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* AIRLINE EMPLOYEES FOR HEALTH FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Airline Employees for Health Freedom (AE4HF) is a 501(c)(4) organization committed to protecting Americans' rights to bodily autonomy and working to ensure reasonable accommodations from employer-mandated medical treatments. The group is composed primarily of airline employees across the United States who believe that individual medical decisions are not the purview of employers—whether private or public—and that any intrusion into personal health decisions requires the highest justification. Employers should not be assumed to hold such authority.

Unfortunately, religious rights are too often subservient to employer directives in the marketplace. Following *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), employers believe that they may voluntarily choose certain job requirements and then refuse religious accommodations if the self-imposed requirement would cause the employer the slightest burden. This not only conflicts with the text of Title VII of the Civil Rights Act of 1964 and common-sense, it also opens the door for pretextual discrimination by employers.

As discussed below, such discrimination previously took place when the airline Air Canada issued a

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[1] Rule 37 Statement: No attorney for any party authored any part of this brief, and no one apart from *amicus curiae* and its counsel made any financial contribution toward the preparation or submission of this brief.

strict prohibition on pilots having beards—even those doing so because of religious beliefs. No law prompted the airline's requirement, but the airline claimed it was imposing the rule (without exception) for hypothetical safety reasons related to the oxygen masks used on the flight deck. A comprehensive study on mask effectiveness, however, later revealed that the safety rationale was false. Air Canada was merely implementing a preferred aesthetic look.

But even when false motivations are eventually exposed, those revelations often occur after religious employees have endured discrimination for years. A retreat from *Hardison* and a return to the text of Title VII—prohibiting companies from voluntarily manufacturing "undue hardship"—will prevent such discrimination and increase religious freedom in the workplace. *Amicus* thus has a direct interest in the outcome of this case because it addresses AE4HF's mission: protecting the right to free exercise of religion in the aviation workspace.

SUMMARY OF ARGUMENT

> *They tie up heavy burdens, hard to bear, and lay them on people's shoulders, but they themselves are not willing to move them with their finger.*
>
> Matthew 23:4

In exposing the Pharisees' hypocrisy, Jesus explained that they were the very ones responsible for the burdens that were causing others to fall. In other words, they created the problem but were unwilling

to help solve it. The same thing happens in the workplace today.

In the wake of *Hardison*, employers infringe on the religious beliefs of their employees—often with impunity—if there is any conceivable justification that supports refusing an accommodation for a certain job requirement. A company may voluntarily create a hardship for religious workers that the employer then claims is more than a "*de minimis*" hardship to accommodate. Like the Pharisees, the employer creates the hardship that it is then unwilling to help move.

Even more troubling, courts rarely pause to consider whether the "hardship" was actually necessary or was created for other purposes, such as marketing goals or engaging in " 'virtue signaling' and 'currying political favor.' " *Sambrano* v. *United Airlines, Inc.*, 45 F.4th 877, 879 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc) (internal quotations and citation omitted). *Hardison* has created a climate where an employer need only proffer a hypothetical, self-serving "hardship" to avoid accommodating even the most innocuous religious practice of an employee. This reality is inconsistent with Title VII's protection of religious liberty in the workplace. Not only should this Court disavow *Hardison's de minimis* exclusion, it should also clarify that employers cannot manufacture their own "hardship" to evade religious accommodation.

First, the plain text of Title VII indicates that any "undue hardship" on the employer must be genuine,

significant, and necessary to the conduct of the business. A mere *possibility* of hardship is not enough; there must be actual, considerable costs before an accommodation becomes unreasonable. Moreover, the underlying job requirement at issue must be a business necessity, not a tangential objective unrelated to how the business runs.

