No. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

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

BRIEF OF *AMICI CURIAE* JEFFREY PODELL AND THE RIEDERS FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are Jeffrey Podell and The Rieders Foundation. Jeffrey Podell is Plaintiff in a case pending in the United States District Court for the Eastern District of Pennsylvania filed against Lloyd J. Austin, III, in his official capacity as Secretary of the United States Department of Defense; Frank D. Whitworth, III, in his official capacity as Director of the National Geospatial Intelligence Agency; Frank Kenney, in his official capacity as Chief of Police, National Geospatial Intelligence Agency Police; Richard Weiss, in his official capacity as Assistant Chief Of Police, National Geospatial Intelligence Agency Police; Jason Tinnin, in his official capacity as Major of Police, National Geospatial Intelligence Agency Police; Wesley Lee Jordan, in his official capacity as Lieutenant of Police, National Geospatial Intelligence Agency Police; Marcus Dwayne Jackson, in his official capacity as Lieutenant of Police, National Geospatial Intelligence Agency Police; Jesse McNeil, in his official capacity as Lieutenant of Police, National Geospatial Intelligence Agency Police; Marcel Young, in his official capacity as Lieutenant of Police, National Geospatial Intelligence Agency Police; and Larence Dublin, in his official capacity as Corporal of Police, National Geospatial Intelligence Agency Police.

The case was filed on September 1, 2022 to No. 22-cv-3505, and is pending before The Honorable Joel H.

1. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their respective members, or their counsel made a monetary contribution to the brief's preparation and submission.

Slomsky. The current posture of the case is that a 12(b)(6) Motion has been filed, addressed chiefly to the question of venue. The Complaint alleges, *inter alia*, violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the First, Fifth and Fourteenth Amendments to the United States Constitution addressing freedom of religion, equal protection and substantive due process; and the Religious Freedom Restoration Act.

Podell has alleged in his case that not only did the Defendants fail to afford a reasonable accommodation, but in fact they utilized a presumptive policy not to afford a reasonable accommodation or to determine with any degree of specificity the burden of offering a reasonable accommodation. The entirety of the EEOC investigation in Mr. Podell's case is set forth in the Complaint, the most recent of which is his Second Amended Complaint. Defendants, during the EEO process, asserted that Plaintiff and others similarly situated had no rights to accommodation of religious beliefs due to the 24/7 nature of the agency. Defendants did not consider whether another testing date was available to accommodate the religious beliefs of religiously observant Jews such as Plaintiff. *See* paragraph 59 of the Second Amended Complaint, Document 21.

The position of Mr. Podell, a religiously observant Jew who will not participate in activities on the Sabbath that violate the religious laws governing the Sabbath (e.g., handling money, using motorized transportation, using an umbrella on the Sabbath), is that an ingrained prejudicial policy and practice exists on the part of Defendants and instituted by same in which no legitimate "burden" analysis or dialogue is made with respect to accommodation of a

requested religious practice to find a middle ground and/or interim solution as required by the EEOC's own guidances on eliminating religious discrimination. *See, e.g.,* paragraph 30 of Second Amended Complaint, Document 21; and Office of Legal Counsel (2021), *Compliance Manual on Religious Discrimination* (OLC Control No. EEOC-CVG-2021-3). U.S. Equal Employment Opportunity Commission, Office of Legal Counsel, available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_98446132869161074866550 4. Mr. Podell also tried his best during the EEO investigation to educate Defendants that other agencies have practices which accommodate religiously observant Jews. *See* Podell's Second Amended Complaint, Document 21, paragraph 72, as well as how his then current and most recent prior employer accommodated his religious beliefs. As *Amicus*, Mr. Podell urges this Honorable Court to recognize that such a policy is an outgrowth of certain erroneous judicial interpretations of the "undue hardship" requirement following *TWA v. Hardison*, 432 U.S. 63 (1977), and that it offends the principles of religious freedom enshrined in the Constitution and protected by Title VII.

