NO. 19-1388

In the
Supreme Court of the United States

JASON SMALL,

Petitioner,

v.

MEMPHIS LIGHT, GAS & WATER,

Respondent.

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

BRIEF FOR *AMICI CURIAE* MUSLIM ADVOCATES AND THE SIKH COALITION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Muslim Advocates is a national civil rights organization that advocates for equality of all people in America regardless of their faith background. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case relate directly to Muslim Advocates' work defending the right of American Muslims and other religious minorities to avail themselves of opportunities, including in employment, on equal terms.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. For almost two decades, the Sikh Coalition has also led efforts to combat and prevent discrimination against Sikhs in the workplace, including by advocating for religious

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* certify that counsel of record for all parties received notice of the intent to file this brief at least ten days before it was due and have consented to this filing.

accommodations and against policies which require Sikhs to choose between their religious beliefs or their career. The Sikh Coalition is deeply concerned about the ability of employers to discriminate against those requiring accommodations—including in a manner allowing for segregation, failure to hire, and situations that create a retaliatory or hostile work environment—and how this discrimination disproportionately affects minority communities by failing to provide for equal access to employment opportunities. The Sikh Coalition joins this brief in the hope that this Court will protect religious rights in the workplace.

SUMMARY OF ARGUMENT

The First Amendment guarantees that all citizens of any faith (or no faith at all) can fully participate in public life. In 1972, Congress sought to extend that right of full and equal participation to the private marketplace with an amendment to Title VII of the Civil Rights Act of 1964.

As amended, Title VII not only prohibits discrimination on the basis of religion (as it does with race, sex, and other protected classes), but it also grants religion special solicitude by mandating that employers alter their ordinary practices to make space for their employees' religious beliefs and practices. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015). In short, employers must reasonably accommodate their employees' religious beliefs and practices. But employers need not provide accommodations that would impose an "undue hardship" on them.

In 1977, however, a majority of this Court held that an "undue hardship" exists whenever an accommodation would require "more than a *de minimis* cost" to the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Justice Thurgood Marshall dissented, noting that this new *de minimis* rule "effectively nullif[ied]" Title VII's faith-based protections and defied "simple English usage." *Id.* at 89, 92 n.6. (Marshall, J., dissenting).

Hardison is demonstrably incorrect. As persuasively shown by Judge Thapar's concurrence below and Small's petition, the *de minimis* rule has no grounding in the statutory language of "undue hardship." That phrase denotes an "imposition of significant costs" in ordinary usage and every other statutory context. It is the opposite of what *de minimis* means. Worse still, *Hardison*'s twisting of the text virtually nullifies the accommodation scheme that Congress created to protect religious employees. The *de minimis* standard is so lax that a small cost or minor inconvenience for the employer can override any obligation to reasonably accommodate an employee's most sacred beliefs.

This misinterpretation of Title VII eviscerates the right to accommodations for all faiths, but has especially pernicious effects for religious minorities, who more often require accommodation in the workplace because their religious traditions, unlike those of majority faiths, are not already accommodated. As Justice Marshall predicted in his dissent, the *de minimis* rule is "[p]articularly troublesome" for "adherents to minority faiths who do not observe the holy days on which most businesses

are closed," like Sunday, Easter, and Christmas, but instead "need time off for their own days of religious observance." *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting). Further, members of minority faiths are more likely to wear religious clothing, like a headscarf, that conflicts with a company's uniform policy. *Id.* at 88. Because *Hardison* strips Title VII of any meaningful accommodation requirement, employees whose religious practice includes a certain appearance or attire may be forced "to give up either the religious practice or the job." *Id.*

The experiences of Muslim and Sikh employees epitomize this struggle. Both groups have distinct practices that require modest accommodations in some workplaces. But since *Hardison*, case after case has denied Muslim and Sikh workers' requests for reasonable accommodations under the current *de minimis* rule—often because of a speculative harm or small financial cost. Unless this Court corrects *Hardison*'s misinterpretation of Title VII, far too many Muslims, Sikhs, and other religious minorities will continue to face the "cruel choice of surrendering their religion or their job." *Id.* at 87.

What's more, there is no doubt that greater reasonable faith-based accommodations are possible in the workplace. In fact, the kinds of modest accommodations the *de minimis* standard often denies members of minority faiths—an exemption from a uniform policy; the purchase of suitable, alternative equipment; an adjustment to the ordinary break schedule—are each provided under other accommodation regimes, like the Americans with Disabilities Act and federal and state Religious

Freedom Restoration Acts. These other accommodation statutes show that, if this Court corrects *Hardison*'s error, employers will not incur unbearable costs.

