No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF, *Petitioner*

v.

LOUIS DEJOY, POSTMASTER GENERAL.

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

BRIEF OF *AMICUS CURIAE* THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Congress amended Title VII in 1972 to require employers to provide reasonable accommodations for the religious beliefs and practices of their employees unless doing so would impose an "undue hardship" on the employer. 42 U.S.C. §2000e(j). In enacting this amendment, Congress sought to protect the religious rights of all believers—especially religious minorities like *amicus*'s members—and prevent them from being forced to choose between their jobs and their religion. But in *Trans World Airlines* v. *Hardison*, this Court adopted an interpretation of the phrase "undue hardship" that allows an employer to evade that protection if it can show anything more than a *de minimis* burden. 432 U.S. 63, 84 (1977). That test is unjust and unworkable. And it is wrong as a legal matter—for reasons going well beyond the strong textual and historical arguments advanced by Petitioner.

Specifically, where a statutory term "is obviously transplanted from another legal source *** it brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013). "Undue hardship" is such a legal term of art. And, when Congress amended Title VII's definition of "religion" to include that phrase, it necessarily codified the meaning of "undue hardship" as used in a 1967 EEOC guideline.

The proper understanding of that phrase can be discerned from analysis of the EEOC cases applying

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward its preparation or submission.

that guideline between 1967 and the 1972 amendment. Those cases make clear that an employer incurs an "undue hardship" *only* when a reasonable accommodation would impose an immense or extreme cost or harm in relation to the employer's business. *Hardison*'s *de-minimis*-plus test misses the mark by a mile.

That legal error—highlighted at the time in Justice Marshall's *Hardison* dissent—has imposed substantial hardship on *amicus*, the General Conference of Seventh-day Adventists ("General Conference"), and on members of the Seventh-day Adventist faith. The General Conference is the administrative body for the worldwide Seventh-day Adventist Church, a Protestant Christian denomination with more than 22 million members and a longstanding commitment to religious liberty.

Members of the Seventh-day Adventist Church often experience a conflict between job requirements and their sincerely held religious beliefs because a fundamental belief of their faith is that no secular work should be performed on the Sabbath—from sundown Friday to sundown Saturday. Accordingly, the Seventh-day Adventist Church has extensive nationwide experience in litigating Sabbath accommodation cases on behalf of its members and other people of faith. That experience confirms that *Hardison* makes it nearly impossible for employees to obtain the religious accommodations promised by Title VII. *Amicus* urges this Court to vindicate the religious rights of Adventists and all other people of faith by disavowing the interpretation advanced in that ill-conceived decision.

STATEMENT

When Petitioner Groff began working for the US Postal Service, he was not required to deliver mail on Sundays. J.A. 296. And even when USPS signed a contract to deliver packages for Amazon and chose to do so on Sundays, Groff was exempted from those shifts because of his religious beliefs. *Id.* at 6-7, 296. But, after USPS entered an agreement with a union about its Amazon deliveries, Groff was told he would have to begin working on Sunday. *Id.* at 5, 167-168. He transferred to an office that did not yet do Sunday Amazon deliveries, but eventually that office too required him to work on his Sabbath. *Id.* at 146. Even though Groff volunteered to work extra shifts, including on Saturdays and holidays, USPS refused to exempt him from Sunday work. *Id.* at 296-297. Eventually, Groff resigned to avoid being fired. *Id.* at 150.

Groff sued under Title VII. Pet. 4a, 44a. The district court granted summary judgment for USPS, reasoning that exempting Groff from Sunday deliveries would cause undue hardship to USPS because it would "cause[] more than a *de minimus* [sic] impact on [Groff's] co-workers" and cause USPS to violate its agreement with the union. Pet. 56a, 58a-59a.

On appeal, a divided panel of the Third Circuit affirmed, holding that (1) eliminating a conflict between a job requirement and a religious practice is a reasonable accommodation but (2) exempting Groff from Sunday deliveries would result in an undue hardship to USPS under *Hardison*. *Id*. at 24a-25a.

SUMMARY OF ARGUMENT

"Undue hardship" is a legal term of art, transplanted from a 1967 EEOC regulation adopted only a few years before Congress incorporated the term into Title VII. The EEOC decisions under that regulation make clear that "undue hardship" is a much higher standard than *Hardison*'s yardstick of "something more than *de minimis* harm." It is even more robust than a "significant difficulty or expense"—the standard subsequently adopted in the Americans with Disabilities Act. The EEOC's decisions before the 1972 amendment to Title VII compel the conclusion that the burden on an employer must be much higher to avoid accommodation: Contrary to *Hardison*, only an immense or extreme cost or harm in relation to the employer's overall business qualifies as "undue hardship."

Correcting *Hardison*'s error is crucial to the ability of Adventists (among many others) to live out their faith. Adventists believe that working from sundown Friday to sundown Saturday transgresses one of God's commandments, and that to violate the Sabbath would be detrimental to their spiritual relationship with Him. Under the current *de-minimis*-plus standard, employers can and often do force Adventists to choose between their jobs and their faith, simply by pointing to a minor, often theoretical inconvenience that an accommodation would impose on them. The result is that a typical Adventist worker today is virtually forced to avoid certain jobs and professions, or to abandon his or her faith. Either outcome is both a personal and societal tragedy—one the Court can and should avoid by overruling *Hardison*.

