No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

PETITIONER,

v.

Louis DeJoy,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, AND VERMONT IN SUPPORT OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

KARL DAVID SMITH
Deputy Solicitor General
Counsel of Record

BRIAN J. BAKER
NICHOLAS ULRICH
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
karl.smith@atg.wa.gov

Additional Counsel Listed On Signature Page

QUESTIONS PRESENTED

The questions presented are:

1. Whether this Court should overrule the more-than-de-minimis-cost test for 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 by showing that the requested accommodation burdens the employee's co-workers.

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INTERESTS OF AMICI CURIAE

The States of Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Maine, Maryland, Minnesota, and Vermont submit this amicus curiae brief in support of Respondent.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court interpreted the "undue hardship" standard that appears in Title VII's definition of "religion." This Court held that an "undue hardship" exists when an employer must "bear more than a de minimis cost[.]" *Id.* at 84. During the nearly half century since *Hardison* was decided, this Court, along with every circuit court to address the issue, has treated *Hardison* as binding authority.

Amici States, like many employers, have an interest in continued adherence to the *Hardison* standard, as they have relied on it in making numerous employment decisions. Because a re-interpretation of federal law presumptively "must be given full retroactive effect," *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), States may be subject to liability for decisions made in good faith reliance on clearly established precedent. This would be contrary to "[e]lementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Amici States also have an interest in ensuring that the *Hardison* standard is correctly applied. To

this end, Amici States have an interest in seeing this Court clarify the *Hardison* standard in a way that ensures meaningful protection of religious liberty and predictability for employers. Lower court decisions applying *Hardison* identify appropriate considerations. Correctly applied, Title VII's undue hardship standard for religious accommodation claims, as interpreted in *Hardison*, provides meaningful protection; numerous plaintiffs have appropriately prevailed under that standard.

Amici States also have an interest in continuing to innovate in developing laws that protect religious liberty. Amici States strongly value religious liberty. Religious freedom is a foundational aspect of state constitutions. *E.g.*, Wash. Const. art. I, § 11; Cal. Const. art. I, § 4; Haw. Const. art. I, § 4; Me. Const. art. I, § 3; Minn. Const. art. I, § 16. The *Hardison* standard sets a floor for such protection, and States have built upon that floor, adopting thoughtful and nuanced statutory protections for religious observance, practice, and belief, such as provisions specific to health care workers. Raising the floor set by Title VII will effectively displace state statutory structures. Such a change should come from Congress, which will have an opportunity to more fully study the results from the "laboratories of 'innovation and experimentation'" that are the States. *Berger v. North Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

SUMMARY OF THE ARGUMENT

This Court definitively interpreted 42 U.S.C. § 2000e(j)'s undue hardship standard in *Hardison*. This Court—along with every circuit, numerous States, and the EEOC—has understood that interpretation to be binding, and States have accordingly relied on that standard in making numerous employment decisions. Arguments by Petitioner and other amici attempting to undermine the reasonableness of States' reliance on this longstanding, consistent precedent lack merit. Reliance on this Court's interpretation was particularly reasonable in light of the "special force" of *stare decisis* with respect to statutory interpretation, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)), and Congress's decision to provide an express definition of the term "undue hardship" in other statutes without amending 42 U.S.C. § 2000e(j).

In light of States' and other employers' reasonable reliance on the *Hardison* standard, this Court should decline Petitioner's invitation to overrule *Hardison*. Reliance strongly counsels against overturning precedent. While this Court should not depart from the *Hardison* standard, this Court can and should clarify that standard. At least three clarifications are appropriate. First, as lower courts have correctly recognized, the burden of establishing an undue hardship is squarely on the employer. *E.g.*, *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978). Second, employers must demonstrate an *actual* hardship; speculative or hypothetical harm does not suffice. *E.g.*, *Brown v. Polk County, Iowa*,

61 F.3d 650, 655 (8th Cir. 1995) (en banc). Third, the inquiry into whether a cost is de minimis is fact-specific; one employer's undue hardship can be another employer's de minimis cost. *E.g.*, *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1577 (7th Cir. 1997).