Nor would reversing *Hardison* mean that Title VII's religious protections would promote other kinds of harassment or discrimination. Correctly interpreted, Title VII's religious accommodation provision does not allow the violation of Title VII's rigorous and wide-reaching protections against discrimination based on race, color, religion, sex, and national origin. This Court should say as much when reversing *Hardison*.

ARGUMENT

I. This Court should grant review and apply the ordinary meaning of "undue hardship" to Title VII's accommodation scheme.

A. The *de minimis* rule is textually indefensible and strips Title VII of any meaningful mandate to accommodate religion.

By its own terms, Title VII does not excuse employers from providing accommodations that could cause *any* hardship. Instead, it excuses employers only from making accommodations that will lead to an *undue* hardship. 42 U.S.C. § 2000e(j) (2018). As Judge Thapar explained below, dictionary definitions and other statutes reflect that an undue hardship "impose[s] significant costs." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J., concurring). That is quite literally the

"opposite" of *de minimis*. *Id.* at 828 (noting the definition of *de minimis* is a "very small or trifling matter").

Hardison's reading of "undue hardship" is so out of step with normal usage that the Code of Federal Regulations notes the phrase "has different meanings" depending on whether it is used "with regard to religious accommodation." 29 C.F.R. § 37.4 (2019). In every other context, undue hardship means "significant difficulty or expense." *Id.* But "[f]or purposes of *religious accommodation only*, 'undue hardship' means any additional, unusual costs, other than *de minimis* costs." *Id.* (emphasis added). In other words, the *de minimis* standard is not only textually wrong, it effectively "single[s] out the religious for disfavored treatment"—something this Court has rejected as unconstitutional. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017).

In the end, by neglecting the "plain language" of § 2000e(j), *Hardison* "prevents the effectuation of congressional intent" in crafting Title VII's religious accommodation scheme. *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). Five years ago, this Court explained that Congress created Title VII to extend "favored treatment" to religious employees and "affirmatively obligat[e] employers" to alter "otherwise-neutral policies to give way to the need for an accommodation." *Abercrombie & Fitch*, 135 S. Ct. at 2034. But the *de minimis* standard offers no such protective mandate. Rather, it allows employers to override their employees' need for religious accommodations for

almost any perceived cost or inconvenience. Indeed, in *Hardison* itself, an employee did not receive an alternative work schedule that would have, at most, cost his employer—then one of the world's largest airlines—an extra $150 spread over three months. *See* 432 U.S. at 92 & n.6 (Marshall, J., dissenting).

B. A plain reading of "undue hardship" creates a workable rule that aligns with other accommodation regimes.

This Court can correct *Hardison*'s error and prevent the ongoing harm to minority religious groups by interpreting Title VII's words—undue hardship—"as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). As Judge Thapar explained, this language almost certainly meant "impos[es] significant costs." *Small*, 952 F.3d at 827 (Thapar, J., concurring).

Applying that plain language would create a workable balance between the interests of employees and employers. Employees would receive meaningful accommodations of their faith-based practices unless such a change would impose a significant cost or inefficiency. No longer would a minor inconvenience to an employer force employees to choose between their beliefs and their livelihoods. Employers, however, would not need to provide accommodations that would hamstring their businesses.

Several other accommodation schemes enacted since *Hardison* prove that greater accommodations are not only possible, but are what Congress intends when it creates accommodation schemes. The widespread application of these statutes should

alleviate any fear that carrying out Title VII's actual text would prove too burdensome in practice.

The Americans with Disabilities Act ("ADA") offers an obvious comparison. That subsequently enacted statute uses "undue hardship" language nearly identical to Title VII. Employers must accommodate an employee's disability unless doing so would demand "an action requiring significant difficulty or expense"—evaluated in light of the employer's size, financial condition, and other factors. 42 U.S.C. § 12111(10)(A), (B) (2018). This scheme protects disabled workers while ensuring that employers do not "go broke or suffer other excruciating financial distress" because of required accommodations. *Vande Zande v. Wis. Dep't. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995); *see EEOC v. Amego, Inc.*, 110 F.3d 135, 148 (1st Cir. 1997) (rejecting ADA claim where accommodating one employee would have required hiring multiple additional staff and incurring significant expense).