ARGUMENT

I. "Undue Hardship" Is a Legal Term of Art from a 1967 EEOC Regulation and pre-1972 EEOC Decisions Interpreting It, Providing Much Greater Protection than *Hardison*'s Test.

As explained more fully elsewhere, "undue hardship" in Title VII is not a term of ordinary meaning. See James C. Phillips, *Ordinary Meaning as Last Resort: The Meaning of "Undue Hardship" in Title VII,* at 31-43.[2] Rather, the term is a legal term of art and should be so interpreted: "[I]f a word is obviously transplanted from another legal source, *** it brings the old soil with it." *Sekhar*, 570 U.S. at 733. Justice Marshall was therefore correct in his *Hardison* dissent: In interpreting the term "undue hardship", the Court should look to (1) a 1967 regulation adopted by the EEOC to implement Title VII, from which Congress later adopted identical language, and (2) how the meaning of "undue hardship" was fleshed out by the EEOC over the next few years "in a long line of decisions." 432 U.S. at 85-86 & n.1(Marshall, J., dissenting).

As shown below, a careful analysis of this history provides a clear, workable standard for determining whether the employer's burden of an accommodation constitutes an "undue hardship": Only accommodations that inflict an immense or extreme cost or harm relative to the employer's overall business qualify as an "undue hardship." The *Hardison* standard—something more than *de minimis* harm—is thus incorrect

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[2] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363032 (Feb. 18, 2023).

and insufficient. So too is the more elevated standard subsequently adopted in the Americans with Disabilities Act, that the accommodation entail "significant difficulty or expense." See 42 U.S.C. §12111(10)(a). The "immense or extreme cost or harm" standard drawn from pre-1972 EEOC decisions is the one Congress codified in Title VII.

A. By using the phrase "undue hardship" in the 1972 amendment, Congress codified a 1967 EEOC regulation and agency decisions interpreting it.

As a legal term of art, "undue hardship" first appeared in American law nearly two centuries ago. See Phillips at 38. It is seldom used in ordinary American English, appearing just 10 times in the Corpus of Historical American English from 1820 to 1966, but nearly 10,000 times in legal sources over that same period. See *id.* at 31-32. This disparate usage between ordinary and legal materials provides strong evidence that the phrase is a legal term of art. See *id*. at 32.

1. Of course, "[e]ven as a legal term," the meaning of undue hardship "is far from clear" as a *general* matter because the term "has taken on different meanings in different statutes[,]" cases, regulations, and other legal materials. See *FAA* v. *Cooper,* 566 U.S. 284, 292, 294 n.4 (2012); see also Phillips at 32, 34-42. Furthermore, the term "undue hardship" has a built-in equitable quality. See *Universal Elec. Corp.* v. *Golden Shield Corp.*, 316 F.2d 568, 572 (1st Cir. 1963) ("Whether or not [something] imposes an undue hardship is a question of judgment. Each case must depend upon its own facts and circumstances.") (cleaned up). This "chameleon-like quality" across a variety of legal

contexts requires looking to the *most* relevant context. *Cooper*, 566 U.S. at 294.

Fortunately, there is "prior regulatory practice" that provides that context and the term's meaning: EEOC regulations and decisions before 1972. See *George* v. *McDonough*, 142 S. Ct. 1953, 1963 (2022).

2. To implement Title VII of the 1964 Civil Rights Act, the EEOC initially enacted a regulation in June 1966 that specified employers' duties under the Act's original version. That regulation promulgated a "serious inconvenience" standard, placing a duty on employers to accommodate its employees' religious needs so long as the employer experienced no "serious inconvenience to the conduct of the business." 29 C.F.R. §1605.1(a)(2) (June 14, 1966).

The term "serious inconvenience" was undefined. But the regulation explained that employers were free "to establish a normal workweek (including paid holidays) generally applicable to all employees," regardless of its effect on religious employees. 29 C.F.R. §1605.3. Additionally, businesses could choose just one faith's religious holidays to observe by closing. *Id*. §1605.3(b)(2). Further, "absent an intent on the part of the employer to discriminate on religious grounds," employees or applicants were "not entitled to demand any alteration" to the employer's prescribed "normal work week and foreseeable overtime requirements" to "accommodate *** religious needs." *Id*. §1605.3(b)(3). Finally, when an employee's schedule must be changed, creating a conflict with that employee's religious obligations, "an employer is not compelled to make such an accommodation at the expense of serious

inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees." *Id.* §1605.3(b)(4).

