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 *AMICI CURIAE* OF FORMER EEOC GENERAL COUNSEL AND TITLE VII RELIGIOUS ACCOMMODATION EXPERT IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former employees of the U.S. Equal Employment Opportunity Commission (EEOC) and experts in employment discrimination as it relates to religious discrimination and accommodation. Sharon Fast Gustafson is a former General Counsel of the EEOC. During her tenure she established a Religious Discrimination Work Group. She has worked to promote religious nondiscrimination and accommodation, as well as litigated these cases under Title VII of the Civil Rights Act of 1964. Rachel Morrison was an attorney advisor to General Counsel Gustafson at the EEOC and a member of the General Counsel's Religious Discrimination Work Group, where she advised the General Counsel on religious discrimination matters. She has written and spoken as an expert on employees' religious rights in the workplace.

Amici offer this brief to explain Title VII's religious accommodation and undue hardship standards and why *Trans World Airlines, Inc.* v. *Hardison*'s "more than a *de minimis* cost" standard conflicts with Title VII. Under this non-textual standard, employers will continue to feel safe to ignore religious accommodation requests, believing that they can easily demonstrate a cost that is slightly more than *de minimis*; and employees of all religions, especially minority religions, will be unable to secure their vital religious protections guaranteed by Title VII.

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

SUMMARY OF ARGUMENT

This case raises the issue of whether the "more than a *de minimis* cost" standard articulated by the Court in *Trans World Airlines, Inc* v. *Hardison*, 432 U.S. 63, 84 (1977), is the proper construction of "undue hardship" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

Under Title VII, when a workplace rule violates an employee's sincerely held religious belief, an employer must reasonably accommodate the employee's religious belief if it can do so without undue hardship to the employer's business. Despite Title VII's broad protections for religious accommodations, the Court in *Hardison* "effectively nullif[ied]" those protections by defining "undue hardship" as merely "more than a *de minimis* cost." 432 U.S. at 89 (Marshall, J., dissenting). This definition is non-textual and widely criticized, including by Justices and judges. Under *Hardison*, employers feel safe to deny religious accommodation requests, believing they can easily demonstrate a cost that is slightly more than *de minimis* and judges are compelled to affirm such denials.

Without repudiation of *Hardison*'s non-textual standard by the Court, *Hardison* will continue to effectively nullify the vital religious protections guaranteed by Title VII to Petitioner Groff and other employees, especially religious minorities, who request religious accommodations. The Court should reverse the Third Circuit and reject *Hardison*'s more than a *de minimis* cost standard.

ARGUMENT

Petitioner Groff holds uncontested sincere religious beliefs about resting, worshiping, and not working on his Sunday Sabbath. Pet. App.3a. His employer USPS was unsuccessful in its effort to find employees to voluntarily swap Sunday shifts. *Ibid*. In accordance with his religious beliefs, Groff did not work when he was scheduled to work on his Sunday Sabbath. *Ibid*. USPS progressively disciplined Groff, leading ultimately to this lawsuit. *Ibid*.

While the Third Circuit found the accommodation unreasonable as it would not eliminate the conflict with Groff's religious observance, it held under *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), that a complete exemption from Sunday work "far surpasses a de minimis burden." Pet. App.22a. n.18. Under *Hardison*, those whose religious beliefs prohibit them from working on one day of the week are severely restricted in their employment opportunities.

I. Title VII provides vital religious accommodation protections.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in the workplace on the basis of religion. *Id.* 2000e-2(a). By text and by design, Congress created affirmative protections against such discrimination.