The Rieders Foundation, established more than 30 years ago as a non-profit organization, is dedicated to enhancing Jewish culture and the civil rights of the Jewish people. Its Hatzilu division provides financial aid directly to needy members of the Jewish community. The Rieders Foundation combats all forms of anti-Jewish discrimination through litigation, including when the discrimination is expressed as anti-Israelism.

The Rieders Foundation has previously filed litigation in federal court and before government administrative agencies on behalf of members of the Jewish faith who have faced discrimination as a result of their beliefs, adherence and convictions.

Amici have joined together to file this Brief because they share a commitment to equal opportunity for all American citizens.

SUMMARY OF ARGUMENT

The issues accepted by this Court are:

1. Whether the Court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and

2. 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 coworkers rather than the business itself.

It is clear that both of these issues underlie the reasoning of the United States, as pled by Mr. Podell, in failing and refusing to consider a reasonable accommodation and overtly to determine not even to attempt an accommodation. No consideration was made as to whether an accommodation would be more than a *de minimis* obstacle or would burden other employees

employed by the United States of America. It is the legacy of *TWA v. Hardison*, 432 U.S. 63 (1977), which this Court is to review, that the United States, in its hiring practices, is disinterested in even making the analytical analysis dictated by the case law, the statute, the regulatory structure, and the United States Constitution. The slippery slope of *TWA v. Hardison* has led to the abyss of disinterest in affording a reasonable accommodation which has directly affected the interests of Jeffrey Podell.

It is further the view of *Amici* that a double standard appears to exist with respect to religious members of the Jewish community who observe Saturday as their Sabbath, and that those who observe religious principles in general are relegated to secondary status. Such status does not accord either with constitutional principles or the foundation of Title VII.[2]

ARGUMENT

I. The history of employment discrimination against Jewish Americans.

While the history of discrimination against minorities in America is well-known, sometimes less understood are the obstacles and burdens faced by religiously observant Jewish Americans. The constitutional protections afforded Americans do not pertain to any particular class or group.

2. The United States of America, in the *Podell* matter, has also raised in its 12(b)(6) Motion, that Title VII totally preempts any constitutional right, an assertion with which Plaintiffs in *Podell v. Austin, et al.* vigorously disagree. The Second Amended Complaint is Document 21, and Plaintiff Podell's Opposition to the 12(b)(6) Motion filed by the United States of America is Document 25.

Invidiously discriminatory animus has been found to violate American core principals in a myriad of cases too numerous to mention.

Therefore, *Amici* seek the Court's indulgence in a brief sketch of obstacles faced by Sabbath observing Jewish Americans in America.

The history of discrimination against Jewish communities in the United States dates back to the arrival of Portuguese Jews to New Amsterdam in 1654. Following the Dutch West India Company's approval of Jewish immigration to New Amsterdam, Peter Stuyvesant adopted several different approaches to discourage Jews from permanent settlement.[3]

In 1654 or 1655, the date is unclear from the literature, Stuyvesant, "importuned the colonial council to bar Jews from serving in the volunteer home guards." While this ban was eventually overturned after a two-year legal battle between Asser Levy, Joseph Barsimon and the colonial court, it represented one of the first instances of state-sanctioned discrimination against Jews serving in official positions.[4]

Following the Dutch capture of Swedish territory along the Delaware River, "Stuyvesant refused to issue trade permits to Jewish settlers in the new territory." After protests by Jewish settlers against these harmful

3. M. Feldberg, "Amsterdam's Jewish Crusader" Jewish Virtual Library (© 1998-2023 American-Israeli Cooperative Enterprise),https://www.jewishvirtuallibrary.org/new-amsterdam-s-jewish-crusader.

4. Ibid.

restrictions, Stuyvesant was disciplined by the Dutch West India Company. "From then on, Jews in the colony were allowed to trade and own real estate, but not hold public office, open a retail shop, or establish a synagogue."[5]

In Jonathan Sarna's *Commentary on Anti-Semitism and American History,* he offers a thorough analysis of the history of anti-Semitism in North America.