3. But the Commission quickly abandoned this standard. Less than a year later, it published a new regulation in the Federal Register, inviting comments. See Phillips at 44 (examining history of regulation). The Commission received many comments lauding the proposal, particularly for its benefits to Seventh-day Adventists and Orthodox Jews. See *id.* at 44-45. But businesses mostly opposed the proposed changes, including its undue hardship standard. *Id.* Friends and foes alike thought the "undue hardship" standard would be more protective of employee religious rights than the prior "serious inconvenience standard." See *id.* For instance, one corporation criticized the new undue hardship standard, observing that it would impose "a more stringent standard" than "serious inconvenience." *Id.* at 45. That letter also complained that "[t]o force an employer to go to the brink of 'undue hardship' on the conduct of his business in accommodating the religious needs of his employees and prospective employees, before he can fulfill his obligation not to discriminate, is placing an unwarranted and unreasonable burden on the employer." *Id.*

Nevertheless, in July 1967, the EEOC adopted the new regulation because of "[s]everal complaints filed with the Commission." 29 C.F.R. §1605.1(b) (July 13, 1967). The new guideline required an "employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."

Id. "Undue hardship" was undefined, but the EEOC noted that it would "review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise." *Id*

4. As Petitioner explains, Congress's "primary purpose" in adopting the 1972 Amendment was to codify the EEOC's standards for reasonable accommodation and undue hardship, in direct response to court decisions that "clouded" the interpretation of Title VII. See Pet. Br. 25-27. In *Dewey* v. *Reynolds Metals Co.* and *Riley* v. *Bendix Corp.*, the lower courts had spurned those guidelines, reasoning that Title VII did not mandate accommodation where an employer's policies were facially neutral. 429 F.2d 324, 328, 334 (6th Cir. 1970); 330 F. Supp. 583, 591 (M.D. Fla. 1971). An equally divided Supreme Court shed little light on the matter, issuing a *per curiam* affirmance of *Dewey* without explanation. 402 U.S. 689 (1971).

In response, Congress swiftly amended Title VII and adopted the reasonable accommodation requirement, with its accompanying exception for undue hardship. 42 U.S.C. §2000e(j). Recognizing that codification, the Fifth Circuit then reversed the district court in *Riley*, holding that the EEOC's 1967 guidelines properly interpreted Title VII, "as validated by the subsequent legislative recognition of that fact." 464 F.2d 1113, 1117 (5th Cir. 1972).

To understand exactly what that legislative recognition entailed, one must examine the EEOC's prior interpretations of the guidelines Congress codified. Only then does the proper interpretation of "undue hardship" become clear.

B. Before 1972, the EEOC consistently interpreted "undue hardship" to require something more than a "de minimis plus" or even "significant" burden.

Between 1967 and 1972, the EEOC issued "a long line of decisions" addressing the meaning of "undue hardship," *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting), putting meat on the bones of what that term means in this "particular context," *Cooper*, 566 U.S. at 294. During this time, ten EEOC decisions applied the "undue hardship" standard, with the Commission determining in eight of them that reasonable cause existed to believe employer had violated Title VII by failing to accommodate employees' religious exercise.[3] See generally Phillips at 47-57.

1. The first decision where the EEOC did not find an undue hardship involved a Seventh-day Adventist mechanic. EEOC Dec. No. 70-110, 1969 WL 2908 (Aug.

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[3] In contrast to "a robust regulatory backdrop," *McDonough*, 142 S. Ct. at 1959, from "a long line of [agency] decisions," *Hardison,* 432 U.S. at 85, the federal case law interpreting Title VII prior to the 1972 amendment is sparse and not "well-settled," see *Sekhar* v. *United States*, 570 U.S. 729, 732 (2013), making it unlikely to be the source of legal soil Congress transplanted into Title VII according to the legal meaning canon. See Phillips at 43. The legislative history supports this conclusion. See 118 Cong. Rec. 652, 705-706 (1972) ("I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. *** This amendment is intended, in good purpose, to resolve by legislation *** that which the courts apparently have not resolved. I think it is needed *** because court decisions have clouded the matter with some uncertainty.") (Statement of Sen. Jennings Randolph).

27, 1969). Employees working weekend overtime were required to work both days. *Id.* at *1. However, employees who worked Saturday but not Sunday were still paid for their Saturday work; they just had a recorded absence for Sunday. But employees who didn't show up on Saturday were prohibited from working Sunday. *Id.* Thus, the Adventist mechanic was completely denied overtime for not working on his Sabbath while those who observed a Sunday Sabbath were allowed some overtime. *Id.*

The employer made two arguments in defense. First, an accommodation would require discrimination for the mechanic's religion and against others. *Id.* at *2. Second, accommodating him required paying him Sunday's double-time rates while he skipped Saturday's time-and-a-half rates, thus imposing "a considerable expense to accommodate his religious beliefs." *Id.* The Commission rejected these arguments and found reasonable cause that the employer had violated Title VII. *Id.*

Hence, the Commission implicitly determined that neither concerns about preferential treatment nor even "considerable expense" to the employer (short of threatening its business) are undue hardships.