Second, because of the textual requirements of Title VII, employers should not be allowed to manufacture their own insurmountable hardship through voluntary impositions on religious employees. Such a system thwarts the plain meaning of Title VII and its fundamental aim of favoring religion. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

As discussed below, some airlines' requirement that pilots shave their beards is a useful example. See *infra* Part II.B. That requirement may help the company achieve a desired "look", but it is not central to running an airline, as evidenced by the fact that many airlines do not have that requirement. Yet an airline might hide behind the veil of safety to avoid providing an accommodation. And it would likely not matter whether the policy was actually safer—just that the company could argue it was. Setting aside the procedural hurdles in processing a claim through the Equal Employment Opportunity Commission,[2] current caselaw makes it difficult for the religious pilot seeking an accommodation to suc-

[2] See 42 U.S.C. § 2000e-5(e)(1), (f)(1).

ceed in court. (This reality is in stark contrast to an employee entitled to a reasonable accommodation under the Americans with Disabilities Act (ADA), further confirming that Title VII's protections should not be artificially limited by *Hardison*.)

A ready solution is to prevent employers from voluntarily choosing burdens that supposedly cannot be accommodated, or, at minimum, to treat self-imposed burdens as suspect when evaluating an employer's undue hardship. That would enforce the text of Title VII and help prevent companies from deploying pretextual excuses against accommodations.

For all these reasons, this Court should reject *Hardison* and disavow the resulting *per se* rule that naturally favors employers' whims over religious freedom. The judgment of the court of appeals should be reversed.

ARGUMENT

The unfortunate reality created by *Hardison* is inconsistent with the plain language of Title VII, not to mention the First Amendment's promise of religious freedom. This Court should disavow the *de minimis* loophole and make clear that an employer must incur real, significant expense, that is necessary to the conduct of the business itself—and not a voluntary burden—before an employer is excused from providing a religious accommodation.

I. An Employer's Hardship Must Be Genuine, Significant, And Necessary In Order To Avoid Accommodating An Employee's Religious Observance Or Practice.

In statutory construction cases, this Court always "[s]tart[s] * * * with the statutory language[.]" *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 475 (2017). "The text must be construed as a whole." ANTONIN SCALIA & B. GARNER, READING LAW 167 (2012). Title VII provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion * * *.

42 U.S.C. § 2000e-2(a)(1). Congress added the phrase "undue hardship" when it defined "religion" in its 1972 amendments:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice *without undue hardship on the conduct of the employer's business.*

Id. § 2000e(j) (emphasis added). The statute is thus designed to provide a "reasonable accommodation" for an employee's religious belief where possible. *Id.* While "undue hardship" was left undefined, the plain meaning of the phrase suggests that an employer must incur real, significant costs or difficulty "on the conduct of the employer's business" before it is excused from offering an accommodation. See *infra* Part I.C. While courts have followed that plain reading of the phrase in the ADA context, religious beliefs under Title VII have suffered after *Hardison*.

In juxtaposition to the plain language of Title VII, *Hardison*'s dicta has led courts to impose a much lower standard, allowing employers to deny religious accommodations that impose "more than a de minimis cost." See *Hardison*, 432 U.S. at 84. "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." Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1683 (2020). In other words, *Hardison* has evolved into a *per se* rule that virtually any cost to an employer—real or fictitious—constitutes undue hardship.

This Court can correct *Hardison*'s error by interpreting Title VII's words—"undue hardship"—"as taking their ordinary, contemporary, common meaning * * * at the time Congress enacted the statute." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin* v. *United States*, 444

U.S. 37, 42 (1979)). Contemporaneous dictionaries define "hardship" in a manner that would "imply some pretty substantial costs." *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 826–27 (6th Cir. 2020) (Thapar, J., concurring) (citing 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)). "Undue hardship" is hardship that "must be 'excessive.' " *Id.* at 827 (citation omitted). This is consistent with Congress's intent that a "very, very small percentage of cases" would result in no accommodation. 118 Cong. Rec. 706 (1972).

In correcting *Hardison*, the Court should make clear that an employer's claimed hardship must be: (1) genuine; (2) significant; and (3) necessary to the conduct of the business itself.

