving

religious adherents exceptions to such practices would constitute impermissible preferential treatment.

Justice Thurgood Marshall observed that the reasoning in *Dewey* and *Riley* was "strikingly similar" to the majority's opinion in *Hardison*, even though such reasoning was supposed to be put to bed with the 1972 amendments. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Indeed, the 1972 amendments broadly defined "religion" to include religious practices and not just beliefs. Congress therefore made it clear that Title VII does not just protect employees from discrimination on the basis of their religious beliefs, but also from discrimination on the basis of their religious practices, even if such discrimination comes in the form of a generally applicable policy.

The Court in *Hardison* nevertheless stated that it would be

> anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 81. Having elevated the flawed premises of *Dewey* and *Riley* to Supreme Court

precedent, the Court then introduced its "undue hardship" standard and dealt "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):

> To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. . . . [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.

Hardison, 432 U.S. at 84.

By expanding the definition of "undue hardship" to include anything that results in "more than a de minimis cost," the Court essentially did away with any obligation to accommodate at all, since almost any cost will be more than a de minimis burden. Thus, the flawed reasoning of *Dewey* and *Riley* reigns.

Such contravention of the legislative purpose of Title VII must be corrected, especially when the reasoning of *Dewey* and *Riley* was further undermined by this Court's 2015 decision in *EEOC v. Abercrombie & Fitch Stores, Inc.* There, this Court found that failing to hire an applicant because her religiously required headscarf ran afoul of the employer's neutral employee dress policy constituted discrimination under Title VII, even if the employer

did not have direct knowledge that the applicant was a Muslim. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770, 773-74 (2015). Significantly, this Court opined that "Title VII does not demand mere neutrality with regard to religious practices," but instead "gives them favored treatment[.]" *Id.* at 775. As a result, "when an applicant requires an accommodation as an aspec[t] of religious . . . practice,"—like the employees in *Dewey*, *Riley*, *Hardison*, and here—"it is no response that the subsequent fail[ure] . . . to hire was due to an otherwise-neutral policy." *Id.* (internal quotation marks removed). The employer's failure to accommodate Hardison because it would give him a benefit due to his religion is therefore no longer viable when "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

At this point, *Dewey* and *Riley* have no precedential value, yet the "more than a de minimis cost" standard they birthed lives on. The devastating irony is that Congress ultimately envisioned that a "very, very small percentage of cases" would result in no accommodation. 118 Cong. Rec. 706 (1972). But the "more than a de minimis cost" standard turns this purpose on its head, because in most cases an employer can articulate a "very small" or "trifling" hardship. *See Black's Law Dictionary* 482 (4th ed. 1968). This greatly restricts religious liberty, rather than ensuring it for "all time[,]" 118 Cong. Rec. 705 (1972), and puts religious employees to the "cruel choice of surrendering their religion or their job[,]" *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). This Court should therefore honor the legislative

history of the 1972 amendments and retire the "more than a de minimis cost" standard for good.

B. *Hardison* Misunderstood the Import of the 1967 EEOC Guidelines

As a preliminary point, the "more than a de minimis cost" standard announced in *Hardison* did not even interpret the actual text of Title VII. As Justice Thomas noted, it interpreted the 1967 EEOC Guidelines in effect at the time, which contained the same "undue hardship" language. *Abercrombie*, 575 U.S. at 787 n. (Thomas, J., concurring in part and dissenting in part). This renders the reasoning merely dicta, although lower courts have failed to see it that way, instead using it to make religious protections in the workplace obsolete.

In any event, the history of that regulation (including its departures from the regulation preceding it), Congress' explicit mention of the regulation in the legislative history of the 1972 amendments, and Congress' ultimate endorsement of the regulation demonstrate Congress' intent for the religious freedom protections in the amendments to be far more robust than the *Hardison* majority found.

First, the history. In 1966, the EEOC issued regulations declaring that an employer had an obligation under the statute "to accommodate the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.1(a)(2) (1967) (effective June 15, 1966).

However, that same guideline also contained the following two restrictive provisions:

> 1605.1(a)(3)
>
> an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees.
>
> 1605.1(b)(3)
>
> [t]he employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

In 1967, the EEOC amended its guidelines again, departing significantly from its previous iteration by omitting the above-quoted language entirely and adding an affirmative obligation for employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made

without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b) (1968) (effective July 10, 1967). The new guidelines also contained an example of undue hardship: "where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." *Id.*

Next, Congress' response. The 1972 amendments at issue in this case were enacted five years after the 1967 regulation. Generally, when Congress "amend[s] the law without repudiating the regulation," it "'suggests its consent to the Commission's practice.'" *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (quoting *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981)). Here, Congress was very much aware of the history of these guidelines when it contemplated the 1972 amendments, and its consent to the Commission's practice in 1967 was more than implicit, lending further support for overturning *Hardison*'s undue hardship standard.