Sarna referenced Jacob R. Marcus' *The Colonial American Jew,* "a definitive three-volume study published in 1970, [devoting] a full chapter to 'rejection' of Jews in pre-revolutionary times, discussing literary images, social prejudice, and full-scale incidents of anti-Jewish violence."[6] Sarna added, "various recent monographs demonstrate that the range of anti-Semitic incidents in the young republic spanned the spectrum from literary and cultural stereotyping, social and economic discrimination, attacks on Jewish property, all the way to blood libels and lurid descriptions of purported anti-Christian sentiments in classical Jewish texts."[7] Even American heroes were not exempt from engaging in anti-Semitic rhetoric, as Thomas Jefferson "in spite of having several Jewish acquaintances, continued to think Jews morally depraved, and lamented that 'among them ethics are so little understood.'"[8]

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5. Ibid.

6. J. D. Sarna, "Anti-Semitism and American History" Commentary Magazine, vol. 71, No.3 (March 1981), 42-47, 43. https://www.brandeis.edu/hornstein/sarna/popularandencyclopedia/Archive/Anti- SemitismandAmericanHistory.pdf.

7. Ibid.

8. Ibid., 44

In the decades leading up to World War II, Sarna contended that "by all accounts, anti-Semitism crested in America during the half-century preceding World War II. During this era of nativism and then isolationism, Jews faced physical attacks, many forms of discrimination, and intense vilification in print, on the airwaves, in movies, and on stage."[9]

In 1956 Lois Waldman published an exposé outlining the history of anti-Semitism in the American workplace. She began with the troubling assertion that, "existing evidence concerning the employment of Jews in the United States indicates that American Jews still face handicaps in obtaining employment, handicaps that are not faced by non-Jews…[Jews] are largely excluded from many of the basic industries, such as commercial banking, automobile manufacturing, shipping and transportation, agriculture and mining."[10]

Waldman cited several studies and surveys that indicated the presence of anti-Semitic discrimination in the American workplace. She explained, "The Chicago Bureau on Jewish Employment Problems made a survey of 20,000 job orders placed with commercial employment agencies in Chicago during 1953 and 1954. Over 90 percent of the openings were in white-collar categories, mostly of a routine clerical nature. Despite the extreme shortage of workers in these categories, more than 20 percent of the orders were specifically closed to Jews and such orders

9. Ibid., 45

10. Footnotes 10 L. Waldman, "Employment Discrimination against Jews in the United States - 1955." Jewish Social Studies, vol. 18, no. 3 (1956), 208–16, 208. http://www.jstor.org/stable/4465458.

were placed by 27 percent of the firms involved. (Among 955 Chicago firms placing discriminatory orders were 142 companies holding contracts with the government; these contracts prohibit discrimination.)"[11] Similarly, a report from September 1955 by the Chicago Bureau on Jewish Employment Problems "found that Jewish job-seekers have less than half as much opportunity to be placed by employment agencies as non-Jewish applicants."[12]

In May 1954 the Jewish Congress' Commission on Law and Social Action conducted a survey of the employment experiences of the law school graduates of Chicago, Columbia, Harvard and Yale Universities, which demonstrated, "Jewish law school students in the period 1951-1952 encountered markedly different treatment in applying for employment in the legal profession. The survey revealed that the rate of job acceptance is substantially lower for Jewish than for non-Jewish graduates."[13] As a result, 35 percent of Jewish graduates seeking employment in the legal field admitted to refraining from applying to certain businesses out of the fear of discrimination. Waldman inferred that, "this would indicate that a substantial proportion of the Jewish group exhibits a greater awareness of and concern with this dimension of job-seeking; a concern that plays relatively little part in the job-seeking behavior of non-Jews."[14] Unfortunately, this sentiment is still prevalent among Jewish communities to this day.