A. The Employer's Hardship must be Genuine.

First, the employer's claimed hardship must be real, not hypothetical. This aligns with Title VII's instruction that avoiding an accommodation requires a "hardship." Just as a speculative harm cannot provide standing for a plaintiff,[3] a speculative or fictitious hardship should not excuse an employer from

[3] See *Whitmore* v. *Arkansas*, 495 U.S. 149, 157 (1990) (speculative harm is insufficient to support Article III standing).

offering an accommodation. There must be a genuine hardship.

Correctly, some "[c]ourts are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice." *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (internal citation and quotation omitted). Other courts, however, have held that a hypothetical hardship can constitute an undue hardship. See *Weber* v. *Roadway Exp., Inc.*, 199 F.3d 270, 274–75 (5th Cir. 2000) ("Roadway's hypotheticals regarding the effects of accommodation on other workers are not too remote or unlikely to accurately reflect the cost of accommodation."); see also *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008) (relying on *Weber* in explaining that "an employer is not required to wait until it feels the effects of a proposed accommodation before determining its reasonableness" (internal citation and quotation marks omitted)); *Virts* v. *Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 519–21 (6th Cir. 2002) (applying *Weber*'s rationale). This is inconsistent with Title VII's placement of the obligation on the employer to *show* an undue hardship. See 32 Fed. Reg. 10,298-99.

The Court should clarify that employers must show actual—as opposed to hypothetical or speculative—hardship to avail themselves of Title VII's safe harbor. This is especially true given the statute's explicit direction that an employer must "demonstrate[ ]" any claimed hardship. 42 U.S.C. § 2000e-2(a)(1).

B. The Employer's Hardship must be Significant.

Second, the hardship in question must involve a significant cost. "When Congress amends legislation, courts must presume it intends the change to have real and substantial effect." See *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021) (internal quotation marks and citation omitted). Here, Congress purposefully used the term "undue" to modify "hardship" in Title VII. See 42 U.S.C. § 2000e(j). Thus, as amended, "Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that." *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013).

Under ordinary rules of statutory construction, "undue hardship" means that an employer must incur significant difficulty or expense in light of the employer's financial resources and the nature of its operations and facilities before it is excused from accommodating an employee's religious exercise. Post-*Hardison*, however, the interpretation of "undue hardship" in Title VII is fundamentally at odds with both the phrase's ordinary meaning and the courts' interpretation of "undue hardship" in seemingly every other context.

For example, the ADA incorporates the undue hardship standard but defines "undue hardship" as "an action requiring significant difficulty or expense" in light of certain enumerated factors. 42 U.S.C. §§ 12111(10), 12112(b)(5)(A). In reaffirming the plain meaning of the statutory text, the ADA explicitly re-

jected "the principles enunciated by the Supreme Court in [*Hardison*]" for interpreting an "undue hardship." S. Rep. No. 101-116 at 33 (1989); H.R. Rep. No. 101-485(II) at 68 (1990) (same). Congress enacted other civil rights laws with similarly defined "undue hardship" defenses. *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari) (citing Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4303(15); Affordable Care Act, 29 U.S.C. § 207(r)(3)).

In contrast, "[f]or purposes of religious accommodation only, 'undue hardship' [currently] means any additional, unusual costs, other than de minimis costs." 29 C.F.R. § 37.4. Not only is *Hardison*'s *de minimis* standard textually wrong, it effectively "single[s] out the religious for disfavored treatment"—something this Court has rejected as unconstitutional. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2020 (2017).