Title VII defines religion broadly to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. 2000e(j). Beliefs are considered "religious" if they are "sincerely held" and, "in the individual's 'own scheme of things, religious.'" EEOC,

Compliance Manual: Religious Discrimination § 12 (2021) [hereinafter "EEOC Religion Guidance"][2] (quoting *Welsh* v. *United States*, 398 U.S. 333, 339 (1970), and *United States* v. *Seeger*, 380 U.S. 163, 185 (1965)); see also EEOC Guidelines on Discrimination Because of Religion [hereinafter "EEOC Religion Guidelines"], 29 C.F.R. 1605.1 (EEOC has "consistently applied" *Welsh* and *Seeger* standard to Title VII). Title VII protects an individual's religious beliefs regardless of whether those beliefs are common or traditional. EEOC Religion Guidance § 12-I-A-1 (citing *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)).

Title VII forbids employers, including the federal government, to discriminate based on religion, in hiring, promotion, discharge, "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1), 2000e-16(a). Further, employers must not "limit, segregate, or classify" employees based on religion "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Id.* 2000e-2(a)(2). Employers are prohibited from discriminating intentionally (disparate treatment) or through policies that have a disparate impact on religious employees. See *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015).

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[2] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination. EEOC's religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC's positions and contains extensive footnotes to caselaw in support.

Religious accommodation requirement. In addition to those negative proscriptions, employers are affirmatively required to "reasonably accommodate" an employee's religious beliefs, observances, and practices unless the accommodation would pose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). Absent undue hardship, an employer's failure to reasonably accommodate religious belief constitutes unlawful discrimination. In *Abercrombie*, the Court held that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." 575 U.S. at 775. The Court further explained, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment," creating an affirmative obligation on employers. *Ibid.*

An employee's "sincerely held" religious objection to a workplace policy or job duty—such as working on the Sabbath—qualifies for a religious accommodation. EEOC Religion Guidance § 12-I-A-2 (citing *Seeger*, 380 U.S. at 185); *id.* § 12-IV; EEOC Religion Guidelines, 29 C.F.R. 1605.2; accord *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee.").

An employer is not required to provide an *un*-reasonable accommodation and is not necessarily required to provide the employee's preferred accommodation. EEOC Religion Guidance § 12-IV-A-3 (citing *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68 (1986)). For an accommodation to be reasonable, it "must not discriminate against the employee or

unnecessarily disadvantage the employee's terms, conditions, or privileges of employment." *Ibid.* (citing *Ansonia*, 479 U.S. at 70). An employer's proposed religious accommodation is not reasonable if the employer provides a more favorable accommodation to other employees for non-religious reasons. *Ibid.* (citing *Ansonia*, 479 U.S. at 70-71).

Likewise, a religious accommodation is not reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment" and there is another accommodation available that would not require such a harm. EEOC Religion Guidance § 12-IV-A-3. When there is more than one reasonable accommodation that does not pose an undue hardship, "the employer * * * must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." EEOC Religion Guidelines, 29 C.F.R. 1605.2(c)(2)(ii).

Employees who need religious accommodations should generally be accommodated in their current positions unless there is no accommodation in that position that does not pose an undue hardship. EEOC Religion Guidance § 12-IV-C-3 (citing EEOC Religion Guidelines, 29 C.F.R. 1605.2(d)(iii)). Only when no such accommodation is possible, should the employer consider reassignment or a lateral transfer as an accommodation. *Ibid.* (citing EEOC Religion Guidelines, 29 C.F.R. 1605.2(d)(iii)).

Work schedule modification for Sabbath observance, the religious belief at issue in this case, is a common religious accommodation request. Reasonable accommodations could include: (a) flexible

scheduling, such as certain days off, early or late start, and flexible work breaks; (b) voluntary substitutes or swaps of shifts and assignments; (c) lateral transfers or changes in job assignment; and (d) modifying workplace practices, policies, or procedures. EEOC Religion Guidelines, 29 C.F.R. 1605.2(d).