2. The next year, the EEOC decided a case involving an employee who, after joining a Sabbatarian church, requested "to work Sundays instead of Saturdays" or "transfer (to the Warehouse) to avoid this conflict." EEOC Dec. No. 70-580, 1970 WL 3513, at *1 (Mar. 2, 1970). His employer denied these requests, raising two reasons why an accommodation would work an undue hardship. First, the plant was closed

on Sundays and the employee's job could not be performed alone. *Id*. Second, because that job could be done only by one of a few equivalent employees, accommodating him would require another such qualified employee "working extra and consecutive shifts." *Id*.

The Commission rejected these defenses. It noted that they assumed religious discrimination occurs only when different groups are treated differently, and it rejected the employer's argument that it had not violated the statute simply because its "Saturday-work rule applie[d] equally to all employees." *Id*. The Commission labeled such an argument "invalid because while a rule may apply equally to all employees, it may well have unequal impact on them." *Id*. (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Dewey* v. *Reynolds Metals Co.,* 300 F. Supp. 709 (D.C. Mich. 1969)). Accord *EEOC* v. *Abercrombie & Fitch*, 575 U.S. 768, 775 (2015) (rejecting similar employer argument). Finally, the Commission noted that the employer had failed to state "whether another employee could be trained to substitute for the [religious employee] during Sabbath days, or whether already qualified personnel have been invited to work a double shift." EEOC Dec. No. 70-580, *supra*, at *2. So, according to the EEOC, there was no showing of undue hardship.

The takeaway from this decision is that training another employee to take over a shift or even recruiting another employee to work a double shift is not an undue hardship.

3. In another 1970 case, an Orthodox Jewish woman's faith mandated she be home before sunset, so she needed to leave work an hour or two before normal closing time in the winter months. EEOC Dec. No. 70-

716, 1970 WL 3586 (Apr. 23, 1970). Initial permission to do so was later retracted, and she was given the option of staying for her full shift, being fired, or taking a part-time job "at the same wage rate but with a substantial loss of hours worked and benefits received." *Id.* at *1. In response, she "offered to come in early or work late on another night to make up the time, to take a cut in pay proportional to the amount of time lost, or have the amount of time deducted from her normal vacation time." *Id.* But her employer rejected these proposed accommodations. *Id.* When she left early the next Friday, the employer terminated her. *Id.*

Before the EEOC, the employer tried to justify its actions by arguing that the size of its workforce prevented it from making individualized exceptions to its policies. *Id.* But the Commission noted that the employee only had to leave early in the winter months and worked a job that did not require supervision, so she "could easily compensate for the lost hours at other times." *Id.* at *2. Noting also that she initially received permission, the Commission found "that her temporary absences" would not have "worked an undue hardship on [the employer's] business needs." *Id.*

In short, seasonal absences of a non-supervised employee did not constitute an undue hardship. And merely having to make an exception to company policy does not count as undue hardship either.

4. In a later 1970 decision, an employee joined a church that mandated attendance at its annual two-week convention. EEOC Dec. No. 71-463, 1970 WL 3544, at *1 (Nov. 13, 1970). So she asked for permission to take her vacation or a leave of absence then. *Id.*

The employer refused, stating that vacations could only be taken during the two-week period when the plant was shut down each year, and any leave of absence longer than "one or two days" would not be allowed "for religious reasons." *Id.* But the employee attended the convention anyway, resulting in a two-week suspension. The next year, over a warning that she would be fired if she left again for the convention, the employee did so and was dismissed. *Id.*

In defense, the employer alleged that granting the request "would have caused undue hardship to its business, both by necessitating the training of a replacement *** and by 'establishing a precedent which would have been a source of discontent for many employees.'" *Id.* The Commission disagreed, noting that, "[w]here an employment policy has a disproportionate impact on members of a group protected by Title VII, the employer has the burden of showing that the policy is *so necessary* to the operation of his business as to justify the policy's discriminatory effects." *Id.* (emphasis added).

The Commission further noted the employer's concession that, while normally the soldering iron assembly was a one-person operation, sometimes to meet extra production requirements two people would work together. *Id.* at *2. The Commission also emphasized that the employer, anticipating a month beforehand that the employee would again leave for two weeks and so be fired, had trained *another* employee for the job and that the two had worked together for that month. *Id.* Given the employer's "assertions as to the importance of the job and its statement that the job some-

times requires two employees," the Commission determined that it was not an undue hardship "to have at least one employee other than [the fired employee] trained in soldering iron assembly." *Id.*

Finally, the Commission rejected the employer's "employee discontent" argument, disagreeing with the Sixth Circuit's decision in *Dewey* to the extent that case "requires less than a showing by an employer that 'chaotic personnel problems' will ensue if the religious needs of particular employees are accommodated." *Id.* Because there was no "persuasive evidence" that accommodating the religious employee "would have given rise to such 'employee discontent,'" there was no undue hardship. *Id.* (cleaned up).

In sum, while an undue hardship can theoretically arise from "chaotic personnel problems" and thus justify a policy that is "*so necessary* to the operation of [one's] business" to justify refusing an accommodation, mere "employee discontent" is not an undue hardship. See *id.* at *1-2 (emphasis added). Nor is the cost and burden of training another employee to back up an employee who needs days off for religious reasons.

