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 THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE NATIONAL INSTITUTE FOR WORKERS' RIGHTS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE[1]

NELA is the world's largest organization of plaintiff employment lawyers, with over 2,000 members. As such, its membership has been involved in litigation on several sides of religious accommodation issues—representing employees who have requested workplace accommodations for their religious beliefs or practices and representing employees who were burdened by accommodating others' religious beliefs. This gives NELA a unique perspective that can assist this Court in analyzing this difficult and possibly polarizing issue with varying views across society and the civil rights community. With diversity, equity, and inclusion as the core tenets of our organization, this brief advocates for a standard that protects the interests of persons with varied backgrounds and beliefs in the workplace, while ensuring that the accommodations their employers are required to make are not so onerous as to disrupt workplace efficiency or neutrality among religions.

The mission of the National Institute for Workers' Rights is to advance workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. The Institute aspires to a future in which all workers are treated with dignity and respect; workplaces are equitable, diverse, and inclusive; and the wellbeing of workers is a priority in business practices. As the nation's employee rights

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than Amici Curiae, its members, and its counsel have made monetary contributions to the preparation or submission of this brief.

advocacy think tank, the Institute influences the broad, macro conversations that shape employment law.

SUMMARY OF ARGUMENT

NELA and the Institute have analyzed this issue from both sides of the caption and are filing here on behalf of neither party. NELA and the Institute believe that it would be appropriate for this Court to address the confusion surrounding the de minimis language adopted in *Trans World Airlines, Inc v. Hardison*, 432 U.S. 63 (1977). This Court should clarify the confusion over *Hardison*'s de minimis language and the employer's burden under Title VII's religious accommodation provision.

In revising the standard, this Court should clarify that the effects on employees are quite relevant to both sides of the accommodation equation. In clarifying *Hardison*, this Court should make clear that Congress's mandate to provide accommodation for religious beliefs and practices means that the undue hardship standard is and ought to be a meaningful barrier to overcome for employers. And employers must provide proof of the hardship and not just speculate on potential harm. Moreover, this Court should make clear that hardship "on the conduct of the employer's business" will, in many cases, necessarily encompass the effect on co-workers.

Because the District Court and Third Circuit relied on *Hardison*'s de minimis language and did not require proof of hardship, the case should be remanded to properly apply the revised standard. Further, this Court should caution lower courts against the use of summary judgment when there are contested issues of material fact, as pointed out in Judge Hardiman's dissent.

ARGUMENT

I. IT WOULD BE APPROPRIATE FOR THIS COURT TO REVISE THE *HARDISON* DE MINIMIS STANDARD

A. *Hardison*'s De Minimis Language was Written in a Context Where Undue Hardship was Not Yet Part of Title VII

In *Hardison*, the Court confronted the difficult task of balancing Title VII's congressional intent to provide a workplace free from discrimination while creating a standard that would not impose such a high burden of accommodation on employers that would violate the Establishment Clause. In enacting Title VII, Congress's purpose was "'to eliminate . . . discrimination in employment based on race, color, religion, or national origin.'" *Hardison*, 432 U.S. at 71 n.6 (quoting H.R. Rep. No. 914, at 26 (1963)). As enacted, Title VII did not include an affirmative duty to accommodate religion; that obligation was initially recognized by EEOC guidelines. *See* 29 C.F.R. § 1605.1(a)(2) (1966).

The Guidelines' provision exempting employers from providing reasonable accommodations due to undue hardship was incorporated into Title VII in 1972. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (1972). But the events adjudicated in *Hardison* took place before the EEOC guidelines were codified. This makes *Hardison*'s de minimis language dicta as applied to interpreting the post-1972 text of Title VII.

At the time *Hardison* was decided, the threat of establishment of religion cautioned the Court against creating an accommodation obligation which was too high.[2] Accordingly, the Court treaded lightly in defining the employer's burden so that the competing concerns—that is, Title VII's mandate, avoiding Establishment Clause violations, and enforcing an obligation that would not over-burden employers—would be constitutionally balanced.

How the courts evaluate Establishment Clause claims has evolved since the Court abrogated the reasoning in *Lemon*. The Court recognizes that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses. . . ." *Cutter v. Wilkinson*,

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[2] *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), *abrogated by Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970))) (internal citation omitted).