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11. Ibid., 211

12. Ibid., 211

13. Ibid., 213

14. Ibid., 213

In February 2022, Matt Gonzales with the Society for Human Resource Management (SHRM) authored an article titled, "Combating Anti-Semitism in the Workplace." Gonzalez's research demonstrated that "one in 4 Jewish Americans say they have been a target of anti-Semitic behavior, such as a physical attack or a racial slur, according to a 2021 report by the American Jewish Committee. These incidents happen in public, at schools and in the workplace."[15] Andrea Lucas, a commissioner on the Equal Employment Opportunity Commission added, "too often, instances of anti-Semitism in the workplace go ignored, unreported or unaddressed."[16] Gonzalez clarified that examples of anti-Semitism in the workplace "include firing, not hiring or paying someone less because the person is Jewish; assigning Jewish individuals to less-desirable work conditions; refusing to grand religious accommodations; and making anti-Jewish remarks."[17]

The renowned Professor Jonathan Sarna contributed to Plaintiff's Brief before the District Court aforementioned, in *Podell v. Austin,* Document 25, as Exhibit A to that Brief. Given the outstanding status of Professor Sarna in connection with his understanding of the Jewish Sabbath and how it relates to employment practices, that Exhibit is reproduced herein in its entirety:

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15. M. Gonzales, "Combatting Antisemitism in the Workplace," Feb.1, 2022, Combating Antisemitism in the Workplace (shrm.org).

16. Ibid.

17. Ibid.

11

THE JEWISH SABBATH

Jonathan D. Sarna

University Professor and Joseph H. & Belle R. Braun Professor of American Jewish History

Brandeis University

"Remember the Sabbath day and keep it holy" the Bible teaches (Exodus 20:8). Jews, along with some Protestant, observe the Sabbath day on Saturday as the Bible enjoins. Most Christians, by contrast, consider Sunday to be the Sabbath day, a change sanction (*sic*) in the year 321 by Constantine, the first Christian emperor of Rome, partly from a desire to distinguish Christianity from Judaism in the eyes of the world.[18]

In the seventeenth century, the Puritans, as part of their religious teachings, greatly strengthened observance of the Sunday Sabbath, prohibiting both work and recreation on that day. They brought these principles with them to the New World, with the result that strict Sunday laws – later popularly known as "blue laws" were enacted in all of the colonies.[19]

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18. T. Eshkenazi, et al. *The Sabbath in Jewish and Christian Traditions* (Hoboken, NJ, 1991).

19. L. Pfeffer, *Church, State and Freedom* (Boston, 1967), 270-286.

> Jews as well as Seventh Day Baptists suffered harshly under these laws. Where most Americans worked six days week, they could work only five. On Saturday they rested to uphold the demands of the Lord and on Sunday they rested to uphold the demands of the state. Many who observed the Sabbath on Saturday faced a stark choice: they had either to violate the tenets of their faith or starve.[20]
>
> As early as 1817, a Jewish lawyer named Zalegman Phillips sought to persuade a Philadelphia judge that "those who profess the Jewish religion and others who keep the seventh day" should be exempted from blue laws on freedom of religion grounds.[21] Although Phillips lost his case, leading nineteenth-century proponents of Sunday legislation advocated exemptions for all who conscientiously observed the Sabbath on Saturday. In time, several states (twenty-four by 1908) enacted such exemptions into law.[22]
>
> The immigration of over 2 million East European Jews to the United States between 1881 and 1924 transformed the issue of the

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20. J.D. Sarna and D.G. Dalin, *Religion and State in the American Jewish Experience* (Notre Dame, IN, 1997), 139-140.

21. The document is reprinted in J.Blau and S. Baron, *Jews of the United States: A Documentary History* (New York, 1963), 22-24.

22. Sarna & Dalin, *Religion and State in the American Jewish Experience,* 11.

> Jewish Sabbath in the United States. A great many available jobs in the clothing trade, the cigar trade, and even on farms and in peddling made working on Saturday a condition of employment. With the six-day work week commonplace and Sunday closing laws strictly enforced, unsympathetic employers decreed that "if you don't come in on Saturday, don't bother coming in on Monday."[23]
>
> An immigrant named Harry Fischel described in his autobiography what it meant for him to be asked to violate the Jewish Sabbath. After weeks of searching for work as a new immigrant, he wrote, he found the job of his dreams in an architectural firm. He worked happily for five days and then requested to take Saturday off at no pay, so he could observe the Sabbath. His request was firmly denied, and he was ordered to come into work or lose his job. "It seemed," he recounted, "as though God had decided to give him another test of his devotion to his religious principles and his ability to withstand temptation." After a sleepless night, he resolved to compromise: "He would not give up his position, but, before going to work he would attend services in the synagogue." His worship complete, Fischel prepared to go to his office, but the sight of other Jews observing the Sabbath and the shock that he knew his parents would experience "could they but know the step he contemplated" gave him pause:

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23. J.D. Sarna, *American Judaism: A History* (2nd ed., New Haven, 2019), 162.