5. A month later, the EEOC found another Title VII violation. EEOC Dec. No. 71-779, 1970 WL 3550 (Dec. 21, 1970). The employee in that case was a registered obstetrics staff nurse with 13 years of experience. *Id.* at *1. For religious reasons, she "always wore a scarf which covered her hair," which she had "worn *** to her pre-employment interview, and was never seen without it." *Id.* Because her duties required she wear a "scrub cap," she wore the scarf underneath, which was completely covered by the cap. *Id.* When transferred to a new post, she asked permission to

wear her scarf either under a cap or in place of it, but her supervisor refused her request, resulting in a loss of employment. *Id*.

The hospital defended its cap policy based on the need for "sanitary considerations," but "offer[ed] no evidence that a simple white scarf wrapped closely around [the employee's] hair would be less sanitary than the typical nurse's cap." *Id.* at *2. Another proffered reason for the policy was "that the nurse's cap has traditionally served as a 'symbol,'" that "it used to be customary to require a nurse to work without her cap for two or three weeks as the severest of disciplinary measures," and that "student nurses are not permitted the 'privilege' of wearing a cap until their six month probationary period is completed." *Id*. Unconvinced, the Commission found "that [the employer's] policy of requiring its nurses to wear white caps instead of white scarves is not *so necessary* to the operation of its business as to justify the effect that this policy has upon the employment opportunities of [the nurse] and others of similar religious convictions." *Id*. at *3 (emphasis added) (cleaned up).

Once again, refusing a religious exception to a dress code or other company policy would have to be not only "necessary," but "*so* necessary to the operation of [one's] business *as to justify [its] effect* *** upon the employment opportunities" of those whose religious practices would be affected. Only then would the effect of the religious accommodation qualify as an undue hardship.

6. A decision the next year involved a woman who, upon "adopt[ing] Islam as her religious faith," began "wear[ing] dresses which substantially covered her

legs and arms and which had a high neckline." EEOC Dec. No. 71-2620, 1971 WL 3957, at *2 (June 25, 1971). Her supervisor "pointed out that we are a business and, as such, feel that there are certain standards of dress to which we expect our employees to conform and that, frankly, the attire she described did not fall within those standards." *Id.* at *1. The employer thus argued that it discharged the employee, not because she was a Muslim, but "because she did not wish to comply with the Company's definition of appropriate business attire," which "discourages attention-attracting clothing." *Id.* at *3.

Before the EEOC, however, the employer admitted "that no employee had been previously discharged for wearing clothing considered by the Company not to be appropriate business attire," with a "witness confirm[ing] that no action had been taken against other females for wearing clothing not usually considered as being in good business taste." *Id.* Further, "[d]uring the investigation, as well as on a previous occasion, the Commission's Representative observed female employees of Respondent attired in clothing which could only be described as 'attention-attracting clothing.'" *Id.* Given that the company "offered no evidence that its dress policy is necessary to the safe and efficient operation of its business," and given "that other female employees have on occasion worn unusual and attention-getting clothing, such as miniskirts, and that no other employee has been discharged," *id.* at *2, the Commission concluded the employer violated Title VII.

One can fairly infer from this decision that granting an exception to a company policy is not an undue

hardship if the policy has not been consistently enforced. And here again, an exception to a company policy can qualify as undue hardship only when the policy is truly "*necessary* to the safe and efficient operation of [one's] business." See *id.* (emphasis added).

7. In another case, an employee who was initially willing to work any day and all hours, with his job requiring some evening and weekend work, joined his wife's Sabbatarian faith. He then informed his employer that he could not work after sundown Fridays through sundown Saturdays. EEOC Dec. No. 70-670, 1970 WL 3518 (Mar. 30, 1970). However, he offered to reduce his lunch time "or make it up[]" otherwise, and would "cheerfully work any other day and any other hours." *Id.*

His employer denied his request with a warning that failing to finish his Friday work shift "would be considered [his having] abandoned his job or resigned his position." *Id*. at *3. On the second straight Friday that he left work early, he was fired. *Id*. at *2.

In defense, the employer argued that, because the employee was one of five with similar duties, without him the remaining four would have to add his load to theirs, "provid[ing] a hardship for both the remaining individuals and the company, [given its] need to provide service on a [24/7] basis." *Id*. The employer also claimed that accommodating this employee would be unfair to other employees who had requested Sundays off for worship and who all had been denied, and that it "could not enter into separate or special agreements with individuals who are represented by a bargaining agent." *Id.* at *1.

The Commission rejected this reasoning because "the number of Saturdays required to be worked by each of the five employees in [the employee's] classification has not been shown." *Id.* at *2. For example, each of these employees was required to be on call every fifth Saturday, so requiring one to be on call an extra Saturday "would hardly qualify as an undue 'hardship' for [the employer]," particularly if it would compensate for the accommodation by requiring extra Sunday duty of the employee seeking Saturdays off (which would also enable the employer to give a different employee a Sunday accommodation). *Id*. Reasonable cause thus existed for a Title VII violation. And the presence of a "bargaining agent" didn't change the result.