544 U.S. 709, 713 (2005) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Similarly, in the Title VII accommodation context, a balance should exist between accommodation requirements and the Establishment Clause. As the Court has previously stated, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion. . . .'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

Indeed, eight years after *Hardison*, the Court confronted the Establishment Clause issue that may arise from the Title VII reasonable accommodation clause, ruling unconstitutional a Connecticut statute providing that "'[a]n employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.'" *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 706 (1985) (quoting Conn. Gen. Stat. § 53-303e(b) (1985)). The Court reasoned that Connecticut, with "this unyielding weighting in favor of Sabbath observers over all other interests[,]" created a statute that "ha[d] a primary effect that impermissibly advance[d] a particular religious practice." *Id.* at 710. Even the Petitioner and amici in support of Petitioner have conceded that over-accommodation of religion could violate the Establishment Clause. *See* Pet. Br. 24; *see also* Br. for Religious Liberty Scholars, et al. as Amici Curiae Supporting Pet. at 5, *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (2023) (No. 22-174).

But the primary problem with how *Hardison* has been applied in the ensuing decades—particularly in light of the inclusion of "undue hardship" in Title VII—is that it has not provided sufficient protection for employees seeking accommodations, as required by Title VII. NELA, the Institute, and other amici agree that confusion over the de minimis language in *Hardison* has led to many cases where the requested accommodation appeared minimal and reasonable but was nevertheless deemed an undue hardship.[3] Because of this confusion, this Court should now refine the *Hardison* standard and further clarify the employer's evidentiary burden.

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[3] *See* Br. for the Sikh Coalition, et al. as Amici Curiae in Support of Pet. at 12-13, *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (2023) (No. 22-174) (first citing *EEOC v. Sambo's of Georgia*, 530 F. Supp. 86, 88 (N.D. Ga. 1981) (affirming restaurant's denial of Sikh man's managerial application when his turban and beard were inconsistent with the restaurant's grooming policy and long standing public image), then citing *Birdi v. UAL Corp.*, No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002) (finding it reasonable for airline to fire a Sikh, who wore a turban, for refusing to move to a position where he would not be seen by customers)); *see also* Br. of the Rutherford Institute as Amici Curiae in Support of Pet. at 7, *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 2023 (No. 22-174) (citing *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018) (finding undue hardship in Muslim workers' request to have meal break at sunset because other employees preferred a later mealtime)).

B. Any Revised Standard Should Clarify That the Employer Has the Burden of Showing Actual Harm

The undue hardship standard arises after the person seeking accommodations has made out a prima facie case that they are entitled to such accommodations under Title VII. The burden then shifts to the employer to demonstrate two things. *See Webb v. City of Phila.*, 562 F.3d 256, 259 (3d Cir. 2009).

First, the employer must show a good faith effort to accommodate.[4] A good faith effort to accommodate should include requiring the employer to show not only a real harm that would result from an accommodation, but also: (1) why the employee's preferred accommodation was rejected; (2) that the employer exhausted all reasonable options; (3) that the employer initiated attempts to accommodate; (4) and/or the employer has attempted to modify practices to accommodate beyond the existing norm.

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[4] *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988) (stating "[t]he burden shifts to the employer to 'prove that [it] made good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that [it was] unable reasonably to accommodate his beliefs without undue hardship.'" (quoting *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978)); *see also Harrell v. Donahue*, 638 F.3d 975, 980 (8th Cir. 2011); *Cf. EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243–44 (9th Cir. 1981); *Redmond v. GAF Corp.*, 574 F.2d 897, 904 (7th Cir. 1978).

Consistent with making a good faith effort to accommodate, this Court may want to emphasize that an employer should engage in an interactive process with their employee to agree on a reasonable accommodation jointly. This process may include conferring with the individual who needs an accommodation to understand the employee's specific concerns, reviewing an employee's recommendations for accommodations, and discussing various possibilities of reasonable accommodations with the employee.

Second, if the accommodation attempt is unsuccessful, then the employer must show that there would be undue hardship from further accommodation. In doing so, employers must demonstrate actual harm and not merely hypothetical future harm.

For example, costs that may pose undue hardships in some circumstances, like overtime or premium pay to another employee to relieve the accommodated employee, may be reasonable in other circumstances.[5] Costs that are primarily administrative in nature, like rearranging schedules or recording payroll substitutions, generally should not constitute undue hardship.[6]

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[5] *See Redmond*, 574 F.2d at 904 (holding that employer failed to demonstrate undue burden of paying premium replacement worker wages where the plaintiff would also have been paid premium wages during those hours); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir. 1986) (finding no undue hardship for Sabbath accommodation where the company ordinarily maintained a floating crew of replacement workers).

[6] *See*, *e.g.*, *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1089 (6th Cir. 1987) (finding that costs associated with advertising the

On the other hand, accommodations that do not require additional financial outlays may still pose an undue hardship for the employer, where the ordinary operations of the business would be significantly disrupted by the accommodation.[7]

C. The Clarification of the Standard Must Also Reiterate the Appropriate Standard for Summary Judgment Adjudication.

This Court should also ensure that lower courts properly apply any revised standard while scrupulously respecting summary judgment standards. As the Court has stated, "Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial. . . ." *Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 627 (1944). "[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Id.* Summary judgment "must be construed with due regard . . . for the rights of persons opposing such claims and defenses to demonstrate in

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need for shift trades or contacting employees about shift trades were not an undue burden on the employer).

[7] *See Brown v. Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) (finding that accommodation allowing employee to assign typing of Bible study notes to secretary would require more than *de minimis* cost because secretary would otherwise be performing the employers' work); *Protos*, 797 F.2d at 134-35 (employer failed to prove undue hardship when "efficiency, production, quality, and morale" were unaffected by employee's absence).

the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (stating "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor").

This case presents an example of how the lower courts have failed to properly apply the existing *Hardison* standard because the court did not require the employer to show actual harm. Indeed, Judge Hardiman's dissent made this very point. *Groff v. DeJoy*, 35 F.4th 162, 176 (3d Cir. 2022) (Hardiman, J., dissenting). Judge Hardiman argued that if the Court followed a purely textual understanding of undue hardship, "the decision to remand" would have been "easier for [the] panel to make." *Id*. at 176 n.1 (Hardiman, J., dissenting). While Judge Hardiman conceded that USPS may be able to prove the accommodation resulted in a more than de minimis cost to their business, under his understanding of undue hardship, he still found that there was insufficient evidence to grant summary judgment, as "issues of material fact remain[ed]" regarding how burdensome Groff's accommodations would have been for USPS. *Id.* at 177 (Hardiman, J., dissenting). The proper use of summary judgment can be facilitated under a clarified undue hardship standard by requiring employers to show evidence of actual hardship.

II. TITLE VII'S UNDUE HARDSHIP STANDARD MUST CONSIDER THE EFFECT AN ACCOMMODATION WOULD HAVE ON CO-WORKERS

Businesses employ many people with diverse religious beliefs. Accordingly, employees' religious freedoms and secular employees' rights must be balanced among several interests. Regardless of the standard this Court adopts, the impact on co-workers should be a relevant and important consideration in this Court's analysis. Even Petitioner admits that an accommodation's impact on co-workers can be "relevant." Pet. Br. 39. Indeed, although employers must—and should—make reasonable accommodations for an employee's "sincerely held religious belief," an accommodation's impact on coworkers will often be relevant to the analysis.

A. The Impact on Other Employees is a Necessary Consideration in Determining Whether a Religious Accommodation Imposes an "Undue Hardship on the Conduct of the Employer's Business"

Courts have focused considerable and understandable attention on what amount or degree of burden constitutes undue hardship, particularly considering *Hardison*'s confusing de minimis gloss on that language. But few courts have focused on the object of that hardship: "the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Judge Hardiman's dissent references the object of the undue hardship standard on a few occasions, indicating that "Title VII requires USPS to show how Groff's accommodation would harm its '*business*,' not Groff's coworkers[,]"and explaining that "neither our Court nor the Supreme Court has held that impact on coworkers alone—without showing business harm—establishes undue hardship." *Groff*, 35 F.4th at 176 (Hardiman, J., dissenting).

But the dissent's argument that the statute requires a showing of "business harm"—as in, fewer customers or lower revenue—is an overly narrow reading of the statute that seems to redline the words "conduct of the" out of the statutory phrase "undue hardship on the conduct of the employer's business." It is neither hardship "on the employer" nor hardship "on the business" that is the proper focus of analysis under the plain text of the statute. Rather, it is undue hardship "on the *conduct* of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added).

This statutory language, like the rest of the expanded definition of "religion" in Title VII, comes from the EEOC regulations that were in place interpreting the Civil Rights Act before Congress codified the regulations in 1972. Indeed, versions of this phrase appeared in both the 1966 EEOC guideline to Title VII (religion should be accommodated "where such accommodation can be made without serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.1 (1967)), and the 1967 amended EEOC guideline "where such accommodations can be made without

undue hardship on the conduct of the employer's business." 29 C.F.R § 1605.1 (1968) (both cited in *Hardison*). And this EEOC guideline on accommodating religion was then imported into the statute through the 1972 amendment to Title VII of the Civil Rights Act.

The word "conduct" is not defined in the statute, and so we use its ordinary meaning. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Merriam-Webster defines "conduct" as "the act, manner, or process of carrying on" or and lists "management" as a synonym. *Conduct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/conduct (last visited Feb. 28, 2023). Oxford defines it as "the way in which a business or an activity is organized and managed." *Conduct*, Oxford Advanced Learner's Dictionary, https://tinyurl.com/bdzhk59h (last visited Feb. 28, 2023). A fundamental part of the "the way in which a business or an activity is organized and managed" is determining who does what, and how the work is done. Clearly, managing people is part of the object of "hardship" under Title VII. But it goes beyond that. The "conduct of the employer's business" also includes, for example, how the organization interacts with and serves customers, which necessarily happens through the organization's employees.

The relevant inquiry, then, is not whether hardship on *only* co-workers can ever be sufficient to defeat a Title VII religious accommodations claim. Rather, impact on co-workers must be considered through the lens of how the accommodations affect the "conduct of

the employer's business." This means that, at times, an impact on only co-workers might be *so great* that it poses an undue hardship; but other times it will not.

In this case, the USPS's business is mail and package delivery, whether sent through USPS or Amazon. A key part of "the . . . process of carrying on" that activity is making sure there are sufficient people to deliver on each day of the week. If USPS can show that accommodating Mr. Groff's observance of the Sabbath on Sunday causes undue hardship to the Postal Service's task of making sure that there are sufficient people to deliver every day, then the defendant will have met its burden. This is, of course, a fact-intensive inquiry, not always capable of resolution at the summary judgment stage.

As the Third Circuit's majority opinion pointed out, negative impacts to employee morale caused by Groff's accommodation can also evidence "hardship to the conduct of the employer's business."[8] Low morale can impact the quality of the service the business provides and cause challenges in recruiting and retaining employees. Undoubtedly, both are fundamental components of "the act, manner, or process of carrying on" a business.[9]

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[8] *Groff*, 35 F.4th at 174 n.19 (stating "[a] business may be compromised, in part, if its employees and poor morale among the work force and disruption of work flow. This, of course, could affect an employer's business and could constitute undue hardship.").

[9] *Conduct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/conduct (last visited February 28, 2023).

To effectively determine whether an accommodation can be made "without undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j), a reviewing court will frequently have to consider the impact on other employees caused by such an accommodation. After all, the effect an accommodation has on other employees' capabilities must be considered by employers so that they may ensure the efficient management of their business. Indeed, employees are "participants" in the business without whose cooperation the business as "a practical matter" cannot function. *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 199 (2d Cir. 2003).

Moreover, many lower courts already recognize that the impact on other employees is a relevant factor in Title VII's undue hardship analysis.[10] Although Judge Hardiman in dissent does not believe that impact on "co-workers [alone]" is sufficient, he nonetheless agrees with the *premise* that third-party harm is relevant. *Groff*, 35 F.4th at 178–79 (emphasis added). Indeed, an 'actual imposition' on third parties, meaning a *real* harm as opposed to a *hypothetical* one, can pose a significant burden. *Brown*, 61 F.3d at 655

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[10] *Groff*, 35 F.4th at 174; *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021); *Porter v. Chicago*, 700 F.3d 944, 951–53 (7th Cir. 2012); *Harrell v. Donahue*, 638 F.3d 975, 980-81 (8th Cir. 2011); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 520–21 (6th Cir. 2002); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001); *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996); *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986).

