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 *AMICUS CURIAE* ZIONIST ORGANIZATION OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Zionist Organization of America (ZOA), the oldest pro-Israel organization in the United States whose leaders have included United States Supreme Court Justice Louis Brandeis. Established in 1897, the ZOA played a key role in mobilizing support for the establishment of the State of Israel. Since then, the ZOA has been on the front lines of Jewish activism, seeking justice for American victims of international terrorism, fighting antisemitism in all its forms, and defending Israel and the rights and interests of the Jewish people,

The ZOA's members and supporters include observant Jews who live their lives according to Jewish religious law. This includes observing the Jewish Sabbath (Shabbat), which begins before sunset every Friday and concludes after sunset every Saturday. Jewish law is replete with proscriptions on working during the Sabbath and observant Jews strictly adhere to this religious obligation. For example, Exodus 20:8 commands, "Remember the Sabbath day to keep it holy." Observant Jews (and other religious minorities) are thus required to abstain from work on their Saturday Sabbath.

The ZOA has a strong interest in ensuring that Title VII of the Civil Rights Act is enforced as written, consistent with the law's purpose to prohibit practices that create inequality in employment opportunity due

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

to religious and other forms of discrimination. That means interpreting Title VII to require an employer to make more than merely a de minimus or trivial effort to accommodate an employee's religious needs. The Court's current de minimus cost standard for determining "undue hardship" under Title VII gives employers virtually carte blanche to deny a religious accommodation, putting Jewish employees (and employees of other religious faiths) in the untenable position of choosing between their jobs and their sacred religious obligations.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act requires an employer to reasonably accommodate an employee's religious practice and belief unless doing so would impose an "undue hardship." 42 U.S.C. §§ 2000e(j), 2000e-2(a). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court stated that requiring an employer "to bear more than a de minimus cost" to accommodate an employee's religious needs constitutes undue hardship. *Id.* at 84.

Hardison's de minimus cost standard is not contained in the text of Title VII and is inconsistent with the plain and ordinary meaning of "undue hardship." In addition, the de minimus cost standard is inconsistent with the interpretation of "undue hardship" applied in other federal statutes. This Court should abandon *Hardison*'s de minimus cost standard, since requiring employers to make only a negligible showing means that they, as a practical matter, are under no real obligation to accommodate any employee's religious observance. The de minimus cost standard leaves observant Jews (and other religious

minorities) without the legal protections they need to participate in the workforce without compromising their religious beliefs and practices.

Public policy also demands that this Court jettison *Hardison*'s de minimus standard for "undue hardship." From its inception, our nation has been committed to religious liberty and religious pluralism. Yet antisemitism is surging in the United States, and studies show that discrimination and bias against Jews is a serious problem in the workplace. To discourage anti-Jewish bias and ensure equal employment opportunity for Jews, Title VII's "undue hardship" standard should be re-evaluated, and the de minimus cost standard abandoned. Employers should have to make more than a trivial showing before they can deny an accommodation request and force Jews (and other religious minorities) to choose between their religious observance and their livelihoods.

ARGUMENT

I. *Hardison*'s De Minimis Cost Standard Is Not In Title VII's Text, Is Contrary To The Plain Meaning Of "Undue Hardship," And Is Inconsistent With The "Undue Hardship" Standard Applied In Other Federal Laws

Title VII of the Civil Rights Act makes it unlawful "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). Under Title VII, "[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.* at § 2000e(j).

Title VII does not define "undue hardship." But this Court defined the term in *Hardison*, when it considered the extent to which an employer, Trans World Airlines (TWA), had to accommodate an employee whose religious beliefs prohibited him from working on Saturdays. *Hardison*, 432 U.S. at 66.

TWA could have allowed the employee to work a four-day week to avoid working on his Sabbath. *See id.* at 84. Or, TWA could have filled the employee's Saturday time slot with other available employees, which may have required paying them overtime. *Id.* Overtime, as Justice Marshall noted in his dissenting opinion, would have cost TWA a "far from staggering" $150.00 for three months. *Id.* at 92 n.6. (Marshall, J., dissenting). Neither option would have seriously burdened an employer like TWA, then one of the largest airlines in the world. But the Court imposed virtually no burden on TWA, stating, "To require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Indeed, the Court seemed dismissive of the employee's religious needs, describing them merely as a "shift preference" rather than as a sacred religious obligation. *Id.* at 80-81.