Thus, according to the EEOC, the administrative burden to the employer of requiring other employees to switch a day or work an extra day is not an undue hardship to the employer. And similarly—of particular relevance to Question 2—the employer could not establish the requisite undue hardship based on burdens faced by its other employees.

8. The final EEOC decision in favor of the employee's religious rights prior to Title VII's 1972 amendment involved a Seventh-day Adventist. EEOC Dec. No. 72-606, 1971 WL 3912 (Dec. 22, 1971). At first his employer, aware that his religion "prohibited him from working between sunset on Friday to sunset on Saturday," never required him to work during those times. *Id*. at *1, *2. Later he was promoted to a position requiring Saturday work, and when he refused to work two consecutive Saturdays, he was fired. *Id*. The employer alleged that no other employees were asked

to fill in for him because they were all either working or unavailable. *Id.* at *3.

The Commission ultimately concluded that the employer violated Title VII. *Id.* at *2. Reiterating its disagreement with the Sixth Circuit's decision in *Dewey*, the Commission said it would require "a showing by an employer that 'chaotic personnel problems' will ensue if the religious needs of particular employees are accommodated." *Id.* And here "[t]here [was] no evidence of record that [the employer] made any effort to find a replacement for [the religious employee], nor [was] there evidence that such effort would have been futile." *Id.* at *1.

Here again, the EEOC's decision shows that anything short of chaotic personnel problems fundamentally disrupting the employer's business—something well beyond finding another employee to take over a religious employee's shift—is not an undue hardship. And this decision reinforces the conclusion that this type of burden on other employees doesn't count as undue hardship to the employer.

9. The two cases in which the EEOC *did* find for the employer confirm this reading of "undue hardship." In the first, a Seventh-day Adventist high school student was hired for six weeks to process perishable crops. EEOC Dec. No. 70-99, 1969 WL 2905, at *1 (Aug. 27, 1969). She had to work Mondays through Saturdays, but for religious reasons she missed five consecutive Saturdays, and so was fired just before her last scheduled week. *Id.*

The Commission applied its undue hardship standard, finding that the employer "would have to obtain

*** substitute employees from outside its work force" because it had "no available pool of qualified employees" to pull from. *Id*. And the Commission "note[d] the practical *impossibility* of obtaining and training an employee from outside the work force to work one day per week for one-and-a-half months per year." *Id*. (emphasis added). The Commission thus concluded no Title VII violation had occurred. *Id*. And it thereby established that a "practical impossibility" *is* an undue hardship.

10. In the only other decision to find such a hardship, a company initially offered an Orthodox Jewish job candidate a position as a process engineer. But it then revoked the offer when he "conditioned his acceptance on being allowed to be absent from work on Saturdays and to leave work early on Fridays during the winter months in order to arrive home before sundown as required by his religion." EEOC Dec. No. 70-773, 1970 WL 3527, at *1 (May 7, 1970).

The company defended its action given the unique nature of the position. *Id*. Process engineers must be available 24/7 because the plants operate continuously; only one engineer is normally assigned to a plant; and the process engineer typically oversees plant operations. *Id*. The company argued that when "setting up a new plant or modifying an existing plant" the company "details a 'team' of process engineers" to a plant, that each has "a specialized task," making it "not possible to replace [the worker in question] with another member of the engineering department without significant loss of time." *Id*. Also, the company "contend[ed] that, if a process engineer is unavailable

at all times to take corrective action on operation problems[,] 'very often the plant must be shut down at a cost of 15 to 25 thousand dollars per day during shut down.'" *Id.*[4] Finally, 15 of the 16 process engineers were regularly assigned to plants, working rotating shifts with the off-shift engineer serving as back-up if the on-shift engineer needed help. *Id.* at *2.

Based on this evidence, the Commission found that an accommodation of the job candidate would work an undue hardship on the company's business "within the meaning of the [regulation]." *Id.* In short, accommodating an irreplaceable employee whose absence may shut down operations and inflict immense economic costs was an undue hardship.

C. The EEOC's pre-1972 decisions show that "undue hardship" meant a burden or expense that was immense or extreme in relation to the employer's overall business.

Combining these EEOC decisions, a standard for determining "undue hardship" can be gleaned. It is clear from those decisions that an "undue hardship" requires something like a practical impossibility, chaotic personnel problems, shutting down one's operations (and suffering exorbitant lost income and costs), or violating a policy truly necessary to the safe and efficient operation of one's business. But it is not an "undue hardship" to (a) give religious employees so-called

[4] A daily financial loss of $15,000-25,000 in 1970 equals about $115,659-192,764 today. See CPI Inflation Calculator, available at https://www.in2013dollars.com/us/inflation/1970?amount=1 (calculating that $1 in 1970 is worth $7.71 today) (last visited February 27, 2023).

preferential treatment, (b) suffer considerable expense (short of exorbitant), (c) experience significant employee discontent (short of chaotic personnel problems), (d) train another employee to take over a shift or work a double shift, or (e) experience seasonal, short absences of a non-supervised employee. And, given the EEOC's decision to replace its earlier regulation with a more protective standard, a mere "serious inconvenience" also is not an "undue hardship."