After describing the amendments, the Chairman of the House Committee specifically stated, "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey*, 429 F.2d 325 (6th Cir. 1970), Affirmed by an equally divided court, 402 U.S. 689 (1971)." 118 Cong. Rec. 7167 (1972). Far from being "opaque,"[14] this statement shows Congress intended

[14] *Hardison*, 432 U.S. at 74 n.9.

for the 1972 amendments to provide statutory support for the EEOC's 1967 guideline challenged in the *Dewey* decision.[15] Congress' purpose in the 1972 amendments could not be any more transparent: it "track[ed]" that guideline's language, *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting), and "adopted [its] position[,]" *id.* at 86.

This position was far more protective of religious employees than the 1966 Guidelines. It removed the 1966 regulation's requirement that employees' religious needs be "reasonable" to be worthy of protection. The Commission also changed its view from permitting employers to establish generally applicable "normal work week[s]"[16] with no

---

[15] *Id*. at 88 (Marshall, J., dissenting) (explaining that "[a]fter the EEOC promulgated its second set of guidelines requiring reasonable accommodations unless undue hardship would result, at least two courts [including the Sixth Circuit in *Dewey*] issued decisions questioning, whether the guidelines were consistent with Title VII.").

[16] While the majority opinion in *Hardison* stated that "[t]he EEOC at that time did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable, even if they do not 'operate with uniformity . . . upon the religious observances of [all] employees[,]'" *Hardison*, 432 U.S. at 72 n.7, this assertion is "incomprehensible" because

> [t]he preface to the later guidelines, 32 Fed. Reg. 10298 (1967), states that the 'Commission hereby amends § 1605.1, Guidelines on Discrimination Because of Religion. . . . Section 1605.1 as amended shall read as follows. . . .' Thus the later guidelines expressly repealed the earlier guidelines. Moreover, the example of "undue hardship" given in the new guidelines and quoted in the text makes clear that the

attendant accommodation requirement to requiring accommodation absent "undue hardship." Most notably, Congress specifically departed from the "serious inconvenience" language in the 1966 Guidelines, opting for a more stringent standard of "undue hardship" in the 1967 edition. Yet *Hardison* ignored all of this, returning to the pre-amendments, pre-EEOC guidelines wilderness where accommodation was never required, and even the rejected "serious inconvenience" standard of the 1966 Guidelines is preferable to the "more than a de minimis cost" rule declared. Ultimately, the 1967 Guidelines, which the 1972 amendments validated, could not have contemplated the "more than a de minimis cost" standard because it eviscerates the employer's duty to accommodate.

By rejecting *Dewey* and specifically adopting the language of the 1967 amendments that *Dewey* criticized, Congress made its intent known: accommodation is required absent undue hardship and "undue hardship" means what it says it means.

C. *Hardison* Flouted Congress' Intent to Enforce Constitutional Standards

The 1972 amendments' legislative history reveals another one of *Hardison*'s profound flaws: the

---

> Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for religious observances.

Hardison, 432 U.S. at 86 n.1 (Marshall, J., dissenting).

undue hardship standard's susceptibility to as-applied First Amendment challenges when the employer is a government actor, as it is here. That is because when the government burdens religious employees pursuant to a non-neutral and/or non-generally applicable law, it must show that it is doing so to further a compelling government interest in the least restrictive way. But if the government only needs to establish "more than a de minimis" cost on the conduct of its business to avoid accommodation under Title VII, it will find itself in a First Amendment bind more often than not when strict scrutiny is applicable.

In discussing the amendments, Congress emphasized that Title VII was intended "to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments[,]" and to "go back . . . to what the Founding Fathers intended." 118 Cong. Rec. 705-706 (1972). Congress also contemplated that the amendments would "allow[] flexibility" to decisionmakers to "make a discretionary judgment" regarding whether an employer has "unduly interfered with" religious adherents' free exercise. *Id.* at 706.

The discretionary judgment of whether to grant a religious accommodation constitutes what this Court described as a "mechanism for individualized exemptions" in *Fulton v. City of Philadelphia*—one kind of non-generally applicable policy that is subject to strict scrutiny under the First Amendment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1872 (2021). This is because, "where the State

has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990) (finding that controlled substance law was neutral and generally applicable in the absence of a religious exemption).

Under strict scrutiny, whenever a government employer denies an employee's request for a religious accommodation, the employer must demonstrate that the denial "serves a compelling interest and employs the least restrictive means of doing so." *Dr. A. v. Hochul*, 142 S. Ct. 552, 557 (2021) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

But how can the government show that its denial of a religious accommodation is the "least restrictive means" of furthering its alleged interest if that denial is based on only a "very small or trifling" cost? The simple answer is that it cannot. *Hardison*'s pronouncement means the government will likely violate the First Amendment whenever the asserted cost is only slightly more than de minimis. Congress surely did not envision a rule that would contravene these first principles nearly every time.