Finally, the *Hardison* standard has allowed States to innovate and experiment with unique approaches to protecting religious liberty. States that desire to adopt a "significant difficulty or expense" standard for establishing an undue hardship have done so under state law. States can also adopt additional standards tailored to the realities of certain industries, or to certain types of more-frequent accommodation requests, allowing state legislatures to fine-tune religious protections in the context of a wide variety of competing policy interests. And if Congress amends 42 U.S.C. § 2000e(j) to define "undue hardship" and change its application across all States, it can look to the diverse experiences of the States as it crafts an appropriate standard.

In short, after nearly a half century of reliance by States, any departure from the *Hardison* Court's interpretation of 42 U.S.C. § 2000e(j) should come from Congress. But this Court can and should clarify that *Hardison*'s "more than a de minimis cost" standard imposes a meaningful burden on employers to demonstrate *actual* hardship and that, on the specific facts of each case, the hardship would be more than de minimis, considering, among other things, the availability of other employees and the size and resources of the employer. This approach ensures that Title VII is protective of individual religious exercise, preserves the reliance interests of States and other

employers, and leaves Congress and the States free to adopt more demanding undue hardship standards, either across the board or in a more nuanced manner.

ARGUMENT

A. States Have Reasonably Relied On *Hardison*

States have reasonably relied on the *Hardison* Court's interpretation of "undue hardship" in 42 U.S.C. § 2000e(j) for nearly half a century. States are large employers. According to the United States Census Bureau, "state and local governments employed 19.8 million people" as of March 2020. U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2020*, https://www.census.gov/content/dam/Census/library/publications/2021/econ/2020_summary_brief.pdf. Unsurprisingly, in the 45 years since *Hardison* was decided, States have had to act on numerous requests for religious accommodations. These can arise in a wide variety of settings, from law enforcement personnel refusing to carry out particular assignments, *Endres v. Indiana State Police*, 349 F.3d 922, 923 (7th Cir. 2003) (refusing to work at casino), to requests for religious leave by employees of state-operated 24/7 facilities for adults with developmental disabilities, *Suarez v. State*, 517 P.3d 474, 480 (Wash. Ct. App. 2022), *review granted*, 200 Wash. 2d 1026 (Feb. 8, 2023), and to exemptions from public health-related conditions of employment, *e.g.*, *Brox v. Woods Hole*, 590 F. Supp. 3d 359, 364 (D. Mass. 2022) (reflecting request to public agency for religious exemption from vaccination policy). In states that have not adopted additional or separate requirements

under state law, States have reasonably relied on the *Hardison* standard in determining whether to grant requested accommodations.

States' reliance on the *Hardison* standard is manifestly reasonable. The *Hardison* standard has been in effect for nearly half a century. It has been applied by every circuit to address Title VII's undue hardship standard for religious accommodations, as well as by numerous state courts. During the intervening 45 years, Congress has declined to replace the *Hardison* standard, despite having a ready blueprint to do so in the definition of "undue hardship" it adopted in the Americans With Disabilities Act, 42 U.S.C. § 12111(10)(A), and the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4303(16).

The suggestion by Petitioner and some amici that the *Hardison* standard was not, in fact, a holding of this Court is inconsistent with this Court's treatment of the *Hardison* standard as a binding interpretation. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (reflecting that this Court "determined" the undue hardship standard and "agreed" with the employer "that all conceivable accommodations would result in undue hardship"). It is also inconsistent with the fact that every circuit to address the issue has treated the *Hardison* standard as a holding. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004); *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133-34 (3d Cir. 1986); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Antoine v. First Student, Inc.*, 713 F.3d 824, 839 (5th Cir. 2013);

McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 37 (6th Cir. 1982); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455-56 (7th Cir. 2013); *Brown*, 61 F.3d at 655; *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Lake v. B.F. Goodrich Co.*, 837 F.2d 449, 451 (11th Cir. 1988).

Further illustrating the reasonableness of States' reliance on the *Hardison* standard is Congress's consistent rejection of proposals to amend Title VII. "[*S*]*tare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co.*, 552 U.S. at 139 (quoting *Patterson*, 491 U.S. at 172-73); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 765 (2011) (adhering to prior statutory interpretation after noting "nearly half a century" of congressional deference and the standard's place as "a fixture in the law"). That rationale is particularly forceful in this context, as Congress has repeatedly considered, but not enacted, bills that would amend the definition of "undue hardship" to impose a more stringent standard in the religious context. *E.g.*, H.R. 1440, 117th Cong. (2021); H.R. 5331, 116th Cong. (2020); S. 3686, 112th Cong. (2012); H.R. 5233, 103d Cong. (1994). And Congress has repeatedly amended Title VII since *Hardison* but left the definition of "undue hardship" unchanged. Pub. L. No. 102-166, §§ 104, 109(a) (Nov. 21, 1991) (amending 42 U.S.C. § 2000e by adding definitions); *id.* at §§ 105-114 (amending other provisions of Title VII); *see also, e.g.*, Pub. L. No. 111-2, §§ 3, 5(c)(2) (Jan. 29, 2009) (amending provisions of Title VII).

Petitioner's attempts to undermine the reasonableness of the reliance interests in this context lack merit. This is not an instance where this Court's decision in *Hardison* is obviously contrary to the text of the statute. Rather, the *Hardison* Court's interpretation falls within the contemporaneous common understanding of the phrase "undue hardship." This is clear for two related reasons.

First, as a matter of text, the contemporaneous understanding of the word "hardship" was broad: "Extreme privation; adversity; suffering." *Hardship*, The American Heritage Dictionary of the English Language 601 (1973). The "more than a *de minimis* cost" interpretation falls comfortably within the meaning of "adversity" (a "state of hardship or affliction; misfortune[,]" *Adversity*, The American Heritage Dictionary 19), and "suffer" (to "sustain loss, injury, harm, or punishment[,]" *Suffer*, The American Heritage Dictionary 1286). While a "more than a *de minimis* cost" is not "extreme privation," the *Hardison* Court's interpretation was within the broad textual understanding of the term "hardship." And the definition of the adjective "undue" was inherently subjective, requiring judicial interpretation: "Exceeding what is appropriate or normal; excessive[.]" *Undue*, The American Heritage Dictionary 1398. Had the *Hardison* Court held that a de minimis cost amounted to an undue hardship, Petitioner's argument that it was clearly erroneous might have some force. But by requiring "more than" a de minimis cost, the *Hardison* Court's interpretation gave effect to the word undue. As a matter of first impression, reasonable minds can certainly interpret the 1972 amendment's "undue hardship" language

differently. *E.g.*, *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting). But after nearly half a century of reliance by employers and acquiescence by Congress, this is no longer a matter of first impression. The critical point now is that the *Hardison* Court's interpretation fell within the outer boundaries of the language used by Congress.

Second, as a matter of context, Congress's 1972 amendment to Title VII required reasonable accommodation as part of the existing prohibition on discrimination. This follows from the placement of the "reasonable accommodation" requirement in the definition of "religion," 42 U.S.C. § 2000e(j), and the fact that Congress was codifying an EEOC regulation that was expressly rooted in "the duty not to discriminate[.]" Former 29 C.F.R. § 1605.1(b) (1968). Drawing the line at "more than a de minimis cost" was a reasonable interpretation in this context. Where an employer refuses an accommodation that involves de minimis cost, the inference of discrimination based on religion is very strong. By contrast, where an accommodation would involve more than a de minimis cost, the inference of religiously motivated discrimination is decidedly weaker; ensuring sufficient levels of service or avoiding costs are more reasonable inferences. *Cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 783-84 (2015) (Thomas, J., concurring) (expressing concern about interpretation of Title VII that "would punish employers who have no discriminatory motive"). Again, reasonable minds might interpret the statutory context differently, but the *Hardison* Court's interpretation was not unreasonable. Nothing

in the text or context was sufficient to undermine States' reliance on this Court's holding in *Hardison*.