> Suddenly, although the day was in mid-August and the heat was stifling, he trembled as with the ague. A chill went through every fibre of his being, as though he were confronted with the biting winds of January. At the same time a strange sensation attacked his heart and he was unable to move. It seemed as though he were paralyzed and he would have fallen, had not his body been supported by a friendly wall. When with difficulty he recovered himself, his decision had been reached.

Thanks to this "mysterious manifestation of the Divine Power" he felt able to resist what he described as "the greatest temptation he had ever known." In the clarity of the moment, "he knew that neither then nor later would it ever be possible for him to desecrate the Sabbath." He lost his job but subsequently prospered – good fortune that he credited to his lifelong "principle" of Sabbath-observance.[24]

The Fischel case illuminates what Sabbath observance means to Sabbath-observant Jews. In the post-war era, the US government made it easier for them, as the Orthodox Union explains in a legal document:

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24. Herbert S. Goldstein (ed.), *Forty Years of Struggle for a Principle: The Biography of Harry Fischel* (New York: Bloch, 1928), 17-19.

Federal law requires an employer to "reasonably accommodate" an employee's religious observances, practices and beliefs unless the employer can show that accommodation would cause an "undue hardship" to the employer's business.

What constitutes "reasonable accommodation" and "undue hardship" depends on the facts unique to a particular situation. Essentially, an employer must attempt to create a structure permitting employees to practice their religious beliefs while still maintaining their jobs. In some cases, accommodation may not be possible. However, the employer bears the burden of demonstrating that a serious attempt to accommodate the employee was made.

Neither statutes nor the courts have clearly defined undue hardship. The Supreme Court ruled that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Nevertheless, an employer may not simply refuse to accommodate an employee. If the employer claims that accommodation is not feasible because it would result

> in undue hardship, the employer must demonstrate an actual effect that accommodation would have on the business.[25]

The same document explains the rights guaranteed a Sabbath-observant Jew when faced with an exam only offered on Saturday. Note that "reasonable accommodation" parallels the standard employed under contemporary disability law:

> An employer may not schedule tests in a manner that totally precludes the participation of Sabbath observers. As with the scheduling of work, the employer must attempt to accommodate the religious needs of the employee or prospective employee. The applicant, however, cannot be unreasonable in demanding accommodation. For example, if the same test is being given in another location on another day, the applicant may be required to travel to take it elsewhere. In addition, the employee may be required to take personal time to complete the test after business hours on the Monday following the

25. "Religious Accommodation in the Workplace: Your Rights and Obligations," The Union of Orthodox Jewish Congregations of America; Institute for Public Affairs (© 1997-2008 Ira Kasden), https://www.jlaw.com/LawPolicy/accommodation.html.

> scheduled test date. The same law applies to schools and educational institutions regarding final exams and other tests.[26]
>
> Where once many Jews faced a conflict between Sabbath-observance and earning a living, today the US government and most businesses accommodate Sabbath observance just as they do the religious observances of so many other minority faiths.

II. The limitations of *TWA v. Hardison* as useful precedent.

Amici adopts the reasoning of Petitioners in their Petition for Writ of Certiorari and in their reply.

Relevant to *Amici*, specifically, is the fact that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), is a very narrow decision, based upon facts readily distinguishable from the concerns expressed by *Amici* herein.

The age of the *Trans World Airlines* case does not, *ipso facto*, make it bad law, but it is certainly worth some consideration as to how the issues addressed therein have evolved. The opinion by Mr. Justice White was based exclusively upon Title VII. The Court recognized that discrimination based upon religion is unlawful. The Government defense relied upon the Equal Employment

26. Ibid.

Opportunity Commission, Code of Federal Regulations stating that an employer, short of "undue hardship", must make "reasonable accommodations" to the religious needs of the employees. *Id.* at 66. *TWA* was a Saturday refusal to work claim.