It has been suggested that a factor in determining whether a hardship is "undue" should be whether an employer may be forced to offer the same accommodation to a large number of employees—an aggregation of hardship. For example, an employer may argue that although accommodating one Saturday-Sabbatarian is a minor cost, it would be a significant economic hardship to accommodate 1,000 Saturday-Sabbatarians. This oversimplification, however, glosses over the word "undue" by ignoring that an employer naturally scales up operations to meet business demands already. Consider that an em-

ployer—like an airline—large enough to have 1,000 Saturday-Sabbatarians should be expected to have over 30,000 employees, if not more.[4] And this estimate does not consider the fact that not all those employees would necessarily seek to take the Sabbath off work. Thus the difficulty in scheduling a substitute employee for Saturday work is likely minimal. Consider also that Title VII covers companies with as few as 15 employees. 42 U.S.C. § 2000e(b). If the smallest Title VII employers must accommodate religious employees (and they do), then surely the largest companies can accommodate at least one out of every 15 employees in the same manner without encountering "undue" hardship. In short, larger companies that would be concerned about the aggregation of hardship are also the employers best posi-

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[4] At most, it appears that around 3% of the U.S. population observes the Sabbath on Saturday. Approximately 2.4% of Americans are Jewish. *The Size of the U.S. Jewish Population*, Pew Research Center (May 11, 2021), http://www.pewresearch.org/religion/2021/05/11/the-size-of-the-u-s-jewish-population/. Approximately 0.5% of Americans identified as Seventh-day Adventists, the largest church known for its observance of the Sabbath on Saturdays. Michael Lipka, *A Closer Look at Seventh-day Adventists in America*, Pew Research Center (Nov. 3, 2015), http://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/. Other Saturday-Sabbatarians include Jehovah's Witnesses, who make up approximately 0.3% of the American population. *Jehovah's Witnesses Around the World, United States of America, Fast Facts, United States of America: How Many Jehovah's Witnesses Are There* (last visited Feb. 24, 2023), http://jw.org.

tioned to absorb such scaled costs without it becoming an undue hardship.[5]

C. The Employer's Hardship must be Necessary to the Conduct of the Business.

Third, an employer's claimed hardship must involve a business necessity; it cannot be a tangential objective unrelated to operating the company. This rule is directly tied to the statute's direction that any "undue hardship" must be on the "*conduct* of the employer's business"—*i.e.*, what it takes to carry on the business of the company, not some aspirational goal.

As noted above, core religious freedom principles dictate that nothing less than a true "hardship"—"some pretty substantial costs"—can justify refusing a religious accommodation. *Small*, 952 F.3d at 827 (Thapar, J., concurring). Allowing an employer to quash an employee's free exercise of religion in the name of some vague "business purpose" is a far cry from the "undue hardship" contemplated by Congress in enacting Title VII.

Because Title VII demands that any burden unnecessary to the conduct of the business cannot constitute an undue hardship, courts should focus on

[5] The ADA's interactive process for accommodations demonstrates that a more robust Title VII accommodation requirement would not be an "undue burden" to employers. See 29 C.F.R. app. § 1630.9 (2019).

determining what is within the core "conduct" of a business rather than offering blind deference to the "sensibilities of the executives who populate the C-suite." See *Sambrano*, 45 F.4th at 878 (Ho, J., concurring in denial of rehearing en banc). Several tests are readily apparent. First, a court could consider how the business was historically conducted to determine if a current job requirement is inconsistent with traditional requirements. Second, a court might examine other businesses in the same industry to determine if the job requirement is universal. Third, a court could consider whether the challenged requirement is new (*i.e.*, implemented after employment commenced). In that case, it is far less likely that the job requirement is essential to the conduct of the business because it did not previously exist. Where it is apparent that the job requirement is not part of the "conduct of the employer's business," an employer may not claim an undue hardship to avoid providing an accommodation.

In sum, this Court should reject *Hardison* and make clear that an employer's claimed hardship must be: (1) genuine; (2) significant; and (3) necessary to the conduct of the business itself.

II. An Employer Should Not Be Allowed To Voluntarily Manufacture Its Own Undue Hardship.

It has become apparent that courts' application of *Hardison*—a *per se* rule that virtually any impediment named by an employer is an undue hardship—

has undermined Congress's efforts to safeguard the Constitution's first liberty. "[E]mployers today have near carte blanche over whether and how to provide religious accommodations—a power imbalance that often forces employees into the precise dilemma from which Congress sought to protect them." Flake, *supra* at 1673.