Petitioner's discussion of the meaning of "undue hardship" in other civil rights statutes also does not undermine the reasonableness of States' reliance on the *Hardison* standard. Just the opposite. Petitioner correctly identifies that other statutes define "undue hardship" to require a showing of "significant difficulty or expense." Br. for Pet'r at 20-21 (citing 42 U.S.C. § 12111(10) and 38 U.S.C. § 4303(16)). But a difference in statutory language is "significant." *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 773. Petitioner asks this Court to import express definitions from other statutes into 42 U.S.C. § 2000e(j). "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks [this Court] to add words to the law to produce what is thought to be a desirable result. That is Congress's province." *Id.* at 774. So far, Congress has declined to do so. Congress's post-*Hardison* adoption of a "significant difficulty or expense" definition in other civil rights statutes, while continuing to omit that definition from 42 U.S.C. § 2000e(j), concretely supports the reasonableness of States' reliance on the *Hardison* standard.

Nor is this a situation where States were on notice that this Court's holding was obviously unworkable. Petitioner does not attempt to identify any court that has articulated difficulty in applying the standard. At the same time, Petitioner is wrong in suggesting that the *Hardison* standard is automatically fatal to religious accommodation claims. Circuit precedent applying *Hardison* holds that the burden to establish an undue hardship is on

the employer, and the employer must demonstrate *actual* hardship; hypothetical and speculative hardships are insufficient. *E.g.*, *Brown*, 61 F.3d at 655 (holding that a hardship must be real and not speculative, merely conceivable, or hypothetical); *Toledo*, 892 F.2d at 1492 ("Any proffered hardship . . . must be actual[.]"); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."). Many courts have applied the *Hardison* standard and either allowed such claims to go forward or affirmed judgment in favor of a Title VII plaintiff. *E.g.*, *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 n.4 (8th Cir. 2008) (concluding that employer failed to establish undue hardship and affirming Title VII judgment against employer); *Opuku-Boateng*, 95 F.3d at 1473-74 (concluding that district court erred in finding undue hardship); *Toledo*, 892 F.2d at 1492 (reversing summary judgment in favor of employer and concluding the employer had violated Title VII); *Lake*, 837 F.2d at 451 (affirming Title VII judgment against employer); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1089 (6th Cir. 1987) (concluding that employer did not establish undue hardship and upholding Title VII religious accommodation judgment); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (affirming district court's conclusion that union failed to establish undue hardship); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 451-52 (7th Cir. 1981) (finding no undue hardship to union and affirming judgment).

Finally, Petitioner's reliance on statements by members of this Court to undermine reliance on the *Hardison* standard has little to recommend it. "'[*S*]*tare decisis* is of fundamental importance to the rule of law[,]'" *Patterson*, 491 U.S. at 172 (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)), and "is a basic self-governing principle within the Judicial Branch," *Patterson*, 491 U.S. at 172. And "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation" because "Congress remains free to alter what [the Court] ha[s] done." *Id.*; *see also Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (adhering to *stare decisis* where "Congress has had almost 30 years in which it could have corrected our decision . . . and has chosen not to do so").

Petitioner suggests it has been unreasonable for States and other employers to rely on this "fundamental" and "basic self-governing principle" where some members of this Court have expressed "misgivings about [*Hardison*]." Br. for Pet'r at 32 (alteration in original) (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018)). Petitioner's reliance on *Janus* is decidedly misplaced. *Janus* involved constitutional interpretation and therefore did not implicate the "special force" of *stare decisis* reserved for statutory interpretation. *Patterson*, 491 U.S. at 172. Petitioner's argument also gets it precisely backward. Where Congress continues to accept a decision of this Court "even after Members of this Court began to raise questions about the doctrine[,]" overruling requires a

"*particularly* 'special justification[.]'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019) (emphasis added). The existence of dissenting opinions and skeptical articles by scholars cannot be enough to undermine reliance on precedent; were it otherwise, *stare decisis* would mean little indeed.

In sum, States' reliance on the *Hardison* Court's interpretation of 42 U.S.C. § 2000e(j)'s has been reasonable.