Under the First, Fifth and Fourteenth Amendments, as well as the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb and 2000bb-4, the United States must show a compelling interest in refusing or failing to provide a reasonable accommodation to a Sabbath observer, especially where it is presumptively determined that such an accommodation would not be a *de minimis* intrusion on the Government's operation of its system's management.

TWA agreed to permit the union involved in that case a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set forth in the collective bargaining contract. Hardison had insufficient seniority to bid for a shift where he would have Saturdays off. Therefore, the effect on other employees in the *TWA* case was dramatic, clear and indisputable. That conclusion, however, does not undermine the argument that the *de minimis* test is not in conformity with constitutional principles with respect to religious rights and liberties.

Amici and many others requesting religious accommodations do not have the same issue. It is for that reason that *Amici* believe that an evaluation may be necessary for cases concerning intrusion on religious liberties, which differs depending upon the situation.

The Court may also consider differences with respect to an employee already at work, as opposed to a hiring decision predicated upon a failure and refusal to make a reasonable accommodation with respect to applicant testing and preliminary screening.

In the *TWA* case, the employer had several meetings with Plaintiff in an attempt to solve the problems. The employer did accommodate Plaintiff's observance of special religious holidays. It authorized the union steward to search for someone who would swap shifts, which was the normal procedure. There was conduct which occurred in *TWA*, which factually differs not only from the instant case, but also from the situation frequently encountered by *Amici* Podell and others similarly situated.

A key component of *TWA* was the following: "We do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Id.* at 79.

> Without a clear and express indication from Congress we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.

Id.

As noted in Mr. Hardison's case, accommodations were made to give him days off for religious holidays.

TWA v. Hardison held that it is not an unlawful employment practice for an employer to apply different

standards of compensation or different terms and conditions or privileges pursuant to a *bona fide* seniority or merit system, quoting the statute itself. *Id.* at 82. The Court also noted that there was no suggestion of discriminatory intent. That is not the situation in every case where there is a failure to reasonably accommodate.

Petitioners and Respondents will address themselves primarily to the following language:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. [Footnote omitted.] Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees a day off that they want would involve an unequal treatment of employees on the basis of their religion.

Id. at 84.

There is no question that the "*de minimis*" language was gratuitous and *dicta* unnecessary to the finding, which could have been carefully circumscribed based upon the factual specifics presented in the *TWA* case.

Amici would suggest the following: In providing a reasonable accommodation to an employee with respect to a *bona fide* religious requirement, it is appropriate to consider hardship to the employer when the accommodation will involve *significant* cost, or violation of collective bargaining agreements or other contracts that are inconsistent with the ability of the employer to

conduct the business. Where the employer is a government agency, the employer should be required, consistent with constitutional principles, to provide a compelling reason why it cannot or will not attempt to afford a reasonable accommodation.

It is the assertion of *Amici* that there should be a difference between cases where no reasonable accommodation was attempted but rather was presumptively determined to be inappropriate, versus where the reasonable accommodation was said to be unavailable because it would involve more than *de minimis* costs.

It is unrealistic for an employer to make an assumption that reasonable accommodations cannot be made based upon contracts or other criteria, when in fact that may not be the case. It is also in derogation of Title VII and constitutional principles for Respondents to argue that the United States of America, in particular, either could not or should not attempt to afford reasonable accommodation based upon a standard that would require the United States to make good faith efforts in that regard.

III. Approaches Used by Government Agencies

Both the United States Government Accountability Office and the Department of Defense have addressed reasonable accommodation in a manner that reflects a more consistent approach with the Religious Freedom Restoration Act.

For example, *see* United States Government Accountability Office, Report to the Chairman, Committee

on Homeland Security and Governmental Affairs, US Senate; Religious Compensatory Time, Office of Personnel Management Action Needed to Clarify Policies for Agencies, October 2012. Although this document deals primarily with compensatory time, it does address the need for federal agencies to afford religious accommodation, leave policies for federal law enforcement officers and air transportation safety and security personnel.