An accommodation that merely eliminates part of the conflict is not reasonable, "unless eliminating the conflict in its entirety poses an undue hardship." EEOC Religion Guidance § 12-IV-C-1 (citing *Ansonia*, 479 U.S. at 70 (referring to reasonable accommodation as one that "eliminates the conflict between employment requirements and religious practices")). Compare Pet. App.4a ("Because the shift swaps USPS offered to Groff did not eliminate the conflict between his religious practice and his work obligations, USPS did not provide Groff a reasonable accommodation."), with Pet. App.55a (finding USPS "did not need to completely eliminate the conflict for its offer of accommodation to Groff to be considered reasonable").

Religious accommodation process. Unless the employer is already aware of the conflict between a workplace requirement, policy, or practice and the employee's sincerely held religious belief, observance, or practice, an employee should notify the employer of the conflict to receive a religious accommodation. EEOC Religion Guidance § 12-IV-A-1.

An employer and an employee should engage in a "flexibl[e]" and "cooperative information-sharing process" to identify workplace accommodations that do not impose an undue hardship on the employer. EEOC Religion Guidance § 12-IV-A-2 & n.221. An

employer should thoroughly consider all possible reasonable accommodations. *Id.* § 12-IV-B. To the extent one accommodation would pose an undue hardship, the employer must consider alternative accommodations. *Ibid.*

Undue hardship defense. Undue hardship is not defined in Title VII. In *Trans World Airlines, Inc.* v. *Hardison* the Supreme Court defined "undue hardship" to mean "more than a *de minimis* cost."[3] 432 U.S. at 84. Neither the government nor any of the parties advocated for the more than a *de minimis* cost standard, and the *Hardison* Court failed to explain why it unilaterally adopted a non-textual standard. See *id.* at 84-85; cf. U.S. Amicus Br. at 20, *Hardison*, 432 U.S. 63 (No. 75-1126) (observing employer's duty to provide reasonable accommodation absent undue hardship "removes an artificial barrier to equal employment opportunity * * * except to the limited extent that a person's religious practice significantly and demonstrably affects the employer's business").

Under Title VII, employers have the burden to "demonstrate[]" undue hardship. 42 U.S.C. 2000e(j); EEOC Religion Guidelines, 29 C.F.R. 1605.2(b). To do so, employers must rely on "objective information," not speculative or "hypothetical hardship," including the assumption that other employees might seek

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[3] The *Hardison* Court was interpreting an EEOC guideline that was in effect at the time of the events giving rise to the case. 432 U.S. at 66. The "reasonable accommodation" and "undue hardship" language in the guideline was adopted by Congress in the 1972 amendment to Title VII, which added the affirmative religious accommodation requirement. Nevertheless, courts have consistently applied *Hardison*'s non-textual formulation of undue hardship in the EEOC guideline to Title VII.

accommodations. EEOC Religion Guidance § 12-IV-B-1. Whether a reasonable accommodation exists that does not pose an undue hardship is a fact-specific inquiry appropriate for a case-by-case determination. *Ibid*.

Title VII guidelines point to a number of factors that are relevant: (a) the type of workplace, (b) the nature of the employee's duties, (c) the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and (d) the number of employees who will in fact need a particular accommodation. EEOC Religion Guidance § 12-IV-B-1 (citing EEOC Religion Guidelines, 29 C.F.R. 1605.2(e)).

Under the *Hardison* standard, undue hardship is commonly found when an accommodation would require more than a minimal expense, violate a seniority system, infringe on the rights of other employees, impair workplace safety, or jeopardize security. EEOC Religion Guidance § 12-IV-B. While some of these cases may satisfy the textual standard of undue hardship, others would not as they merely impose more than a *de minimis* cost. Demonstrating more than a *de minimis* cost is a low bar for employers to meet and a lower bar than Title VII imposes.

An accommodation's mere impact on coworkers is insufficient to demonstrate undue hardship. While an accommodation that infringes on coworkers' abilities to perform their duties or subjects them to a hostile work environment will generally be considered an undue hardship on the employer, "mere subjective offense or disagreement," and "general disgruntlement, resentment, or jealousy of coworkers" will not rise to the level of undue

hardship. EEOC Religion Guidance §§ 12-IV-B-4, 12-IV-C-6(a). But cf. Pet. App.22a n.19 ("A business may be compromised, in part, if its employees and poor morale among the work force and disruption of work flow [sic]. This, of course, could affect an employer's business and could constitute undue hardship."). Undue hardship requires more than coworkers' complaints or offense by the alleged "special treatment" afforded to the employee requesting the religious accommodation. EEOC Religion Guidance § 12-IV-B-4.