(quoting *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978)). But the onus remains on the employer to prove it.

B. The Court Has Already Recognized That Third-Party Impact is a Relevant Consideration in Accommodations Cases

Although religious accommodations need not "come packaged with benefits to secular entities [,]" *Amos*, 483 U.S. at 338, the recognition of the impact on third parties (other than the employee and employer) has been a part of the Court's previous accommodations decisions.

By recognizing third-party effects, courts would not simultaneously run into "heckler's veto" issues. Pet. Br. 14. Heckler's veto issues arise in the public sphere, an "open" environment where dissenters are free to depart as they desire.[11] But the employment context is different; it is a "closed" environment. Employees must work together—that is, they cannot simply walk away from certain speech or action if they do not like it. Therefore, accommodating an employee's

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[11] Examples of "heckler's veto" issues demonstrate its relevance to public settings. *See*, *e.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965) (public protest); *Feiner v. New York*, 340 U.S. 315 (1951) (public sidewalk); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (public speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (public street); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015) (public festival); *Startzell v. City of Phila.*, 533 F.3d 183 (3d Cir. 2015) (same); *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286 (9th Cir. 2015) (public park).

religious beliefs will sometimes *directly impact* another employee. And if those impacted employees want to remain employed, they have little choice but to work with the accommodation.

Hardison contemplated third-party effects by concluding that "Title VII does not require an employer" to "deny the shift and job preferences of some employees . . . in order to accommodate or prefer the religious needs of others." *Hardison*, 432 U.S. at 81. In fact, the Court repeatedly stressed that "accommodat[ing] . . . the needs" of both religious and secular employees was integral to the analysis. *Id*. at 78. Even the dissent acknowledged that "important constitutional questions" would be posed by an interpretation of Title VII that forces fellow employees to incur substantial costs. *Id*. at 90 (Marshall, J., dissenting).

In addressing religious accommodation requests under Religious Land Use and Institutionalized Person's Act ("RLUIPA"),[12] the Court noted that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries. . . ." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (citing *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). The Court explained that courts "must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Id*. Further, religious accommodation "must be measured so that it does not override *other significant interests*." *Id.* at 710 (emphasis added); *see also Holt v. Hobbs*, 574

[12] 42 U.S.C. § 2000cc-1(a)(1)–(2) (2000).

U.S. 352, 370 (2015) (Ginsburg, J., concurring) (reasoning that "accommodating [prison]er's religious belief . . . would not detrimentally affect others who do not share [prison]er's belief").

Similarly, in *US Airways, Inc. v. Barnett*, the Court found that the impact on third-party expectations is a legitimate consideration in analyzing undue hardship in the ADA context. 535 U.S. 391, 404 (2002). The Court reasoned that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to show undue hardship because requiring the employer to show more "might well undermine the employees' expectations of consistent, uniform treatment. . . ." *Id.* at 404–05.

Consistent with the plain meaning of Title VII and the Court's prior decisions, courts must consider the impact a requested religious accommodation may have on non-beneficiaries.[13]

CONCLUSION

This Court should clarify the confusion over *Hardison*'s de minimis language and emphasize that employers have the burden to prove actual hardship,

[13] *See generally* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 Cardozo L. Rev. 595, 641 (1999) (noting that. under Title VII, an employer must accommodate a religious employee "so long as the accommodation . . . does not impose any significant burden on coworkers").

not just speculative harm. At the same time, this Court should make clear that hardship "on the conduct of the employer's business" will often include the impact on co-workers as part of the analysis.

Here, because the lower court relied on *Hardison*'s de minimis *language* and did not require the employer to show *actual* proof of hardship, the district court erred in granting summary judgment. The case should be remanded to the district court to apply Title VII's religious accommodation requirement consistent with this Court's opinion.

Respectfully submitted,

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