But even more problematic is allowing employers to create their own undue hardship. Because *Hardison*'s *de minimis* test functionally eliminates judicial review of an employer's rationale for implementing a job requirement, employers can more easily argue "undue hardship" for pretextual reasons. This is most apparent when a company voluntarily takes on a burden that it then claims would be unreasonable to accommodate. Though the new job requirement is obviously not necessary to the conduct of the business, the self-imposed hardship is used against the religious employee. This end run around the text and purpose of Title VII—allowing an employer to create a burden so big they cannot lift it—should be eliminated.

A. Allowing Employers to Create Their Own Undue Hardship Thwarts Title VII's Fundamental Purpose.

Allowing employers to voluntarily create hardships that they are unwilling to bear "make[s] a mockery" of Title VII. See *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting). After all, "[a]t the risk of belaboring the obvious, Title VII was aimed to en-

sure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye*, 721 F.3d at 456. Giving teeth to the undue-hardship standard better reflects Title VII's requirement to provide "favored treatment," not "mere neutrality," toward religious practices. *Abercrombie*, 575 U.S. at 775.

The problem arises because employers generally may fashion any number of job requirements for employees that are facially neutral toward religion but nevertheless interfere with the free exercise thereof. Title VII requires that the employer consider the religious rights of its employees and justify its policies with more than just desiring a certain "look" or some other goal tangential to the business model. *Ibid.* But, under *Hardison*, the employer can enforce those tangential goals even against religious objectors with a pretextual justification. Because courts have not enforced Title VII's textual directives, see *supra* Part I, employers have discriminated against religious employees by failing to provide accommodations when the enforced job requirement was not necessary as part of the conduct of the business.

For example, an airline might want to combat sexism in the workplace by requiring that all flight attendants—women and men alike—wear the same pants, not skirts or dresses. This would pose a profound problem for a Muslim, Pentecostal Christian, or Orthodox Jewish woman whose religion dictates

that she wears skirts, not slacks.[6] But at the same time, the airline might articulate some business rationale such as: flight attendants wearing pants can move about the cabin more easily during an emergency or deal with unruly passengers more effectively. The "pants-only" rule would be an otherwise-neutral policy with a reasonable safety-related rationale attached to it. The accommodation question, however, should still consider whether it has an actual effect on the conduct of the business or whether the rationale was overstated (or worse, invented out of whole cloth) to covertly implement a desired look policy.

This type of concern is magnified because an employer will have superior knowledge of how its business runs and can easily proffer a reasonable sounding—though potentially pretextual—justification for rejecting an accommodation. See *Davis* v. *Fort Bend Cnty.*, 765 F.3d 480, 488 (5th Cir. 2014). Courts have come close to saying as much: "[The employer] was in a better position than [the employee] to know whether [an accommodation could be made and] * * * the Court does not substitute the speculation of an employee for the judgment of an employer." *Farah* v. *A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, at *9 (D. Kansas Nov. 20, 2013).

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[6] *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. E.E.O.C. Guidance (last visited Feb. 24, 2023), http://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities.

As noted above, however, courts should make an explicit determination on the legitimacy of the employer's accommodation denial rather than showing blind deference to employers. This may take place by considering factors such as: (1) how the business was historically conducted; (2) whether other businesses in the same industry have the same requirement; and (3) whether the challenged requirement was implemented after the employee's employment began. Tellingly, all of these factors will likely indicate that a job requirement is not essential to the conduct of the business where the employer has invented a new burden that it now claims would be an "undue hardship" to accommodate. Such voluntarily-assumed hardships should thus be rejected outright or, at the least, treated as suspect under the text of Title VII.

Not only is preventing employers from manufacturing their own "undue hardship" a textual corollary to Title VII, such a rule is rooted in fundamental fairness to the employee. If the employer chooses a new job requirement, it is hardly equitable to allow a manufactured hurdle to overcome the religious freedom rights of an employee already working for the company. (And, again, it is hard to say the hardship is "undue" if the company did not enact the job requirement against the employee from the beginning of the relationship.)