A mere impact on coworkers—without demonstrating harm to the business—does not suffice to establish undue hardship under Title VII. As Judge Hardiman stated in his dissent below, "Simply put, a burden on coworkers isn't the same thing as a burden on the employer's business." Pet. App.28a. (Hardiman, J., dissenting). Compare Pet. App.24a. (majority op.) (finding more than a *de minimis* cost because "it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale"), with Pet. App.26a (Hardiman, J., dissenting) ("[W]ithout more facts, I cannot agree that USPS has established 'undue hardship on the conduct of [its] business' by accommodating Groff's sincerely held religious belief." (second alteration in original)).

II. Title VII requires a higher standard than *Hardison*'s more than a *de minimis* cost standard.

In the sentence immediately following its adoption of the more than a *de minimis* cost standard, the *Hardison* Court suggested that Title VII does not require accommodations that would result in "unequal

treatment of employees on the basis of their religion." 432 U.S. at 84. However, as the EEOC and Solicitor General have noted, *Hardison*'s focus on neutrality is "irreconcilable" with *Abercrombie*. U.S. Amicus Br. at 22, *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349).

Ordinary meaning of undue hardship. The ordinary meaning of "undue" is "[e]xceeding what is appropriate or normal; excessive." *American Heritage Dictionary of the English Language* 1398 (1969); see 18 *Oxford English Dictionary* 1010 (2d ed. 1989) ("Going beyond what is appropriate, warranted, or natural; excessive."). An undue hardship, then, would be an "excessive hardship" or a hardship that is "more than appropriate or normal."

In contrast, *Hardison*'s more than a *de minimis* cost standard does not naturally follow—and is utterly divorced from—the statutory text. Accord Pet. App.27a n.1 (Hardiman, J., dissenting) (*Hardison* "obliges us to depart from Title VII's text."). A *de minimis* cost is "very small or trifling." *Black's Law Dictionary* 482 (Rev. 4th ed. 1968); cf. *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) (Court found undue hardship where potential cost to employer would be "$150 for three months."). Something that is "very small or trifling" is not "excessive," "more than appropriate or normal," or "significant." Thus, contrary to *Hardison*, undue hardship is not best—or even accurately—interpreted as more than a *de minimis* cost.

Congressional definitions of undue hardship. Indeed, to counter *Hardison*, Congress provided a definition of undue hardship in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.

12101 *et seq.*, which requires employers provide reasonable accommodations in the workplace for disability. *Id.* 12112(b)(5)(A); see S. Rep. No. 101-116 at 36 (1989) ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in [*Hardison*] are not applicable to this legislation."); H.R. Rep. No. 101-485(II) at 68 (1990) (same). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense," and lists as several factors to consider, such as the accommodation's cost and the employer's financial resources. 42 U.S.C. 12111(10)(A)-(B).

This definition is consistent with Congress' earlier use of the phrase "undue hardship" in other employment-related statutes passed pre-*Hardison*. See, *e.g.*, 29 U.S.C. 207(r)(3) (1938) (defining "undue hardship" under the Fair Labor Standards Act as "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business"); 38 U.S.C. 4303(16) (1958) (defining "undue hardship" for veteran employment as "significant difficulty or expense" in light of several factors). In December 2022, Congress incorporated the ADA's meaning and construction of "undue hardship" into the Pregnant Workers Fairness Act, which requires employers "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee," unless "the accommodation would impose an undue hardship on the operation of the [employer's] business." Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. II, §§ 102(7), 103(1), 136 Stat. 4459 (2022).