The Court in *Hardison* created the de minimus cost standard "in two brief paragraphs at the end of the opinion . . . almost as an afterthought." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 828 (6th Cir. 2020)

(Thapar, J. concurring), *cert. deni*ed, 141 S. Ct. 1227 (2021). The Court set forth this standard "in a single sentence with little explanation or supporting analysis." *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari). Yet it has had huge repercussions for employees who need reasonable accommodation so that they can follow their religious faith. As Justice Marshall described in his dissent, the Court's interpretation of "undue hardship" as nothing more than a de minimus cost to the employer "effectively nullif[ied]" employees' protections under Title VII, and "makes a mockery of the statute." *Hardison*, 432 U.S. at 88-89 (Marshall, J. dissenting).

Consistent with the low bar set by the Court in *Hardison*, lower courts have "routinely" granted summary judgment in favor of employers "if an accommodation would impose on the employer virtually any burden at all." Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 Wash. L. Rev. 1673, 1683 (2020). "In fact, some courts have gone so far as to grant employers summary judgment, not because of any actual hardship, but because of the mere possibility of hardship in the future." *Id.*

For example, in *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000), the court considered whether an employer's refusal to accommodate an employee's religious beliefs by "skipping over" the employee in scheduling overnight trucking runs constituted unlawful employment discrimination in violation of Title VII. *Id.* at 273. The court concluded that it did not and affirmed the grant of summary judgment in favor of the employer. *Id.* at 274-75. Relying on this Court's decision in *Hardison*, the court

stated that "[t]he mere possibility of an adverse impact on co-workers as a result of 'skipping over' is sufficient to constitute an undue hardship." *Id.* 274.

The interpretation of "undue hardship" as nothing more than a de minimus cost to the employer is not supported by the plain meaning of the term. "Hardship" alone means more than de minimus or insignificant. Dictionaries define "hardship" as "adversity," "suffering" or "a thing hard to bear." *Small*, 952 F.3d at 826-27 (Thapar, J., concurring) (quoting The American Heritage Dictionary of the English Language 601 (1969); Black's Law Dictionary 646 (5th ed. 1979); Webster's New Twentieth Century Dictionary of the English Language 826 (2d ed. 1975)).

"Hardship" that is "undue" demands even more. Relying again on dictionary definitions of the term, Judge Thapar, in his concurring opinion in *Small*, noted that hardship that is undue "must 'exceed[] what is appropriate or normal'; in short, it must be 'excessive.'" *Id.* at 827 (quoting The American Heritage Dictionary of the English Language 1398; Black's Law Dictionary 1370; Webster's New Twentieth Century Dictionary of the English Language 826).

This more rigorous standard, consistent with the plain and ordinary meaning of "undue hardship," has been applied in many other contexts, including other federal civil rights laws. For example, the Americans with Disabilities Act (ADA), like Title VII, requires employers to reasonably accommodate employees with disabilities unless doing so would impose "undue hardship." 42 U.S.C. § 12112(b)(5)(A). Unlike Title VII, the ADA includes a

definition of "undue hardship" that is far more stringent than a de minimus cost standard. The ADA defines "undue hardship" as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A).

Also consider the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects members of the military from discrimination by their civilian employers. 38 U.S.C. §§ 4301-4335. USERRA defines "undue hardship" as "actions requiring significant difficulty or expense, when considered in light of" the employer's "overall financial resources" and other factors. 38 U.S.C. § 4303(16).

Consider, too, the Fair Labor Standards Act, which, among other provisions, requires employers to accommodate the needs of nursing mothers. 29 U.S.C. § 207(r). Certain employers are not subjected to the accommodation requirements if they "would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." *Id.* at § 207(r)(3).

Title VII's de minimus cost standard is the outlier. "Alone among comparable statutorily protected civil rights, [under Title VII] an employer may dispense with . . . [the right to exercise one's religious beliefs] nearly at whim." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). An employer is free to deny even the most minor accommodations that would enable an employee to follow their religious faith.

Justice Marshall, joined by Justice Brennan, called this result "intolerable." *Hardison*, 432 U.S. at 87.

Observant Jews (and other religious minorities) are often forced "to make the cruel choice of surrendering their religion or their job." *Id.*

Our nation was built on the values of religious liberty and religious pluralism. Yet *Hardison*'s de minimus cost standard most frequently harms Jews and other religious minorities – "people who seek to worship their own God, in their own way, and on their own time." *Small*, 952 F.3d at 829 (Thapar, J., concurring).

This Court should finally jettison Title VII's de minimus cost standard and provide religiously observant employees with a higher level of workplace protection. Employers should be required to show more than a trivial cost to their business before they can refuse to accommodate the religious practices and beliefs of their employees.

II. At A Time When Antisemitism Is A Serious and Alarming Problem, Including In The Workplace, Title VII Should Be Interpreted In A Way That Discourages, Rather Than Facilitates, Bigotry Against Jews

As the ZOA can attest to, based on our work and long experience in fighting discrimination and bigotry against Jews, antisemitism is a serious and rising problem in the United States. The problem is also well-documented.

Incidents of antisemitic harassment, vandalism and assault are tracked and recorded yearly by the Anti-Defamation League (ADL), and the information is published in an annual Audit of Antisemitic Incidents.

Based on the results of its latest audit, the ADL concluded that antisemitism in the United States reached an "all-time high" in 2021. Anti-Defamation League Press Release, *ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021* (Apr. 25, 2022), https://www.adl.org/resources/press-release/adl-audit-finds-antisemitic-incidents-united-states-reached-all-time-high.

Specifically, the ADL recorded 2,717 antisemitic incidents across the United States, a 34 percent increase from 2020, and a record high since the ADL began tracking antisemitic incidents in 1979. Anti-Defamation League, *Audit of Antisemitic Incidents 2021*, https://www.adl.org/audit2021. Antisemitic incidents occurred in every state, as well as in the District of Columbia. *Id.*

Studies also show that discrimination against Jews in the workplace is a growing and worrisome problem. In one 2022 study, the researchers noted that while workplace discrimination based on sex or gender, race and age "has been extensively studied," workplace discrimination based on religion "is less well understood." Rachel C. Schneider, Deidra Carroll Coleman, Elaine Howard Ecklund & Denise Daniels, *How Religious Discrimination is Perceived in the Workplace: Expanding the View*, 8 Socius Jan.- Dec. 2022, first published online Jan. 24, 2022, https://journals.sagepub.com/doi/epdf/10.1177/23780231211070920. This is "unfortunate," according to the researchers, "because nearly three quarters of Americans consider religion important in their lives," and "because reported incidents of religious discrimination in the workplace are rising." *Id.* at 1.

These researchers surveyed 13,270 people and conducted 194 in-depth interviews with Christians, Muslims, Jews and nonreligious respondents. *Id.* at 4. The national survey included questions about religious expression and practices in the workplace, and experiences of discrimination in the workplace, among other topics. *Id.* More than half of the Jewish respondents (52 percent) reported perceiving religious discrimination in their workplace, a higher percentage than any other religious group besides Muslims. *Id.* at 5.

The in-depth interviews of those surveyed illuminate how employees perceived religious discrimination and "othering" in the workplace. Jewish and Muslim respondents in particular described struggles with regard to religious accommodations and wearing religious attire in the workplace. *Id.* at 8. "In fact," the researchers found, "anticipating mistreatment and hostility, several Jewish and Muslim women interviewed actively concealed or downplayed their religious identity in the workplace to preempt discrimination." *Id.*

Another 2022 survey of workplace discrimination made far more troubling findings. In November 2022, ResumeBuilder.com surveyed 1,131 hiring managers and recruiters in the United States regarding their views of Jewish individuals and their perception of antisemitism's presence in the workplace. Resume Builder, *1 in 4 Hiring Managers Say They are Less Likely to Move Forward with Jewish Applicants* (Jan. 19, 2023), https://www.resumebuilder.com/1-in-4-hiring-managers-say-they-are-less-likely-to-move-forward-with-jewish-applicants/. The survey results showed "an alarming amount of antisemitism within companies, a great deal of which is considered acceptable." *Id.* at 3.

According to this survey, one in four (26%) hiring managers said they are less likely to proceed with Jewish applicants. *Id.* at 3-4. Almost one in four (23%) said that they want their industry to have fewer Jews. *Id.* at 4-5. The survey concluded that "there appears to be more prejudice" in certain areas, including business, construction, education, entertainment, finance, and technology. *Id.* at 5.

One in six hiring managers surveyed (17%) said that they have been told by their company leaders not to hire Jews. *Id.* One-third (33%) of hiring managers said that antisemitism is "common" in their workplace. *Id.* Twenty-nine percent of hiring managers said that antisemitism is "acceptable" at their company. *Id.* In the business sector, the percentage is even higher: 45% of hiring managers said that antisemitism is acceptable in their workplace. *Id.*

The survey revealed growing negative perceptions of Jews in the workplace. Nine percent of hiring managers said that they have a less favorable attitude toward Jews now as compared to five years ago. *Id.* at 6. Sixty-two percent of those hiring managers said they are less likely to proceed with Jewish job applicants. *Id.* Seventy-eight percent said that their industry should have fewer Jewish employees. *Id.*

ResumeBuilder.com noted that that the survey used "a convenience sampling method" (getting information from participants who are convenient for the researchers to access) and was therefore "not necessarily generalizable to the general population of U.S. hiring managers and recruiters." *Id.* at 7. Questions have been raised about flaws in this survey, suggesting that the survey's results cannot

be regarded as conclusive. Alexandra Chana Fishman, *Can We Trust Data Results on Jewish Discrimination? Not Always*, Algemeiner (Feb. 15, 2023), https://www.algemeiner.com/2023/02/15/can-we-trust-data-results-on-jewish-discrimination-not-always/.

Even if the ResumeBuilder.com survey results are inconclusive, they nevertheless suggest a troubling bias against Jews in the workplace, including in the hiring process, and that antisemitism is not only common but also considered to be acceptable. Another recent survey, the latest of an annual survey conducted by the American Jewish Committee (AJC), buttresses these conclusions.

In the fall of 2022, the AJC surveyed 1,507 American Jews and 1,004 members of the American public at large regarding their respective perceptions of and experiences with antisemitism. *See* American Jewish Committee, *The State of Antisemitism in America Report 2022*, https://www.ajc.org/AntisemitismReport2022. The survey found that 41% of American Jews say that their status in the United States is less secure compared to a year ago. *Id.* at https://www.ajc.org/AntisemitismReport2022/AmericanJews.

For the first time, the AJC survey asked American Jews about their experiences in the workplace. Thirty-three percent said that they had experienced anti-Jewish bias in the workplace. *Id.* Ten percent said they had trouble taking time off from work for Jewish holidays. *Id.* Eight percent said they felt unsafe or uncomfortable in their workplace because of their Jewish identity. *Id.*

The AJC survey revealed that antisemitism is not only a Jewish concern; it is also a recognized societal

problem. Nine in 10 of both America's Jews (89%) and the general public (91%) agree that antisemitism affects American society as whole. *Id.* at https://www.ajc.org/AntisemitismReport2022/GeneralPublic. Yet 48% of Jews and 34% of the general population believe that antisemitism is taken less seriously than other forms of bigotry. *Id.*

Even before these studies were published, the U.S. Equal Employment Opportunity Commission (EEOC) recognized the increase in violence, hatred and harassment against Jews in the United States. In a resolution issued on May 26, 2021, the EEOC condemned this anti-Jewish prejudice and discrimination, acknowledging that "hatred, bigotry, and violence have a devastating impact on workers." U.S. Equal Employment Opportunity Commission, *Resolution of the U.S. Equal Employment Opportunity Commission Condemning Violence, Harassment, and Bias Against Jewish Persons in the United States* (May 26, 2021), https://www.eeoc.gov/resolution-us-equal-employment-opportunity-commission-condemning-violence-harassment-and-bias-0. The EEOC reaffirmed its commitment to combat religious and other forms of unlawful discrimination and "to ensure equal opportunity, inclusion and dignity for all throughout America's workplaces." *Id.*

The de minimus cost test of "undue hardship" under Title VII – which places virtually no burden on employers to accommodate their employee's religious beliefs and practices – does not help prevent or remedy anti-Jewish bigotry in the workplace or remove other existing barriers to equal employment opportunity for Jews (or other religious minorities). If our nation is truly

committed to religious pluralism and to affording respect and dignity to Jews and all Americans in the workplace, regardless of their religious faith and observance, then this Court should redefine "undue hardship" under Title VII, consistent with the plain meaning of the term.

Particularly at this time of alarming antisemitism, including in the workplace, employers should not have virtually free rein to deny reasonable accommodations to Jews seeking to observe their religious faith. As Justice Marshall lamented in response to the de minimus cost standard set forth in *Hardison*, "The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength – our hospitality to religious diversity – has been seriously eroded." *Hardison*, 432 U.S. at 97. Justice Marshall understood that as a result of this standard, "[a]ll Americans will be a little poorer until . . . [the] decision is erased." *Id.*

Almost 45 years later, Justice Gorsuch expressed a similar sentiment, urging this Court to finally discard the de minimus cost standard so that the right to religious exercise under Title VII is truly protected: "There is no barrier to our review and no one else to blame. The only mistake here is of the Court's own making – and it is past time for the Court to correct it." *Small*, 141 S. Ct. at 1229.

A reasonable and effective remedy is at hand. Just as employers are required to accommodate disabled individuals unless they can show that they will be forced to incur significant difficulty or expense, employers should be required to make the same or similar showing when their employees require a religious accommodation. Jews (and other religious minorities) must be allowed to participate

fully in America's workforce with dignity and respect, and without having to sacrifice their sacred religious beliefs and observances.

CONCLUSION

This Court should reinterpret the meaning of "undue hardship" in Title VII of the Civil Rights Act. An employer should be required to bear more than a de minimus or trivial cost in order to deny accommodating an employee's religious needs.

Respectfully submitted,

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