To be sure, courts are often reluctant to substitute their judgment for that of employers. See *Sambrano* v. *United Airlines, Inc.*, No. 21-1159, 2022 WL 486610, at *10 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting). But Congress made a policy decision to

allow courts to do exactly that in the Title VII context. Title VII requires employers to accommodate an employee's religious beliefs unless the employer "demonstrates that he is unable to [do so] without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Congress thus rejected any notion that employers be left solely to their own judgment in running their businesses in the face of competing religious claims, and certainly did not intend to let the fox guard the henhouse. After all, a company must "demonstrate[ ]" any alleged undue hardship—courts are meant to monitor employer actions in this space.

Title VII was designed to protect employees from being "forced to live on welfare as the price they must pay for worshipping their God." *Hardison*, 432 U.S. at 96–97 (Marshall, J., dissenting). Permitting employers to self-impose their own insurmountable burdens thwarts the core purpose of Title VII. Thus, for both textual and equitable reasons, the Court should hold that employers may not voluntarily choose burdens that supposedly cannot be accommodated, or, at minimum, that self-imposed burdens are suspect when evaluating the undue hardship of an employer.

B. Case Study: Air Canada's Prohibition on Pilot Beards.

In arguing that voluntarily-assumed burdens should be an explicit consideration for what is an "undue hardship" under Title VII, *Amicus* is not ar-

guing, of course, that employers should be foreclosed from *ever* creating additional job requirements. Instead, *Amicus* is merely asking the Court to recognize that a company's ability to discriminate is enhanced when an employer can self-select their "hardship."

A ready example is some airlines' requirement that all pilots be clean shaven. As one would expect, such a policy would adversely affect Orthodox Jewish, Sikh, and Muslim pilots who must maintain facial hair as part of their religious beliefs.[7] And so while a clean-shaven policy may ensure "the look" that an airline believes pilots should have, *Abercrombie* confirms that religious rights trump company branding concerns. 575 U.S. at 775 ("Title VII does not demand mere neutrality with regard to religious practices * * * * Rather, it gives them favored treatment * * * * Title VII requires otherwise-neutral policies to give way to the need for an accommodation.").

But perhaps the policy is (at least nominally) not just about the look. An airline might claim a "safety" concern based on the oxygen masks used in cockpits across their fleet. Indeed, Air Canada historically required that pilots be clean shaven for this exact reason. The company argued that because their pi-

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[7] See Brief for Islamic Law Scholars as Amici Curiae at 2, *Holt* v. *Hobbs,* 574 U.S. 352 (2015) (No. 13-6827) ("[H]adith requiring beards * * * are widely followed by observant Muslims across the various schools of Islam."); *Religious Garb and Grooming*, *supra* note 6.

lots' oxygen masks would not seal correctly if an individual had a beard, all pilots would have to shave —even those with religious reasons not to do so.[8]

For an American airline seeking to enforce the same policy against Orthodox Jewish, Sikh, or Muslim male pilots, the current question is whether there is a *de minimis* hardship on the employer to accommodate a beard. And at first glance, given the argument advanced by Air Canada, it might appear that an airline could enforce the requirement despite the religious beliefs of its pilots. *Hardison* has provided employers with cover in that situation if they are able to claim a need for uniformity in cockpits regarding safety equipment. When this is compounded with courts granting deference to employers on questions related to their business, employers have wide latitude to deny religious accommodations.

A closer look, however, would reveal that the policy should not be enforced over religious objections. As an initial matter, there is no anti-beard "safety" concern mandated by the Federal Aviation Administration or otherwise forced on any airline. Indeed, many carriers allow pilots to wear beards. It is thus apparent that a no-beard policy is merely a choice that an individual airline makes for its own reasons. And this indicates that the requirement is unneces-

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[8] See *Facial Hair on Pilots: Study Busts Myth*, ScienceDaily (Sept. 21, 2018), http://www.sciencedaily.com/releases/2018/09/180921140157.htm.

sary to the conduct of the business. As a result, the policy could be implemented, but the requirement should not be entitled to Title VII's safe harbor. See *supra* Part I.C.

