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 OF RELIGIOUS LIBERTY SCHOLARS, EMPLOYMENT LAW SCHOLARS, AND KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Trans World Airlines v. Hardison* should be overruled.

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INTEREST OF *AMICI*

Amici are legal scholars who study religious liberty or employment law, and one human-rights organization. *Amici* have an interest in improving the law in their respective fields, in correcting a clearly erroneous decision, and in protecting the organization's members and constituents.[1]

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SUMMARY OF ARGUMENT

This case is an ideal vehicle for correcting an error that has undermined protection for religious workers across the country, in defiance of clear statutory text and underlying principles of religious liberty.

I. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion. 42 U.S.C. §2000e-2(a). The statute requires employers to "reasonably accommodate" their employees' religious practices if they can do so without "undue hardship." 42 U.S.C. §2000e(j).

A. Title VII does not define "undue hardship." But in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court declared that any accommodation that requires the employer to "bear more than a *de minimis* cost" imposes undue hardship. *Id.* at 84. As three Justices recently observed in understated terms, that reading "does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari). "Undue hardship" means serious harm or difficulty, but "de minimis" means a trifle not worth considering.

B. *Hardison*'s error robbed employees of the protection that Congress tried to provide. The Equal Employment Opportunity Commission receives hundreds of religious-accommodation complaints each year. Most of them are dead on arrival, because of *Hardison*. The impact falls most heavily on small minority faiths.

II. Subsequent decisions of this Court have rendered *Hardison* exactly the kind of "doctrinal dino-

saur" that justifies overruling obsolete precedents. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015).

A. *Hardison* suggested that interpreting Title VII as written would be "anomalous," because it would result in "unequal treatment" of other employees. 432 U.S. at 81. But as the Court has since clarified, that concern rested on a fundamental misunderstanding. Title VII gives religious practices "favored treatment." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2034 (2015). "By definition, any special 'accommodation' requires the employer to treat an employee … differently, *i.e.,* preferentially." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

Making allowances for the unusual needs of specific workers does not discriminate against majorities without those needs. Current law provides such allowances for disability, pregnancy, and family medical issues, in addition to religion. *Hardison*'s equation of accommodations with discrimination was erroneous from the start, and it has been further undermined by frequent provision for similar allowances in federal law today.

B. Nor can *Hardison*'s substitution of its *de minimis* standard for Title VII's clear text be justified by any concern about the Establishment Clause.

1. When *Hardison* worried that accommodation of religious practices would result in unequal treatment, it focused on religiously neutral *categories*—on treating religious and nonreligious employees the same, regardless of whether they had similar needs or were similarly situated. An equally coherent and more liberty-protecting understanding of neutrality focuses

on religiously neutral *incentives*. The right to practice or reject religion is most free when governments and employers neither encourage nor discourage religion.

Work rules that force employees to choose between their faith and their job powerfully discourage religious exercise. But accommodating employees with special religious needs does little to encourage other employees to join these usually demanding religions. It is far more neutral to accommodate employees' religious practices than to fire them for practicing their faith.

2. The original public meaning of the Establishment Clause casts no doubt on religious accommodations. Religious exemptions were no part of the historic religious establishment. They emerged in the wake of free exercise and *dis*establishment, to protect religious minorities. Religious exemptions were widespread in the colonial period, and seriously debated. But with only one readily distinguishable exception, there is no record of anyone arguing that religious exemptions would raise an establishment issue.

3. Since *Hardison*, this Court has repeatedly and unanimously confirmed that "there is ample room for accommodation of religion under the Establishment Clause." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). A law may raise Establishment Clause concerns if it guarantees an absolute and unqualified right to accommodation, but Title VII creates no such right. The undue-hardship exception enables courts to fully consider the legitimate interests of both employers and employees. It should not be a veto on nearly all requests for reasonable accommodation.

ARGUMENT

I. *Hardison* Is Inconsistent with Title VII's Text and Deprives Religious Employees of Meaningful Protection.

Title VII requires an employer to "reasonably accommodate" an employee's religious practices, unless doing so would impose an "undue hardship" on the employer. 42 U.S.C. §2000e(j). *Hardison* insisted that an employer suffers "undue hardship" whenever an otherwise reasonable accommodation would generate "more than a *de minimis* cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

That conclusion cannot be reconciled with Title VII's clear text. Pet. 16-19. