No. 22-174

In the
Supreme Court of the United States

GERALD E. GROFF,
Petitioner,
v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* JOSEPH B. HOLLAND, JR. IN SUPPORT OF PETITIONER

ROBERT P. GEORGE
Counsel of Record
KENT J. GEORGE
JEFFREY A. KIMBLE
ROBINSON & MCELWEE PLLC
400 Fifth Third Center
700 Virginia Street East
Charleston, WV 25301
(304) 344-5800
rgeorge@princeton.edu
kjg@ramlaw.com
jak@ramlaw.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Joseph B. Holland, Jr. is the principal stockholder and president of a corporation called Holland Chevrolet in South Charleston, WV. Holland Chevrolet is a closely held small business enterprise in the business of selling and servicing motor vehicles.

In 2013, Mr. Holland and Holland Chevrolet filed an action for declaratory and injunctive relief in the United States District Court for the Southern District of West Virginia to protect them from certain unlawful and unconstitutional requirements of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111-148, 124 State. 119 (2010)), the Health Care and Education Reconciliation Act (Pub. L. 111-152, 124 Stat. 1029 (2010)), and certain provisions of the implementing regulations found in Title 45 of the Code of Federal Regulations (collectively the "ACA"). See Verified Complaint, *Holland v. U.S. Dep't of Health and Human Servs.*, Case No. 2:13-cv-15487 (S.D.W.Va. June 6, 2013), ECF No. 1.

In particular, Mr. Holland's case was filed to protect him and his company from the requirements in the ACA that forced them to include in their group health insurance plan coverage abortion-inducing

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[1] *Amicus Curiae* affirms pursuant to Supreme Court Rule No. 37.6 that no counsel for any party authored or assisted in the drafting of this brief, in whole or in part, and no person other than the *amicus curiae* and his counsel made any monetary contribution intended to fund the preparation or submission of this brief.

drugs and contraceptive counseling on the use and availability of abortifacient drugs (the "Mandate"). *E.g. id.* at 2. Mr. Holland argued that the Mandate deprived him of his fundamental right to practice his sincere and deeply held religious beliefs as protected by the First Amendment of the United States Constitution and Religious Freedom Restoration Act ("RFPA"). *Id.* (citing U.S. CONST., amend. I; 42 U.S.C. §§ 200bb, *et sequens*).

Mr. Holland's case in 2013 was one of many cases brought in federal courts nationwide to overturn the Mandate. *E.g. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Ultimately, these cases, including Mr. Holland's, were resolved by this Court's 2014 decision in *Hobby Lobby*, in which it was determined that the Department of Health and Human Services' regulations imposing the Mandate violated the RFPA, and that the Mandate itself substantially burdened the free exercise of religion. *Hobby Lobby*, 573 U.S. at 683, 685.

Having himself been the benefactor of this Court's jurisprudence affirming his, and others', rights to the free exercise of religion—in the sense of free from governmental intrusion *or* frustration—Mr. Holland has an interest in Mr. Groff's position. This interest arises because of the way that the "more than *de minimis*" standard set forth in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) has effectively led to government-sponsored frustration of

the free exercise of religion that he and others have already fought in the federal courts to protect.

Mr. Holland hopes that his interest in this case "brings to the attention of the Court relevant matter" that "may be of considerable help to the Court," Supreme Ct. Rule 37.1., because of his unique position as a Title VII employer operating a relatively small business in a rural and sparsely populated State. His perspective on this issue is that the position of primacy held by the free exercise of religion, among the protected rights of this nation's citizens, outweighs all other considerations, including any pecuniary benefits that may be realized by businesses like his if the "more than *de minimis*" standard is upheld. Contrary to what may be the public perception, business interests are not of one mind on this, or any, issue. Small businesses like Mr. Holland's not only enjoy their own religious protections, see *Hobby Lobby*, 573 U.S. at 683–84 ("Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them."), but they also can help protect and preserve the religious expression of the people they employ. Title VII was designed to ensure this, and the *Hardison* decision has undermined that purpose.

SUMMARY OF ARGUMENT

Religious accommodation is an essential facet of the protection of liberty afforded by the Constitution of the United States. This dates back to

even before the drafting of the Constitution itself, and particularly to the passing of the Virginia Statute for Religious Freedom in 1786. Va. Code § 57-1. Congress has sought to satisfy its obligations to protect the liberty interests of its citizens, including their right to the free exercise of religion, by protecting them from discrimination in the workplace. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et sequens*, was enacted to accomplish this purpose. See 42 U.S.C. 2000e-2(a)(1).

However, while other forms of discrimination are strongly and effectively prohibited in Title VII jurisprudence and regulation, employers under Title VII are able to discriminate on the basis of religion with near impunity. This is because jurisprudence on the matter of religious accommodations in the workplace, originating with the *Hardison* decision in 1977, have lowered the standard that an employer must reach in refusing an accommodation to such a minimal threshold as to be a mere trifle. See U.S. Amicus Br. 19, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (No. 18-349) (describing the standard in *Hardison* as "any cost that is 'more than a trifle'"). This was not the purpose of Title VII, which was supposed to require religious accommodations in all events, except those which pose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

This Court in *Hardison*, however, held that an employer need not provide religious accommodations to employees if their provision would impose "more than a de minimis cost"—thus equating such a small imposition with "undue hardship." Worse still, *Hardison* affirmed the notion that accommodations that result in "unequal treatment" of employees, or which otherwise burden the accommodated employee's co-workers, are evidence that "undue hardship," as redefined by the *Hardison* majority, has occurred. Thus, *Hardison* has become a basis for government-sponsored frustration of the right of freedom of religious expression.

It is argued here that the "more than *de minimis*" standard set forth in *Hardison* should be overturned. In its place, the Court need not consider any new standard other than what is already written down in Title VII: that a religious accommodation must be made by an employer unless it poses an "undue hardship on the conduct of the employer's business." A *de minimis* cost "seems like the opposite of an 'undue hardship.'" *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring). Thus, all this Court need do is give life to the legislative language by giving that language its plain meaning.

Mr. Holland and his business exemplify the value inherent in an employer-employee relationship that respects religious expression, and that works to protect and encourage that expression in every facet

of life, including the workplace. Even as a businessman with pecuniary interests, Mr. Holland recognizes that Title VII's protections are necessary and important, and without them, the liberty interests of working people in this country are threatened. The balance between the interests of the employer and the employee are struck by the Congressionally-determined plain language of Title VII.

ARGUMENT

I. Religious accommodation is an essential facet of the protection of liberty afforded by the Constitution of the United States.

Amid a multitude of personal accomplishments which he may have chosen to commemorate *in memoriam*, Thomas Jefferson, our nation's third President, left specific instructions that the epitaph etched in stone above his final resting place contain this, "& not a word more":

Here was buried
Thomas Jefferson
Author of the Declaration of American Independence
of the Statute of Virginia for religious freedom
& Father of the University of Virginia.

Thomas Jefferson, undated memorandum on epitaph, *in* THOMAS JEFFERSON PAPERS, Library of Congress.[2]

Of these three, it is the middle achievement that sounds so strongly in the present case. Though signed into Virginia law years before the drafting and ratification of the Constitution of the United States, the Virginia Statute for Religious Freedom greatly influenced the language of Constitution's First Amendment. In fact, this Court has held that the language of the Statute, quoted above, is the language by which "religious freedom is defined." *Reynolds v. U.S.*, 98 U.S. 145, 163 (1878). As was stated by James Madison: the Statute is a "standard of Religious liberty" and "its principle the great barrier [against] usurpations on the rights of conscience." James Madison, "Detached Memoranda," ca. January 31, 1820, *in* THE PAPERS OF JAMES MADISON, RETIREMENT SERIES, (David B. Mattern, *et al.*, eds.) (Charlottesville: University of Virginia Press, 2009). The Bill that became the Virginia Statute for Religious Freedom, in its original draft, declared that

> [T]he opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath

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[2] Image of original document available at http://memory.loc.gov/cgibin/ampage?collId=mtj1 &fileName=mtj1page055.db&recNum=1134.

created the mind free, and manifest his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits hypocrisy and meanness . . . [O]ur civil rights have no dependance on our religious opinions, any more than on our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right . . . that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own;

> [and] that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order[.]

Va. Bill No. 82, "A Bill for Establishing Religious Freedom," June 18, 1779, *in* PAPERS OF THOMAS JEFFERSON, 2:545–47 (Julian Boyd, *et al.*, eds.) (1950) (hereinafter "Va. Bill No. 82, 1779").

To protect religious freedom, as this Court has said it is defined, the First Amendment of the Constitution is drafted to protect religious expression on two fronts: first, to prohibit laws respecting an establishment of religion, and second, to protect against prohibition of the free exercise of religion. See U.S. CONST., amend. I. By extension, it is thus the policy and mission of the "civil government[s]" of the United States of America, and particularly its federal government, not only to enforce the Establishment Clause, but to take efforts to "interfere when principles break out into overt acts against peace and good order" as far as protection of religious expression is concerned. Va. Bill No. 82, 1779. It is on this second front that the dispute presently before the Court is waged.

II. Mr. Holland's small business enterprise in the State of West Virginia emphasizes the protection and encouragement of religious expression, in any form.

Mr. Holland is a practicing born-again Christian, who experienced a life-changing religious conversion in 1996. In accordance with his religious convictions, which form the foundation of his identity as a citizen and as a human being, he has resolved to conduct all aspects of his life, including the operation of his business, in accordance with scripture.

For this reason, Holland Chevrolet, as a cognizable legal person, embraces and conducts itself in accordance with the same religious principles that animate its principal stockholder and president, Mr. Holland. For example, Holland Chevrolet observes a Sunday Sabbath, and is closed on Sundays. Holland Chevrolet's charitable giving has included various Christian causes, and it has employed at various times a chaplain as part of its staff.

Mr. Holland maintains, as did Jefferson, that religious conviction in any form is part of each person's individual identity as an independent citizen; thus, he believes that each person must be able to observe his or her religion without intrusion or frustration in order to be truly free.

While Mr. Holland believes in, and endorses, the Biblical directive that one should "Render therefore unto Caesar the things which are Caesar's,

and unto God the things that are God's," *Matthew* 22:21, Mr. Holland also believes that any good government (any proverbial "Caesar") should implement and preserve a nation where its citizens are *able* to render their due oblations to whatever god they worship. As was stated by the Petitioner in his Petition for Writ of Certiorari, the citizens of this nation "should not be forced to surrender their religious beliefs at the office or factory door." Petition for Writ of Certiorari at 2, *Groff v. LeJoy*, Case No. 22-174 (U.S. Aug. 2022) (hereinafter "Petition").

Mr. Holland thus supports the language of Title VII, which makes it unlawful "for an employer . . . to discriminate against any individual . . . because of such individual's . . . religion," with religion being defined as "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 <u>without undue hardship on the conduct of the employer's business</u>." 42 U.S.C. 2000e-2(a)(1); 42 U.S.C. 2000e(j) (emphasis added). Unfortunately, the language and purpose of Title VII has been vitiated by the jurisprudence interpreting and applying it.

III. The "more than *de minimis*" standard set forth in *Hardison* has created a system of government-endorsed frustration of the free exercise of religion.

In its original form, Title VII did not require employers to make religious accommodations to their employees, as what is now 42 U.S.C. 2000e did not then contain the current language defining "religion." See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 State. 241, 255 (1964).

Approximately four years later, Larry G. Hardison was discharged by his employer, Trans World Airlines ("TWA"), on the grounds of insubordination because he refused to work on Saturdays (his Sabbath), after TWA ceased accommodating his religious requests. In bringing his claim under Title VII, Hardison relied on the 1967 Equal Employment Opportunity Commission ("EEOC") guideline requiring employers "'to make reasonable accommodations to the religious needs of employees' whenever such accommodation would not work an 'undue hardship.'" *Hardison*, 432 U.S. at 69 (quoting 29 C.F.R. § 1605.1 (1968)).

By the time of the *Hardison* decision, Congress had amended Title VII to include the "reasonable accommodation" language currently present in § 2000e(j). As was stated by Justice Marshall (with Justice Brennan joining), this amendment "confronted the same problem" that had been facing courts since 1964: "whether an employer is guilty of

religious discrimination when he discharges an employee (or refuses to hire a job applicant) because of the employee's religious practices." *Hardison*, 432 U.S. at 85, 86; see also *id.* at 88–89 (addressing legislative history). Despite Congress' head-on disposition of this problem in 1972, the *Hardison* majority decided to include in its decision in favor of the defendants that "to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Thus, the Congressional will was flouted by judicial decree, by replacing one standard ("undue hardship") with another ("more than *de minimis*").

Justices Marshall and Brennan dissented, stating that the *Hardison* majority's decision was "intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise." *Id.* at 87. In recent years, Justices of this Court have made statements that tend to agree: in his concurring opinion in *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (joined by Justices Gorsuch and Thomas), Justice Alito wrote that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'"

This statement by Justice Alito regarding *Hardison* may be an understatement. The plain language of the term "undue hardship" speaks for itself: In 1755, Dr. Johnson defined "hardship" as

"injury; oppression," *Hardship*, A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson, ed. 1755); and, in 2014, *Webster's* defined it as "hard circumstances of life; a thing hard to bear; specific cause of discomfort or suffering, as poverty, pain, etc.," *Hardship*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010).[3] Compare this with the definition of *de minimis*: "[t]rifling; negligible . . . insignificant." *De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019). These definitions have remained unchanged for centuries; and for centuries they have not meant, even remotely, the same thing.

It is incontestable that the "more than *de minimis*" language used at the conclusion of *Hardison* was a mistake. The consequence of this mistake has been catastrophic. By making two diametrically disparate standards mean the same thing, the *Hardison* court created a precedent that has turned Title VII into an empty shell as far as religious accommodations are concerned.

This is particularly true because *Hardison* not only introduced a trifling and inconsequential standard to the religious accommodation requirement of Title VII, but it also affirmed the

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[3] It should be noted that the plain language of Title VII not only uses the word "hardship," but further qualifies that word with the adjective "undue." 42 U.S.C. 2000e(j). This implies that Congress anticipated religious accommodations to be at times inconvenient for employers—even rising to the levels of hardship—but only in the event of *undue* hardship should the accommodation be denied.

notion that if a religious accommodation results in "unequal treatment," then such can rise to the level of having a "more than *de minimis*" effect. See *Hardison*, 432 U.S. at 84. This is a logically fallacious conclusion: an accommodation in an employment context, by definition, almost always will involve one employee receiving some benefit or exception that is not afforded another. As Justice Marshall said, "if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif(y) nothing.'" *Id.* at 87.

What has resulted from this one flaw in legal reasoning that occurred 45 years ago is a system of government-endorsed religious discrimination, which put countless people in the position where they must choose whether to "give up [their] religious practice or [their] job." *Id.* at 88.[4] This runs afoul of the precepts set forth at our nation's founding, recognizing the fundamental element of personhood that is religious conviction, and underlying a public policy that is designed to protect a person's free exercise of religion. See generally Va. Bill No. 82, 1779.

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[4] An unfortunate and powerful example of this is described in an *amicus curiae* brief filed in support of the petition for writ of certiorari in this very case. See Brief of John Kluge as *Amicus Curiae* in Support of the Petitioner, *Groff v. LeJoy*, Case No. 22-174 (U.S. Sept. 2022).

IV. Notwithstanding *Hardison*, it remains in the public interest for an employer like Mr. Holland to accommodate the religious expression of its employees.

As a Title VII employer for his entire career, going back decades, Mr. Holland has worked with and hired many individuals in his business endeavors. He has developed relationships with these individuals as he has worked with them to further his business interests *and* his religious aims. He has found that, by respecting the "whole person" of his employees, whoever they may be, his business and his community are benefited. This includes respecting and accommodating their religious convictions.

It is not lost on Mr. Holland that many religious accommodations come with inconvenience. In fact, virtually all of them do, in some way—otherwise, they would not be accommodations. For instance, it is not an accommodation on Mr. Holland's part to give his Christian employees the day off on Sunday, because his business is closed on Sundays anyway. If he employs an individual whose holy day falls on a Saturday, however, and if that individual requests that day off as a religious accommodation, then this would certainly be a business inconvenience for Mr. Holland, especially considering the importance of Saturdays in the retail industry.

But, it is for that very reason that Mr. Holland asserts *Hardison*'s "more than *de minimis*" standard should be overturned. Inconvenience is an intractable part of the accommodation process; and if inconvenience is a reason legally sufficient to deny an accommodation when one is requested, then very few accommodations will ever be granted.

Speaking as a businessman himself, it seems clear to Mr. Holland that Congress has decided how to strike the balance between the business interests of the employer and the religious freedom interests of the employee—and it is high time that Congress' decision be given the chance to operate as it was devised.

V. The Court should use this opportunity to overturn *Hardison*, and replace it with the standard contemplated and codified by Congress.

As stated by the Petitioner in his Petition for Writ of Certiorari, this case presents an excellent vehicle for the Court to right the wrong of *Hardison*'s "more than *de minimis*" standard. See Petition at 31–34. In the lower court, the Petitioner attacked the two main flaws of *Hardison*: (i) the "more than *de minimis*" language of *Hardison*'s conclusion," *id.* at 32 ("the undue-hardship issue is the entire case); and (ii) the accordant determination that "unequal treatment" resulting from an accommodation satisfies the "more than *de minimis*" standard, *id.* at 33–34 ("This case also squarely presents the

important question of whether an employer may rely on an accommodation's impact on co-workers to establish undue hardship").

While in the time that Jefferson was drafting the Virginia Statute for Religious Freedom the greater threat to religious liberty may have been the governmental "establishment" of religion, we in the present day are no longer in that time. Indeed, national trends indicate a shift away from religion. See Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time,* GALLUP, March 29, 2021. While the right to exercise religion implies equally the right to exercise no religion at all, it appears that an overcorrection—evidenced perhaps nowhere better than in *Hardison*'s poorly-reasoned decision—has occurred in the nation's efforts to avoid the "establishment of religion." Instead, the courts of this nation have consistently upheld a framework that encourages religious discrimination in the places where American citizens earn their daily bread—a proposition that runs afoul of the precepts on which the country was founded.

To reiterate Jefferson, "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order[.]" Va. Bill No. 82, 1779, preamble. It is high time to overrule *Hardison* after 45 years of unfortunate consequences, and replace its arbitrary and incorrect result with the "undue hardship" standard determined and

codified by Congress in plain English. This case presents a prime opportunity to do so.

CONCLUSION

For the reasons set forth above, the Petitioner's requests for relief on appeal to this Court should be granted.

Respectfully submitted,

ROBERT P. GEORGE
Counsel of Record
KENT J. GEORGE
JEFFREY A. KIMBLE
ROBINSON & MCELWEE PLLC
400 Fifth Third Center
700 Virginia Street East
Charleston, WV 25301
(304) 344-5800
rgeorge@princeton.edu
kjg@ramlaw.com
jak@ramlaw.com

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