B. Nearly Half A Century Of Reliance Counsels Against Overturning *Hardison*

This Court should not displace the reasonable reliance of States and other employers by re-interpreting Title VII. *Stare decisis* has "added force" when entities "have acted in reliance on a previous decision[.]" *Hilton*, 502 U.S. at 202. Even "a reasonable possibility" of reliance supports adhering to *stare decisis*. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457-58 (2015).

States have acted in reliance on the *Hardison* standard, and overruling *Hardison* would displace settled expectations. Overruling *Hardison* would presumptively operate retroactively, *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993), exposing States to potential liability for actions taken in reliance on longstanding interpretations of Title VII, which have never been disturbed by Congress. This would be contrary to "[e]lementary considerations of fairness[,]" which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly;

settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265.[1]

There is certainly some force to the policy arguments advocated by Petitioner. And reasonable minds may well differ on how 42 U.S.C. § 2000e(j) should have been interpreted in the first instance. But time has not stood still since this Court decided *Hardison*; States have acted in reliance on the *Hardison* standard. Petitioner's arguments are more appropriately directed to Congress, *see Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 774, which knows how to define "undue hardship" in the manner advocated by Petitioner, *see* 38 U.S.C. § 4303(16), 42 U.S.C. § 12111(10)(A). Amendment by Congress has the distinct advantage of operating prospectively and, therefore, not interfering with decisions made in reasonable reliance on the *Hardison* standard.

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[1] To be sure, there are limits on the scope of retroactive liability. A religious accommodation claim must be filed with the EEOC within 180 or 300 days of the allegedly unlawful practice, 42 U.S.C. § 2000e-5(e)(1), and, assuming the EEOC declines to bring suit itself, a litigant must sue within 90 days of receipt of an EEOC right-to-sue letter, 42 U.S.C. § 2000e-5(f)(1). But these deadlines are not jurisdictional. *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1850 (2019) ("Title VII's charge-filing requirement is not of jurisdictional cast."); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[A] timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court[.]"). If this Court replaces the *Hardison* standard with a different rule, litigants will likely seek to invoke equitable tolling to revive and litigate long-stale claims.

C. This Court Should Clarify The *Hardison* Standard

While this Court should not overrule *Hardison*, it should clarify the *Hardison* standard to reflect that employers raising an undue hardship argument must meet a meaningful burden. Many criticisms of the *Hardison* standard are traceable to the misapprehension that it is almost always fatal-in-fact to religious accommodation claims. That is not—and should not be—the case. Instead of overruling the *Hardison* standard, and thereby displacing the reasonable reliance of employers, this Court should instead take this opportunity to clarify the *Hardison* standard and emphasize that it imposes a meaningful burden on employers. Lower court precedent identifies at least three appropriate clarifications.

First, the burden to establish an undue hardship falls squarely on the employer. This flows directly from the text of 42 U.S.C. § 2000e(j), which requires that the "*employer demonstrate*[] that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship[.]" (Emphasis added.) The lower courts appear to be unanimous on this point. *E.g.*, *Protos*, 797 F.2d at 134; *Burns*, 589 F.2d 403.

Second, an employer must establish *actual* hardship; speculative or hypothetical hardships are insufficient. *Brown*, 61 F.3d at 655 (holding that a hardship must be real and not speculative, merely conceivable, or hypothetical); *Toledo*, 892 F.2d at 1492 ("Any proffered hardship . . . must be actual[.]"); *see also* 29 C.F.R. § 1605.2(c)(1). In particular,

"the mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." *Opuku-Boateng*, 95 F.3d at 1474.