In short, only accommodations that inflict immense or extreme burdens or costs in relation to the employer's overall business qualify as creating "undue hardship" under the 1967 EEOC regulation.

Moreover, because Congress "enacted no new definition or other provision indicating any departure from the same meaning that the [agency] had long applied," Congress must be considered to have "codified and adopted the [undue hardship standard] as it had developed under prior agency practice." See *McDonough*, 142 S. Ct. at 1959 (cleaned up). Given that "a robust regulatory backdrop fills" the meaning of "undue hardship," the Court should read that phrase as "[d]efined by this regulatory history." *Id*. at 1959-1960.

D. Applying the codified EEOC standard to this case shows that Petitioner should prevail.

Given this understanding of "undue hardship" in Title VII, the question remains whether USPS faced an immense or extreme cost or harm if it accommodated Groff. It did not.

1. As to USPS itself (the first Question Presented): Accommodating Groff required having someone else work a different shift or an extra shift. But this did not present a "practical impossibility" or cause "chaotic personnel problems." Nor would it have shut down USPS's operations. In fact, for a while USPS *did* accommodate Groff, showing it was not overly burdensome. And this very type of burden was found in some of the relevant EEOC decisions to *not* qualify as an undue hardship. See *supra* 12-13, 19-21.

Whatever inconvenience USPS might face in accommodating Groff, it does not rise to the rarified level of being an "undue hardship" as that term is properly understood in Title VII.

2. As to any harm to USPS's employees (Question 2): As explained above, several of the EEOC decisions during the run-up to the 1972 amendment involved alleged harm to employees. But, in each of those decisions, the EEOC held that any burden on other employees was relevant only to the extent it imposed a hardship on employer itself. See *supra* 11-23. And the text of the 1972 Title VII amendment requires this same approach. 42 U.S.C. §2000e(j) (employer must show "undue hardship *on the conduct of the employer's business*") (emphasis added). Accordingly, the answer to Question 2 is clearly "No."

Even if employee harm were cognizable, the EEOC decisions indicate a need for something much more substantial than the harm alleged here. Any harm to employees forced to substitute for Groff falls nowhere near the level of extreme or immense harm that the relevant EEOC decisions require.

In short, those EEOC decisions, which were effectively incorporated into the 1972 Title VII amendment, foreclose USPS's undue-hardship defense, and thus require reversal.

II. *Hardison*'s *De-Minimis*-Plus Standard Severely Burdens the Religious Exercise of Seventh-day Adventists and Other Sabbath Observers.

By allowing employers to refuse to accommodate religious practices when doing so would impose any more than a *de minimis* inconvenience, *Hardison* puts many employees to a choice between their faith and their job. Doing so contravenes both the meaning and purpose of Title VII. For religious minorities like *amicus* that have beliefs and practices that contravene societal norms or standard business practices, *Hardison*'s burden is acute. This case particularly illustrates *Hardison*'s devastating impact: keeping the Sabbath is a commandment of the highest significance for *amicus* and its members, because it is a matter of salvation. This Court should correct *Hardison*'s error and adopt the definition of undue hardship Congress codified from the phrase's regulatory history so that members of faiths like *amicus* may freely live their faith while retaining their employment.

A. Observing the Sabbath is of utmost importance to Seventh-day Adventists.

To fully appreciate the burden that affirming the lower court would place on Adventists—and the burden that *Hardison*'s *de-minimis*-plus standard already has placed on them—it is important to understand the deep importance of Sabbath Day observance in the Seventh-day Adventist faith. As the name of the church highlights, the observance of a seventh day Sabbath, from sundown Friday until sundown Saturday, is "foundational" and holds "great significance for Adventists and their history."[5]

The Seventh-day Adventist Church originated in the mid-1800s, when a group of Christians engaged in rigorous Bible study during the Second Great Awakening. From that study, they came to understand the great significance of the fourth commandment: "Remember the Sabbath day, to keep it holy." Exodus 20:8 (ESV). And, as they studied the Bible, "they found no evidence that the fourth commandment was to be altered in any way[.]"[6] They therefore began to observe the Sabbath on the seventh day, contrary to the prevailing tradition among Christians of observing Sunday as the day of rest and worship.[7] Seventh-day Sabbath observance is therefore one of the twenty-eight

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[5] Seventh-day Adventist Church, *Why You Should Get to Know Seventh-day Adventists*, https://www.adventist.org/who-are-seventh-day-adventists/.