Religious freedom statutes, found at the federal level and in twenty-one states, offer another example of a more demanding, yet workable, religious accommodation scheme. *See* Tanner Bean, *"To the Person": RFRA's Blueprint for A Sustainable Exemption Regime*, 2019 BYU L. Rev. 1, 2 n.4 (2019). Most resemble the Religious Freedom Restoration Act, which mandates that the federal government cannot "substantially burden a person's exercise of religion" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b) (2018).

Under such "RFRA" schemes, the federal government (and state governments in states with RFRA statutes) must "accommodate the exercise of actual religious convictions" of religious individuals. *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995). These schemes provide greater religious protections without becoming unworkable because they do not require accommodations that would impinge upon compelling government interests. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018) (rejecting RFRA claim because of government's "compelling interest in combating discrimination in the workplace"), *aff'd on other grounds*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1130 (N.D. Ind. 2001) (rejecting RFRA claim where requested accommodation posed threat of "harm to the public health and safety").

Given the wide experience with other accommodation statutes, this Court can be confident that interpreting Title VII to mean what it says will not impose unbearable costs on employers.

II. The *de minimis* rule causes serious harm to religious minorities, as shown by the experiences of Muslim and Sikh employees.

A. Muslim employees are routinely denied accommodations for trivial reasons under the *de minimis* standard.

Many Muslims believe that their faith requires them to engage in certain practices. These practices include praying five times a day at set times (Salat), attending weekly congregational worship on Fridays (Jum'ah), fasting from dawn to sunset for a month

each year (Ramadan), and observing two annual days of festivity (Eid). *An Employer's Guide to Islamic Religious Practices*, Council on American-Islamic Relations (2017), https://bit.ly/2ZfzwjS. Many adherents understand Islam to require a certain way of dress and appearance. Muslim men often maintain a beard, and some wear a small head-covering called a kufi. *Id*. Many Muslim women wear a head-covering, such as a hijab, while some others also may cover their face, as with a burka or niqab. *See id.*

Muslim employees are particularly vulnerable to workplace discrimination. Applying *Hardison*, employers routinely fail to accommodate these religious practices. Though Muslim Americans comprise 1.1% of the national population, 25% of religious accommodation cases involve Muslim employees. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, Wash. Post (June 21, 2016), https://wapo.st/2OdcJin. And from 2009 to 2015, Muslim workers submitted 19.6% of all EEOC complaints, and 26% of EEOC lawsuits were brought on behalf of Muslim employees. *Id.*[2]

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[2] Cases involving Muslim employees also appear to be the plurality of accommodation cases on the federal docket. *See, e.g.*, *Ali v. Brose N. Am., Inc.*, No. 4:20-cv-10551-SDD-MJH (E.D. Mich. filed Mar. 2, 2020); *Davis v. Palmer Int'l, Inc.*, No. 2:20-cv-00508-JHS (E.D. Pa. filed Jan. 29, 2020); *Ahmad v. N.Y.C. Health & Hosps. Corp.*, No. 1:20-cv-00675-PAE (S.D.N.Y. filed Jan. 24, 2020); *Billings v. New York*, No. 7:19-cv-11796-NSR (S.D.N.Y. filed Dec. 25, 2019); *Savage v. Temple Univ.*, No. 2:19-cv-06026-KSM, 2020 WL 3469039 (E.D. Pa. Dec. 15, 2019); *Syed v. Cty. of Los Angeles*, No. 2:19-cv-10410-GW-KES (C.D. Cal. filed Dec. 9, 2019).

Because the *de minimis* standard is so easy to satisfy, courts have permitted paltry theories of undue hardship—based on the negative feelings of customers or other employees, insignificant financial costs, and hypothetical "threats" to safety—to override the religious needs of Muslim employees. The examples below show how the *de minimis* standard fails to achieve Title VII's goal of eradicating workplace discrimination and, instead, can lead to unfair (and sometimes outrageous) results for Muslim employees.

Impact on customers or other employees. Under the *de minimis* rule, negative reactions of customers or other employees to the appearance of Muslim employees can amount to an undue hardship.