Department of Defense Instruction 1300.17, effective September 1, 2020, addresses "Religious Liberty in the Military Services." The originating component (agency) was the Office of the Under Secretary of Defense for Personnel and Readiness. The instruction concerned "accommodation of the religious practices within the military services." The instruction specifically implements requirements in Section 2000bb-1 of Title 42, United States Code 42 U.S.C. § 2000bb-1, also known as, "The Religious Freedom Restoration Act" (RFRA), and other laws applicable to the accommodation of religious practices for Department of Defense to provide, in accordance with the RFRA, that "DoD Components" will normally accommodate practices of a Service member based on a sincerely held religious belief. In accordance with the RFRA, a military policy, practice, or duty may not substantially burden a Service member's exercise of religious. The accommodation can only be denied if the military policy, practice, or duty is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that compelling governmental interest. In applying this standard, the burden of proof is placed upon the "DoD component," not the individual requesting the exemption See DoD Instruction 1300.17, September 1, 2020, available on the

Department of Defense Directives Division Website at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf. It is respectfully suggested that the same test be applied in connection with any other reasonable accommodation, including those under Title VII of the Civil Rights Act. Significantly, Title VII was enacted and *TWA vs. Hardison* was decided long before the RFRA.

The Instruction also defines substantial burden in the following manner:

> **Substantial burden** a governmental act is a substantial burden to a Service member's exercise of religion if it:
>
> Requires participation in an activity prohibited by a sincerely held religious belief;
>
> Prevents participation in conduct motivated by a sincerely held religious belief; or
>
> Places substantial pressure on a Service member to engage in conduct contrary to a sincerely held religious belief.

Id. at 18.

The development of principles by these government agencies set forth an approach more consistent with sincerely held religious practices than *TWA v. Hardison* and its progeny.

State agencies have also created specific procedures for implementing reasonable accommodation of religious observance or practices for applicants and employees. *See, e.g.,* "Procedures for Implementing Reasonable Accommodation of Religious Observance or Practices for Applicants and Employees", *Reasonable Accommodation Procedural Guidelines, City of New York* (2021), Section 6, page 10. For example, the Procedures state:

> "Undue hardship" means an accommodation requiring significant expense or difficulty. Significant difficulty includes a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system.

The pamphlet part lists considerations that should be taken into account.

See "Procedures for Implementing Reasonable Accommodation of Religious Observance or Practices for Applicants and Employees", *Reasonable Accommodation Procedural Guidelines, City of New York* (2021) (document revised December 31, 2021) (citing *inter alia, EEOC Compliance Manual: Section 12 – Religion,* http://www.eeoc.gov/policy/docs/religion.htm), available at Reasonable Accommodation Procedural Guidelines 2021 (https://www.nyc.gov/assets/dcas/downloads/pdf/agencies/reasonable_accommodation_procedural_guidelines.pdf).

Many similar approaches abound throughout the country.

IV. The Third Circuit Holding in *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022) (Shwartz, C.J.)

The opinion in *Groff* recited that Gerald Groff is a Sunday Sabbath observer whose religious beliefs dictate that Sunday is meant for worship and rest. The worker was disciplined and ultimately left USPS. The shift swaps USPS did offer to Groff did not eliminate the conflict between his religious practice and his work obligations.

The Third Court held that the accommodation Groff sought, which was exemption from Sunday work, would cause an undue hardship for USPS. Therefore, the District Court's grant of summary judgment in USPS's favor was affirmed.

The Court first addressed what constitutes a "reasonable accommodation":

> The plain language of the statute directs employers to "reasonably accommodate" religious practices, so "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775, 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015). The Supreme Court has stated that an accommodation is reasonable if it "eliminates the conflict between employment requirements and religious practices." *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (holding an accommodation is reasonable where it "allow[s] the individual to observe fully religious holy days and requires him only to

> give up compensation for a day that he did not in fact work"). Our Court has said that, where a good-faith effort to accommodate a religious practice has been "unsuccessful," the inquiry must then turn to the undue hardship analysis, which suggests that an accommodation must be effective. *Getz v. Pa. Dep't of Pub. Welfare*, 802 F.2d 72, 73 (3d Cir. 1986); *see also US Airways, Inc. v. Barnett*, 535 U.S. 391, 400, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) (explaining that "the word 'accommodation' . . . conveys the need for effectiveness").