Third, whether a particular accommodation would involve an undue hardship requires "considering the particular factual context of each case." *Protos*, 797 F.2d at 134 (quoting *Tooley*, 648 F.2d at 1243 (internal quotation marks omitted)). A particular employee's absence does not categorically establish an undue hardship. *Pyro Mining Co.*, 827 F.2d at 1089; *Protos*, 797 F.2d at 135. Courts appropriately consider, among other things, the availability of other employees capable of performing the task and whether an employer is obliged to pay higher wages. *Protos*, 797 F.2d at 135; *McDaniel*, 696 F.2d at 37 (noting that "[n]o expenditures for overtime or additional wages would have been involved" in affirming finding that employer would not incur undue hardship); *see also* 29 C.F.R. § 1605.2(d)(1)(i) ("Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available."). Courts may also consider the size of the employer and the impact of additional expenses on the employer. *Tooley*, 648 F.2d at 1243-44. An expense that is more than de minimis to one employer may be de minimis to another. *See Ilona of Hungary, Inc.*, 108 F.3d at 1577; *see also* 29 C.F.R. § 1605.2(e)(1) ("The Commission will determine what constitutes 'more than a de minimis cost' with due regard given to the identifiable cost in relation to the size and operating cost of the employer . . . .").

While Amici States do not address the second question presented, this Court's determination of the role of impacts on co-workers will also provide useful guidance on the proper application of the *Hardison* standard.

In sum, this Court can maintain the *Hardison* standard and avoid undermining reliance interests on that standard while nonetheless providing guidance on the proper application of that standard.

D. The *Hardison* Standard Allows States To Explore The Most Effective Means Of Protecting Religious Freedom

Petitioner's invitation for this Court to overrule *Hardison* also implicates state statutory schemes, which reflect considered judgments about competing policy objectives. States are free to adopt a heightened "undue hardship" standard as a matter of state law, 42 U.S.C. § 2000e-7. State experiences with different standards can appropriately inform Congress's judgment in deciding whether—and how—to amend 42 U.S.C. § 2000e(j).

Amici States share a profound commitment to individual religious freedom. Indeed, that commitment forms a cornerstone of their state constitutions. *E.g.*, Wash. Const. art. I, § 11 ("Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . ."); Cal. Const. art. I, § 4; Haw. Const. art. I, § 4; Me. Const. art. I, § 3; Minn. Const. art. I, § 16. In addition, almost every State has adopted state civil rights laws that prohibit employment

discrimination based on religion or creed. *E.g.*, Alaska Stat. § 18.80.220; Cal. Gov't Code § 12921(a); Fla. Stat. § 760.10(1); Tex. Lab. Code Ann. 21.051; Wash. Rev. Code § 49.60.030(1)(a).

Reasonable minds can differ regarding the optimal policies for advancing religious freedom. Some may well share Petitioner's policy view that employers should be required to accommodate individual religious exercise unless doing so requires "significant difficulty or expense." Br. for Pet'r at 22-23. Other people of goodwill might reasonably conclude that such an approach entails a risk of fostering religious resentment, such that a more nuanced standard is appropriate. *See, e.g.*, Dallan F. Flake, *Bearing Burdens: Religious Accommodations That Adversely Affect Coworker Morale*, 76 Ohio State L.J. 169, 178-80 (2015) (reflecting risk that, in some circumstances, religious accommodations may harm employee morale).

As a complement to the *Hardison* standard for Title VII, States have "serve[d] as laboratories of 'innovation and experimentation[.]'" *Berger*, 142 S. Ct. at 2201 (quoting *Gregory*, 501 U.S. at 458). Under state civil rights laws, some States have embraced the "significant difficulty or expense" standard for finding an undue hardship. Ariz. Rev. Stat. § 41-1461(15)(a); Cal. Gov't Code §§ 12926(u), 12940(l)(1); N.Y. Exec. Law § 296(10)(d); Or. Rev. Stat. § 659A.033(4) (requiring "significant difficulty or expense"). Massachusetts has statutorily adopted a unique undue hardship standard that is also broader than the *Hardison* standard. Mass. Gen. Laws ch. 151B, § 4(1A); *see also Pielech v. Massasoit Greyhound, Inc.*, 804 N.E.2d 894, 900-01 (Mass. 2004) (distinguishing

state law standard from Title VII standard). Nothing in *Hardison* prevents a State from imposing these types of more demanding standards on itself or other employers operating in the State.