For example, in 2017, a business denied a Muslim woman's request to wear a hijab while she was working as a customer service representative and then fired her when she insisted on adhering to her faith. *See Camara v. Epps Air Service, Inc.*, 292 F. Supp. 3d 1314, 1319 (N.D. Ga. 2017). The district court approved this termination, holding that the hijab "did not project the image" the employer sought for the company and that customers may have "negative reactions" when seeing a woman in a hijab. *Id.* The court ruled that allowing the hijab could have harmed the "image" the company sought "to present to the public" and might have cost the company "business if some customers [went] elsewhere." *Id.* at 1331-32. The court reasoned that such possible costs were "more than de minimis" and therefore ruled against the Muslim employee. *Id.* at 1332. Thus, the *de minimis* standard led to *possible* customer perceptions, even

those potentially rooted in animus, overriding the employee's obligation to don a hijab.

The current rule also permits employers to deny an accommodation if it might impact the "morale" of other employees. For instance, in 2018, a district court denied Muslim employees' request for a meal break that coincided with sunset during Ramadan, finding that the possible effect on employee morale was more than a *de minimis* cost. *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135, 1182, 1195 (D. Colo. 2018). The court ruled that moving the break "hurt non-Muslim employee morale because many employees prefer[red] a late break." *Id.* at 1181. And the change could have hurt morale if employees viewed it as "favoritism toward Muslim employees" or if they became "more tired and hungry" because of the earlier break—even though the Muslim employees had nothing to eat or drink all day due to their religious observance. *Id.*

Likewise, a district court ruled that altering Muslim employees' break schedule to allow for their daily prayer imposed more than a *de minimis* cost, in part because the "extra breaks could have a negative impact on employee morale." *EEOC v. JBS USA, LLC*, No. 8:10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013). Specifically, "[c]o-workers would be likely to conclude that they were forced to work harder and faster to cover for the Muslims taking extra breaks." *Id.* In these cases, the *de minimis* standard allowed the potential impact on the "morale" of non-Muslim workers to override Muslim employees' request for accommodation, with no regard for the Muslim employees' own "morale" or religious obligations.

Minor financial costs to employers. Under *Hardison,* even large, well-financed employers can avoid paying overtime or incurring minimal costs to provide religious accommodation. Instead, Muslim employees must incur the immense cost of either surrendering their religious practices or their employment.

For example, in *El-Amin v. First Transit Inc.*, a district court ruled it an undue hardship to provide an alternative training time to a Muslim employee who had missed trainings to attend prayer. No. 1:04-CV-72, 2005 WL 1118175, at *6-8 (S.D. Ohio May 11, 2005). The employee suggested the large company retain the trainer at another time to accommodate his religious needs. *Id.* at *8. But the court reasoned that requiring the company to pay overtime was more than a *de minimis* cost, sanctioning the Muslim employee's termination. *Id.*

Similarly, in *Abdelwahab v. Jackson State University*, a district court rejected a Muslim employee's request that his employer arrange for another employee to cover plaintiff's midnight shift to allow him his obligatory nightly worship. No. 3:09CV41TSL–JCS, 2010 WL 384416 (S.D. Miss. Jan. 27, 2010), at *2. The court reasoned Title VII required no accommodation because the logistics of identifying another available employee and the possibility of overtime pay imposed more than *de minimis* cost. *Id.*

Unsupported or hypothetical threats to safety. Any accommodation imposes an undue hardship if it would put others in harm's way. But religious practices may appear "threatening" if they are unfamiliar, as the practices and customs of

minority faiths may be to the majority. Courts have found essentially any degree of hypothetical risk to impose more than a *de minimis* cost. While perhaps faithful to *Hardison*, that narrow view of religious freedom in the workplace is irreconcilable with Title VII and allows unspoken bias to taint an employer's decision-making.

For example, in *EEOC v. GEO Group, Inc.*, the Third Circuit held that accommodating several Muslim female employees' need to wear head-coverings at a private prison posed the chance of danger and thus imposed more than a *de minimis* cost on the employer. 616 F.3d 265, 267, 274-75 (3d Cir. 2010). Even though the employees had worn head-coverings without issue before, the prison claimed the head-coverings posed various hypothetical risks: they could cast a shadow on the employee's face or could be used to smuggle contraband or strangle someone. *Id.* at 268, 274. While the Third Circuit observed that this was a "close case," it reasoned that, even if the head-coverings posed "only a small threat of the asserted dangers," allowing Muslim employees to wear them imposed more than a *de minimis* cost on the prison. *Id.* at 274; *accord Parker v. Ark. Dep't of Corr.*, No. 4:05CV00850 GH, 2006 WL 8445187, at *8 (E.D. Ark. Apr. 26, 2006) (declining to accommodate a correctional officer's hijab that may "potentially create a safety risk").