[6] *Id.*

[7] *Id.*

fundamentals of Seventh-day Adventist belief.[8] Despite many challenges where most of "society's calendar [is] structured to give preference to Sunday"—or increasingly to no holy day at all—"honoring this commandment of God *** remains a priority to this day."[9]

A crucial aspect of Sabbath observance in the Adventist faith is the biblical commandment to refrain from secular work: "Six days shall work be done, but on the seventh day is a Sabbath of solemn rest, a holy convocation. You shall do no work. It is a Sabbath to the Lord in all your dwelling places." Leviticus 23:3 (ESV). As Ellen G. White, co-founder of the Seventh-day Adventist church, stated:

> "The law forbids secular labor on the rest day of the Lord; the toil that gains a livelihood must cease; no labor for worldly pleasure or profit is lawful upon that day; but as God ceased His labor of creating, and rested upon the Sabbath and blessed it, so man is to leave the occupations of his daily life, and devote those sacred hours to healthful rest, to worship, and to holy deeds."[10]

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[8] Seventh-day Adventist Church, *Official Beliefs of the Seventh-day Adventist Church*, available at https://www.adventist.org/beliefs/.

[9] *Why You Should Get to Know Seventh-day Adventists,* supra n. 5.

[10] Ellen G. White, The Desire of Ages 207 (1898), available at https://www.ellenwhite.info/books/ellen-g-white-book-desire-of-ages-da-contents.htm.

For some Christian denominations, failing to hallow the Sabbath by working on it or engaging in secular pursuits like shopping or sports, might be considered a relatively minor sin—or no sin at all. Not so for Adventists, who hold that the Sabbath is "God's perpetual sign of His eternal covenant between Him and His people," and that its observance is "a symbol of [their] redemption in Christ, a sign of [their] sanctification, a token of [their] allegiance, and a foretaste of [their] eternal future in God's kingdom."[11] Adventists believe that, in the last days, "[t]he Sabbath will be the great test of loyalty,"[12] and that, "[w]hen this issue is clearly brought before the world, those who reject God's memorial of creatorship—the Bible Sabbath—*** will receive the 'mark of the beast.'"[13] By contrast, those who keep the seventh-day Sabbath, by "choosing the token of allegiance to divine authority, [will] receive the seal of God."[14] For Adventists, keeping the Sabbath is therefore a matter of the greatest importance.

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[11] *Official Beliefs of the Seventh-day Adventist Church*, *supra* n. 8.

[12] Ellen G. White, The Great Controversy Between Christ and Satan 605 (1911).

[13] Ministerial Association of the General Conference of Seventh-day Adventists, *Seventh-day Adventists Believe* 167 (1988).

[14] The Great Controversy, *supra* n. 12, at 605.

B. *Hardison*'s *de minimis* plus standard disproportionately discriminates against religious minorities like *amicus*.

Because of their seventh-day Sabbath observance, Adventists are disproportionately subjected to religious discrimination in employment. To the extent that any religions are accommodated by employers, majority religions are more often accommodated by default in a societal calendar that caters to their faiths.

For example, while Sunday Sabbath observance is at issue in this case, seventh-day Sabbatarians are likely to face even more difficulties with employment at a post office than are Sunday observers. After all, except for deliveries of private packages like the arrangement at issue here, the mail is delivered on Friday and Saturday, but not on Sunday. See also *supra* at 12-26 (seven of the ten EEOC decisions involved a Saturday Sabbath accommodation request).

And that general principle holds true for many other employers as well: Too often, employing those who wish to observe a Friday sundown to Saturday sundown Sabbath will be deemed an undue hardship (under *Hardison*'s mistaken interpretation of that term) due to normal business hours and operations. By default, then, the greatest harm from *Hardison*'s misinterpretation falls on members of minority faiths that are more likely to deviate from societal norms on issues of dress, Sabbath observance, prayer, religious holidays, and all manner of other religious practices that are central to a religious person's daily living.

As Justice Alito recognized in an earlier case involving an Adventist member, forcing a believer to decide between his religion and his employment is a "cruel choice" indeed. *Abramson* v. *William Paterson Coll. Of N.J.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring). For faithful Adventists, that choice can be between losing their job and breaking a commandment at the core of their religion, with the possibility of a loss of their salvation.

Congress amended Title VII precisely to prevent religious individuals from being forced to make that choice. Indeed, the Title VII amendment at issue was introduced by a Saturday Sabbath observer, who wanted to protect employees from employers' refusal "to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." 118 Cong. Rec., *supra*, at 705 (1972).

Hardison rendered that amendment almost useless. And it is religious minorities like *amicus* and its members that bear the brunt of the burden. See *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring). As Petitioner notes, this discrimination proves that *Hardison*'s *de minimis* plus test is unworkable and unworthy of this Court's *stare decisis* deference. Pet. Br. 33-34.

CONCLUSION

Hardison's *de-minimis*-plus test for undue hardship is incorrect, unworkable, and in effect discriminatory against religious minorities like *amicus* and its members. Because of *Hardison*'s error, *amicus*'s members have too often been put to the choice between

their religion and their vocation—particularly because of their seventh-day Sabbath observance, a central tenet of their faith. It is time for this Court to overturn *Hardison* and adopt an interpretation of undue hardship consistent with this term of art's regulatory history: that is, harm that inflicts an immense or extreme cost in relation to the employer's overall business. No such extreme cost or harm existed here, and this Court should reverse.

Respectfully submitted,

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