Assume, for example, that Hardison was a federal employee, like Mr. Groff. There, it would have cost TWA—one of the largest airlines in the world—only $150 for three months to pay another employee to take Hardison's shift. *Hardison*, 432 U.S. at 92 n.6

(Marshall, J., dissenting). It defies reason to suggest that TWA had no less restrictive alternatives than to burden Hardison's religious exercise when it could have just paid the trivial sum itself without disrupting its payroll or other financial systems.

The employer in *Groff*, which actually is a state actor, fares no better. Here, speculation about the impact of accommodating Groff on his co-workers convinced the court below that the United States Postal Service would suffer an undue hardship in accommodating him. This would not pass muster under the natural and ordinary meaning of Title VII, or under First Amendment standards, yet it was deemed to constitute an undue hardship. This is the dilemma in which *Hardison*-compliant government employers will continue to find themselves until *Hardison* is overturned.

D. *Hardison* Has Been Eroded by Subsequent Congressional Action

The "more than a de minimis" interpretation of "undue hardship," while never endorsed by Congress, has been further eroded by subsequent legislative action. As Justice Gorsuch explained,

> time [has not] been kind to *Hardison*. In the intervening years, Congress has adopted additional civil rights laws using the "undue hardship" standard. And when applying each of those laws, courts are far more demanding. The Americans with Disabilities Act of 1990 (ADA) requires a covered employer to

> accommodate an employee's "known physical or mental limitations" unless doing so would impose an "undue hardship." 104 Stat. 332, 42 U. S. C. §12112(b)(5)(A). The Uniformed Services Employment and Reemployment Rights Act (USERRA) obliges an employer to restore a returning United States service member to his prior role unless doing so would cause an "undue hardship." 38 U. S. C. §§4303(10), 4313(a)(1)(B), (a)(2)(B). And the Affordable Care Act (ACA) provides that a covered employer must provide a nursing mother with work breaks unless doing so would impose an "undue hardship." 124 Stat. 577, 29 U. S. C. §207(r)(3). Under all three statutes, an employer must provide an accommodation unless doing so would impose "significant difficulty or expense" in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities. *See* ADA, 42 U. S. C. §12111(10)(A) (added 1990); USERRA, 38 U. S. C. §4303(15) (added 1994); ACA, 29 U. S. C. §207(r)(3) (added 2010); *cf.* 11 U. S. C. §523(a)(8); 28 U. S. C. §1869(j).

Small, 141 S. Ct. at 1228 (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari). Congress' response could not be more resounding; each time it has defined "undue hardship" after *Hardison*, it has

adopted the ordinary meaning of the phrase, rather than the extratextual one espoused in *Hardison*.

Moreover, Congress explicitly distanced itself from *Hardison*'s interpretation of "undue hardship" in the legislative history of the ADA. Both the House and the Senate stated that "[t]he Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977) are not applicable to this legislation." S. Rep. No. 101-116, at 33 (1989); H.R. Rep. No. 101-485, pt. 2, at 68 (1990) (same). The House of Representatives further stated that,

> a definition was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of [T]itle VII in *TWA v. Hardison*, which held that accommodations to religious beliefs need not be provided if the cost was more than *de minimis* to the employer.
>
> 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). The House's understanding of "undue hardship" comports with the natural meaning of the phrase, unlike *Hardison*'s interpretation.

This is not a situation where the responsibility rests on Congress to "correct [its] mistakes through legislation," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978), when the standard at issue is "th[is] Court's own error." *Girouard v. United States*, 328 U.S. 61, 70 (1946). This Court has a duty to correct its misinterpretation of the "undue hardship" standard before it wreaks any more havoc on religious employees.

CONCLUSION

To restore the undue hardship standard to the text that Congress enacted and give effect to Congress' intent to broadly protect religious liberty, *amici* request that the petition for writ of certiorari be granted.

Dated: September 26, 2022

Respectfully submitted,

Sarah E. Child
Nelson Madden Black LLP
475 Park Avenue South
Suite 2800
New York, NY 10016
Telephone: 212-382-4306
schild@nelsonmaddenblack.com

Counsel for Amici Curiae

APPENDIX

APPENDIX A

AMICI CURIAE MEMBERS OF CONGRESS

Three United States Senators

Senator James Lankford

Senator Tim Scott

Senator Marco Rubio

Twelve Members of the United States House of Representatives

Rep. Vicky Hartzler

Rep. Jody Hice

Rep. Louie Gohmert

Rep. Ronny Jackson

Rep. Mary Miller

Rep. Diana Harshbarger

Rep. Joe Wilson

Rep. Doug Lamborn

Rep. Barry Moore

Rep. John Carter

1b

Rep. Cathy McMorris Rodgers

Rep. Robert Aderholt