B. Sikh employees face exclusion from employment and segregation in the workplace under the *de minimis* rule.

Sikhism is the fifth-largest religion in the world, and its followers are guided by three daily principles: work hard and honestly, always share your bounty with the less fortunate, and remember God in everything you do. *A Brief Introduction to the Beliefs and Practices of the Sikhs*, Sikh Coalition (2008), https://bit.ly/3ioT3Gd.

Sikhs outwardly display their commitment to these principles and Sikh beliefs by wearing the Kakaars, or the five articles of faith: uncut hair, which men cover with a turban and which women may cover with a scarf or turban (Kes); a small comb usually placed within one's hair (Kanga); soldier shorts traditionally worn as an undergarment (Kachera); a sword-like instrument worn with a shoulder strap (Kirpan); and a bracelet worn on one's wrist (Kara). *Id.*

The articles of faith sometimes require modest workplace accommodations. But employers often deny Sikh employees' requests for accommodations because of image-based objections and safety-based concerns—which have each qualified as undue hardships under the *de minimis* standard. These cases further illustrate how *Hardison*'s *de minimis* standard forces adherents of minority religions to choose between their religion and their job—the "cruel choice" that Title VII was intended to prevent. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

Image-based objections. The Sikh articles of faith rarely, if ever, prevent Sikh employees from performing their jobs. Instead, employers much more

often object to a Sikh employee's *appearance*, which they believe violates the company's desired public image and will lead to an adverse reaction by customers. Applying *Hardison*, courts have said that the risk of harm to public perception or a possible violation of customer preference can impose more than a *de minimis* cost.

For example, in *EEOC v. Sambo's of Georgia, Inc.*, a restaurant denied a Sikh man's application for a managerial position because his turban and beard violated the restaurant's general grooming policy. 530 F. Supp. 86, 88 (N.D. Ga. 1981). The court affirmed this rejection of employment because "the wearing of a beard . . . or headwear" did "not comply with the public image that Sambo's has built up over the years." *Id.* at 89. The court relied on the restaurant's belief in the public's "aversion to, or discomfort in dealing with, *bearded people*." *Id.* (emphasis added). Thus, the possibility of an "[a]dverse customer reaction" to the Sikh applicant's appearance imposed more than a *de minimis* cost on the restaurant. *Id.* at 89-90.

This case illustrates how the *de minimis* standard can lead to a segregated workplace, in violation of Title VII's intended protections. Under *Hardison*, a request for an accommodation can be overridden by "nothing more than an appeal to customer preference." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) (quoting *Sambo's*, 530 F. Supp. at 91). Thus, the visible presence of Sikhs (or others whose faith informs their appearance) can "be an undue hardship because it would adversely affect the employer's public image." *Id.* Under the *de minimis* standard, it is easy

for an employer to show that is "too costly" for Sikhs to be seen in the workplace. And so Sikh employees are all too often sent to work hidden from the public eye. Indeed, in, *Birdi v. United Airlines Corp.*, a district court held it was reasonable for an airline to fire a Sikh ticket agent who wore a turban after he refused to move to a position where customers could not see him. No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002).[3]

Such a dynamic—where perceived public bias can relegate practitioners of minority faiths to less desirable positions—causes real harm. "Segregated positions isolate a person; limit that person's ability to interact with co-workers, customers, and the public at large; and validate public or employer bias as to who is worthy of representing a company." Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change 103, 125 (2012). Furthermore, if there is no out-of-view position available, members of religions like Sikhism may be excluded from employment entirely. *See id.*

Safety-based concerns. Employers frequently deny Sikh workers accommodations because of safety concerns. While actual risks of danger to health or well-being could amount to an undue hardship, the *de minimis* standard sets the bar too low and allows

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[3] More recently, the Walt Disney Company segregated a Sikh for seven years (until the Sikh Coalition intervened) because his turban and beard violated the company's "Look Policy." Emil Guillermo, *Disney Desegregates Sikh Employee After Civil Rights Groups Intervene*, NBC News (Jul. 13, 2015), https://nbcnews.to/3euFPo3.

employers to deny accommodation because of incorrect perceptions of danger, or because safe alternatives are more expensive.