Criticism of* Hardison*'s more than a* de minimis *cost standard. *Hardison*'s more than a *de minimis* cost standard has received widespread and persistent criticism. Starting with the dissent in *Hardison*, Justice Marshall explained that this standard "ma[de] a mockery" of Title VII. 432 U.S. at 88 (Marshall, J., joined by Brennan, J., dissenting).

In one recent petition for certiorari asking the Court to revisit *Hardison*'s more than a *de minimis* cost standard, three Justices agreed that the Court should "consider whether *Hardison*'s interpretation should be overruled," recognizing that "more than a *de minimis* burden" is not "the most likely interpretation of the statutory term 'undue hardship.'" *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 685-86 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari); see also *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting from denial of certiorari). In that case, the EEOC voted unanimously to request the Court review *Hardison*. EEOC, *Commission Votes: December 2019*, https://www.eeoc.gov/commission-votes-december-2019. As the EEOC and Solicitor General told the Court in its joint brief, "[*Hardison*'s] formulation is incorrect." U.S. Amicus Br. at 19, *Patterson*, 140 S. Ct. 685 (No. 18-349).

While following the Court's direction in *Hardison*, circuit court judges, including Judge Hardiman below, have called into question *Hardison*'s more than a *de minimis* cost standard, recognizing the Court should restore a proper understanding of Title VII's text. See, *e.g.*, Pet. App.27a n.1 (Hardiman, J., dissenting); *Small* v. *Memphis Light, Gas & Water*, 952

F.3d 821, 826-829 (6th Cir. 2020) (Thapar, J., concurring); cf. *Equal Emp't Opportunity Comm'n* v. *Walmart Stores E., L.P.*, 992 F.3d 656, 660 (7th Cir. 2021) (Easterbrook, J.) (referring to *Hardison*'s standard as requiring "a slight burden," but applying *Hardison* "unless the Justices themselves discard it").

In November and December 2020, the EEOC hosted listening sessions on religious discrimination in employment with a diverse group of stakeholders. EEOC, Religious Discrimination in Employment: General Counsel Listening Sessions Final Report 6 (Jan. 2021).[4] "Participants included representatives from a range of religions and perspectives, including, among others, Christians, Hindus, Jews, Muslims, and Sikhs." *Ibid.* Participants shared concerns that *Hardison*'s standard "hurts religious employees" and "is an obstacle to employees receiving religious accommodations." *Id.* at 10. They were also concerned "that employees cannot win a religious accommodation case because the *de minimis* defense is a low bar that is easily met by employers," which, in turn, "discourages employees" from filing charges of discrimination with the EEOC and filing Title VII claims in court. *Ibid.*

* * *

Hardison's more than a *de minimis* cost standard is incompatible with *Abercrombie*'s recognition that religious accommodations under Title VII require favored treatment. As this Court stated in *Bostock* v.

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[4] https://eppc.org/wp-content/uploads/2023/02/Religious-Discrimination-in-Employment-General-Counsel-Listening-Sessions-Final-Report.pdf. The government website listed on the Report is no longer accessible.

Clayton County, it is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution"—a "guarantee" that "lies at the heart of our pluralistic society." 140 S. Ct. 1731, 1754 (2020). The Court should correct *Hardison*'s non-textual standard and restore Title VII's promise of religious accommodations in the workplace for our pluralistic society.

Without action by the Court, *Hardison* will continue to "effectively nullify[]" the vital religious protections in the workplace guaranteed by Title VII to Petitioner Groff and other employees, especially religious minorities. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Judges will be compelled to follow *Hardison* and employers will feel safe denying religious accommodation requests because they believe they can easily demonstrate a cost that is slightly more than *de minimis*.

CONCLUSION

The Court should reverse the Third Circuit and reject *Hardison*'s more than a *de minimis* cost standard and restore an undue hardship standard consistent with the statutory text of Title VII.

Respectfully submitted.

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