Importantly, as was seen in the case of Air Canada, *the safety rationale was wrong*. Beards do not actually hinder pilot oxygen masks from sealing. *SFU Study Busts Myth About Facial Hair On Pilots,* Simon Fraser University (Sept. 14, 2018), https://www.sfu.ca/science/news/2018-news/sfu-study-busts-myth-about-facial-hair-on-pilots.html. The airline wanted clean-shaven pilots for aesthetic reasons and adopted a false safety concern concerning flight deck masks. It took a study years later disproving the need to have pilots without beards for Air Canada to stop enforcing that policy against religious pilots. See Sherri Ferguson & Dan Warkander, *The Efficacy of Oxygen Delivery Masks for Commercial Pilots with Facial Hair*, Simon Fraser University. In the meantime, religious employees faced discrimination for decades because of management's marketing agenda.

It is true that courts may not always be in the best position to evaluate an employer's rationale(s) in creating a job requirement. The straightforward solution—as shown in this case study—is to require the employer to offer religious accommodations when the job requirement in question is *voluntarily chosen* by the company. This prevents the employer from self-selecting a hardship that is too great for the employer to bear and, by so doing, shield "otherwise-neutral policies" from religious accommodations.

C. Allowing Employers to Create Their Own Undue Hardship Defies *Abercrombie*'s Teaching that Religion is Preferred.

Finally, as explained in *Abercrombie*, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices." 575 U.S. at 775. "Rather, it gives them favored treatment." *Id.*; see also *id*. at 772 n.2 (noting that "accommodate" "means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary").

Hardison—and employers' ability to fashion their own insurmountable burdens—sharply contradicts *Abercrombie*'s command to give "favored treatment" to employees' religious practices. That is because *Hardison* deems virtually any departure from neutral workplace rules an "undue hardship" under its *de minimis* test. *Hardison* reasoned that "Title VII does not contemplate" the "prefer[ential]" treatment of "religious needs" over "nonreligious[ ] reasons for not working on weekends." 432 U.S. at 81, 84–85. In the *Hardison* Court's view, enforcing the plain meaning of "undue hardship" would "involve unequal treatment of employees on the basis of their religion." *Id.* at 84–85. But *Hardison*'s reflexive deference to "neutral" rules, *id.* at 78–79, ignores Title VII's unique treatment of religion.

Not only is *Hardison* itself problematic, the further flattening of its *de minimis* test to a *per se* rule

that any "hardship" is "undue" presents an even greater affront to *Abercrombie*. Title VII establishes a balancing test under which courts consider both a job requirement's burden on an employee's religion and an accommodation's toll on an employer's business. 42 U.S.C. § 2000e(j). *Abercrombie* counsels that this balance must tilt in favor of the employee's religion. 575 U.S. at 775. A *per se* rule that presumes that an employer's hardship is always legitimate is directly contrary to the plain language of Title VII and *Abercrombie*'s mandate of favored treatment.

Under *Hardison*, the employee already starts behind in the analysis with assumed acceptance of the employer's "hardship." The harm is even more egregious when the employer's "hardship" is self-selected and unnecessary to the conduct of the business. *Abercrombie* confirms that this is error under Title VII.

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Justices, judges, scholars, *amici*, and (previously) even the United States have all agreed that *Hardison*'s *de minimis* test is incongruent with the plain text of Title VII. Indeed, the existing *per se* rule that virtually any hardship articulated by an employer is automatically deemed "undue" defies *Abercrombie*'s directive that religion is favored. This Court should reject *Hardison* and make clear that an employer must incur real, significant costs, directly related to the *necessary* "conduct of the employer's business"—not just a voluntary, aspirational company goal—

before it is excused from offering a religious accommodation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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