A common example involves the Kirpan, the Sikh article of faith resembling a sword or dagger, which obligates a Sikh to uphold justice for all people. Many Kirpans are not dangerous (they are often not sharp and are usually kept in a tight sheath under a Sikh's shirt). Yet employers have mistakenly viewed them as illegal weapons or unsafe (even when other objects found in the workplace are objectively as or more dangerous). And courts have found that the perceived risk of danger amounts to more than a *de minimis* burden.

For instance, in 2013, the Fifth Circuit held that permitting a Sikh federal employee to wear a three-inch, dulled Kirpan to her job at the Internal Revenue Service was an undue hardship. *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013). Even though her Kirpan was indisputably safe because it was dull, the court held it still would be more than a *de minimis* cost to ask security "to ascertain whether a blade is sharp or dull" every day when the employee came to work. *Id.* at 330. The court ignored the Sikh employee's testimony that other objects in her workplace—like scissors and box cutters—were objectively more dangerous than her small, dull Kirpan. *See id.* at 326. To add insult to injury, the government even had a security protocol for allowing Kirpans pursuant to applicable RFRA statutes permitting an employee to carry one—Title VII's *de minimis* scheme was just too weak to require the accommodation. *See id.* at 331.

Other Sikh articles of faith have also caused safety-based concerns, including when they have prevented the use of an employer's existing safety equipment. *E.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383-84 (9th Cir. 1984) (ruling unshorn hair created an undue hardship because it prevented an employee from wearing a respirator needed to prevent toxic gas exposure); *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 760 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (ruling a turban created an undue hardship because it prevented wearing a hard hat during hazardous work).

To be sure, Title VII does not demand an unsafe workplace. But the *de minimis* standard imposes such a low threshold for denying an exemption that employers have almost no incentive to develop safe alternative processes or purchase safe alternative equipment if doing so would impose any meaningful cost. Thus, Title VII rarely requires accommodations for safety protocols, even when safe and affordable alternatives are available or possible.[4] This practical

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[4] The paltry *de minimis* rule emboldens employers to deny accommodations imposing no costs at all. For example, a trucking company denied Sikh applicants employment because they declined to give hair samples for a drug test (a violation of the commandment to maintain unshorn hair), even though urine and nail tests were also available; it took eight years to settle the case. *See* Dan Weikel, *Sikh Truck Drivers Reach Accord in Religious Discrimination Case Involving a Major Shipping Company*, L.A. Times (Nov. 15, 2016), https://lat.ms/308uNQp. Similarly, it required years of litigation in federal court for a national

reality leads to serious barriers for Sikhs seeking employment—especially in sectors that typically use safety equipment, like construction, emergency services, or medicine.

Sikh healthcare workers fighting the COVID-19 pandemic have especially struggled under the *de minimis* standard. See *Update: Sikh Medical Professionals and PPE*, Sikh Coalition (May 13, 2020), https://bit.ly/2Bukxtx. Medical professionals must wear personal protective equipment to prevent the virus's spread. Many use the low-cost N95 mask, but some employers disallow male healthcare workers with facial hair from wearing N95 masks. Even though there are several equally safe options that Sikh men can use (like power supplied air respirators and controlled air purifying respirators), those options cost more than N95s and thus may be found to impose more than a *de minimis* burden on employers to provide. *Id.* As a result, employers have threatened Sikh doctors, nurses, and technicians with suspension or termination if they refuse to violate their faith by shaving. *Id.*

In sum, the *de minimis* standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace and forces Sikh workers to choose between their livelihood and their faith.

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automotive parts retailer to grant a minor accommodation of a Sikh's articles of faith and adopt a policy about religious accommodations. *See AutoZone Settles Religious Discrimination Suit With Winthrop Man*, WBUR News (Apr. 3, 2012), https://wbur.fm/38YHdhJ.

C. The accommodations denied to Muslim and Sikh employees under Title VII are available in other contexts under other statutes.

The denial of Muslim and Sikh employees' common requests for religious accommodations in the workplace under Title VII is especially unfair and anomalous because other statutes routinely grant the same or similar accommodations in other contexts.