Some states have administratively adopted a standard equivalent to the *Hardison* standard. *E.g.*, Okla. Admin. Code § 335:15-5-4; W. Va. Code R. § 77-3-2.4. Other States have interpreted their state antidiscrimination laws in a manner parallel to the *Hardison* standard. *E.g.*, *Franks v. Nat'l Lime & Stone Co.*, 740 N.E.2d 694, 697 n.1 (Ohio Ct. App. 2000). Notably, even in these States, plaintiffs can and do prevail on religious accommodation claims. *E.g.*, *Id.* at 699-700; *Kentucky Comm'n on Human Rts. v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361, 363-64 (Ky. Ct. App. 1987); *Kentucky Comm'n on Human Rts. v. Kerns Bakery, Inc.*, 644 S.W.2d 350, 353 (Ky. Ct. App. 1982); *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 586 (Alaska 1979); *see also Maine Human Rts. Comm'n v. Local 1361, United Paperworks Int'l Union AFL-CIO*, 383 A.2d 369, 372, 381 (Me. 1978) (reversing dismissal of religious accommodation claim); *Kentucky Comm'n on Human Rts. v. Kentucky, Dep't for Human Res., Hazelwood Hosp.*, 564 S.W.2d 38, 40 (Ky. Ct. App. 1978). The *Hardison* standard and its state equivalents provide meaningful protections. *Contra* Br. *Amici Curiae* of States of West Virginia, Louisiana, and 20 Other States in Support of Pet'r at 1-2.

Further, even in States that have adopted a standard equivalent to the *Hardison* standard for general religious accommodation claims, those States often also have a more nuanced statutory scheme in other ways. For example, some states have adopted

right-of-conscience laws that provide unique protections in the health care context. *E.g.*, Wash. Rev. Code § 9.02.150 ("No person or private medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to so doing."); 745 Ill. Comp. Stat. 70/5 (Right of Conscience Act); *see also Rojas v. Martell*, 161 N.E.3d 336, 348-49 (Ill. App. Ct. 2020) (rejecting application of *Hardison* defense in religious discrimination employment action under Right of Conscience Act). Other States have adopted statutes providing additional religious protections for public employees. *E.g.*, Minn. Stat. § 15A.22 (entitling public employees to days off for religious observance); N.C. Gen. Stat. § 51-5.5 (providing for specified recusals based on religious objection without hardship exceptions); 43 Pa. Cons. Stat. § 955.1 (prohibiting discrimination against public employees because of observance of Sabbath or holy days); Wash. Admin. Code § 82-56-020 (adopting "significant difficulty or expense" undue hardship standard for two days of annual religious leave for public employees).

The rich tableau of state civil rights statutes provides numerous approaches "from which the federal government itself may learn" in deciding whether to amend Title VII to define "undue hardship" for purposes of 42 U.S.C. § 2000e(j). *Berger*, 142 S. Ct. at 2201.

Displacing the *Hardison* standard would effectively upend state innovation and experimentation. That is certainly the prerogative of Congress. For decades, Congress has declined to do so. If Congress decides to legislatively abrogate *Hardison*, the

existing experiences and ongoing experiments of the States can point the way to improved policy results. In the meantime, a properly applied *Hardison* standard, together with supplemental state legislation, provide meaningful protection for religious observance, practice, and belief.

CONCLUSION

This Court should decline to overrule *Hardison*. Clarification of the *Hardison* standard, based on existing lower court decisions, provides an opportunity for this Court to ensure that Title VII fulfills its promise of prohibiting discrimination based on religion without upsetting the reasonable reliance interests of States.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

KARL DAVID SMITH
Deputy Solicitor General
Counsel of Record

BRIAN J. BAKER
NICHOLAS ULRICH
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200

March 30, 2023

Rob Bonta
Attorney General
State of California

Phil Weiser
Attorney General
State of Colorado

William Tong
Attorney General
State of Connecticut

Kathleen Jennings
Attorney General
State of Delaware

Anne E. Lopez
Attorney General
State of Hawai'i

Aaron M. Frey
Attorney General
State of Maine

Anthony G. Brown
Attorney General
State of Maryland

Andrea Joy Campbell
Attorney General
Commonwealth of
Massachusetts

Keith Ellison
Attorney General
State of Minnesota

Charity R. Clark
Attorney General
State of Vermont