Groff is much more similar to *TWA v. Hardison, supra*, than the situation encountered by those where either no effort has been made to reasonably accommodate or where there is not a preexisting seniority system making such accommodation challenging.

The Circuit Court cataloged what might be considered "reasonable" in terms of accommodation.

> Offering a less desirable shift, position, or location can be a reasonable accommodation. *See Shelton*, 223 F.3d at 228; *see also Sturgill*, 512 F.3d at 1033 (explaining that a reasonable jury could find that Title VII's bilateral duty of cooperation may require an employee to "accept a less desirable job or less favorable working conditions"). Even a reduction in salary associated with the accommodation may not necessarily be unreasonable. *See*, e.g., *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 659-60 (7th Cir. 2021) (offering an hourly rather than

> a salaried position to accommodate a Sabbath observer was reasonable); *Sanchez-Rodriguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2012) (offering lower-paying positions, allowing shift swapping, and refraining from disciplining an employee for missing work constituted a reasonable accommodation); *Bruff v. N. Miss. Health Servs., Inc.*, 244 244 F.3d 495, 502 n.23 (5th Cir. 2001) (reducing pay is not unreasonable). But *see Baker v. Home Depot*, 445 F.3d at 548 (2d Cir. 2006) ("[A]n offer of accommodation may be unreasonable 'if it cause[s] [an employee] to suffer an inexplicable diminution in his employee status or benefits.'") (quoting *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002)). An employer is not required "to accommodate at all costs." *Ansonia*, 479 U.S. at 70.

In addressing whether the accommodation sought would be an undue hardship on the employer and its business, the familiar *de minimis* test was recited. *Groff* highlights that more than *de minimis* inconvenience to an employer to accommodate religious observance is easy to find. Due to the small nature of the post office system in Lancaster, Pennsylvania, it appears that only two people were available to work the Sunday shift, where Groff was not. Naturally and swiftly the Court was able to find that this placed a great strain on the Holtwood Post Office personnel that resulted in the Postmaster delivering mail on some Sundays.

It is believed, and therefore averred, that the circumstances in *TWA v. Hardison* and *Groff v. DeJoy*

represent a very narrow factual scenario where the negative effect on co-workers, or even legal impediments, factor into the inability to make a reasonable accommodation. While *Amici* agree that the *de minimis* test is not in keeping with appropriate legal principles even in that context, the typical employee who is denied a reasonable accommodation, faces an uphill fight dictated by the *TWA dicta* which is hardly a necessary or trustworthy hurdle absent the specific narrow facts encountered in those two cases.

It is the position of *Amici* that the test for the alleged inability to make a reasonable accommodation should be flexible, depending upon the structure of the jobsite, and should be sufficiently responsive to religious needs, so that alleged hurdles will not become a barrier to the exercise of religious rights under constitutional precepts, as ensconced within Title VII. *Amici* have offered several possible formulations to address the inherent bias built into the *de minimis* test which are at least consistent with established constitutional principles, including some utilized by other agencies.

CONCLUSION

The ability of an employer, particularly a large employer like the United States of America, to rely upon more than *de minimis* costs as a defense to the failure to reasonably accommodate an employee's religious rights sweeps so broadly as to undermine the objectives of constitutional protections in Title VII in situations where such deference to a sophisticated employer is not only unnecessary but also detrimental to the Free Exercise Clause of the First Amendment to the United

States Constitution. It is that breathtaking sweep of the *de minimis* test which *Amici* seek to rein in. A more realistic and constitutionally consistent examination of when reasonable accommodation cannot be or should not be made to an employee does not place an inordinate burden on employers or the legal system.

Respectfully submitted,

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