For example, while Muslim employees often do not receive alternative break schedules that allow fast breaking or their daily prayer, the ADA regularly requires altered break schedules. *See, e.g.*, *Spiteri v. AT & T Holdings, Inc.*, 40 F. Supp. 3d 869, 878 (E.D. Mich. 2014) (noting altered break schedule is necessary for diabetic employees); *see also Bracey v. Michigan Bell Tel. Co.*, No. 14-12155, 2015 WL 9434496, at *6 (E.D. Mich. Dec. 24, 2015) (providing altered break schedule for employee with irritable bowel syndrome).

Likewise, although Title VII does not currently require healthcare organizations to purchase more costly respirators for their Sikh medical professionals, the ADA mandates meaningful expenditures to allow disabled employees' inclusion in the workplace. *See Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 438-39 (D. Md. 2016) (ruling that an accommodation costing $120,000 was not undue hardship when hospital's budget was $1.7 billion); *McGregor v. United Healthcare Servs., Inc.*, No. H-09-2340, 2010 WL 3082293, at *10 (S.D. Tex. Aug. 6, 2010) (ruling $2,375 to install automated door openers was not undue hardship).

Moreover, while some adult Sikh employees cannot bring their sword-like Kirpans to work due to "safety concerns," RFRA has permitted even Sikh children to bring their Kirpans to school. *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995).[5] And while both Muslims and Sikhs regularly are denied accommodations for beards and head-coverings that violate a company's uniform policy, a RFRA suit compelled the United States Army to alter its thirty-year policy of banning beards and adopt regulations that allowed service members to wear religious turbans, unshorn hair, and beards if their faith so requires. *See Singh v. Carter*, 168 F. Supp. 3d 216, 233-34 (D.D.C. 2016); Ben Kesling, *Army Eases Uniform Regulations to Allow More Religious Exemptions*, Wall St. J. (Jan. 6, 2017), https://on.wsj.com/2O1ijV5.

A related statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), requires faith-based accommodation even in prisons—a place where safety concerns are at their zenith. *See* 42 U.S.C. § 2000cc-1(a) (2018). For instance, just five years ago, this Court held that a Muslim prisoner's beard must be accommodated despite the state's undisputed "compelling interest in prison safety and security" because the prison grooming policy was not

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[5] Although *Cheema* was decided before this Court limited the federal RFRA to federal government action, its analysis still applies to states with their own state-level RFRA. *See State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009) (citing *Cheema* when applying Arizona's Free Exercise of Religion Act).

narrowly tailored to the government's safety interest. *Holt v. Hobbs*, 574 U.S. 352, 361-69 (2015).

Thus, there should be no doubt that the greater religious protections requested by Muslim and Sikh employees are possible without imposing unworkable burdens on employers.

III. A proper reading of Title VII would not create a backdoor for other discrimination or harassment.

Correctly understood, Title VII would be a valuable protection for religious liberty in the workplace—it would not itself become a tool of employment discrimination against the most vulnerable and marginalized individuals.

First, Title VII's religious accommodation scheme cannot override other individuals' statutory rights and protections. Even if this Court overturned the *de minimis* rule, the text of Title VII "says nothing that might license an employer to disregard other federal statutes in the name of reasonably accommodating an employee's religious practices." *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015). Quite simply, Congress did not require religious accommodations that violate the myriad of federal, state, and local workplace protections and public accommodation laws that ensure equal treatment across American society. Moreover, Title VII itself has always prohibited discrimination on the basis of "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), (2), and these protections would remain, even with a more rigorous religious accommodation standard. Indeed, a harmonious

reading of Title VII could not require discrimination in the name of eliminating discrimination.

Second, an accommodation that allowed an employee to harass or discriminate against others would necessarily impose significant costs and thus would not be required under the correct reading of Title VII. Employee actions that cause a "significant discriminatory impact" in the workforce harm the dignity of other employees and impose serious disruptions in an organization's normal operations. *See Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996). Thus, accommodations permitting "actions that demean or degrade, or are designed to demean or degrade" would continue to qualify as undue hardships. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607-08 (9th Cir. 2004). What's more, requiring the accommodation of harassment would force an employer to "subject itself to possible suits from [other employees] claiming [the] conduct violated *their* religious freedoms or constituted religious harassment" and thus run the risk of significant liability that itself qualifies as an undue hardship. *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996).

Accommodations that violate Title VII's spirit and impose serious dignitary burdens to others should remain outside of what Title VII's religious accommodation scheme requires. This Court can make this explicit when overruling *Hardison* in order to fulfill Title VII's promise of a fair and inclusive workplace for *all* employees.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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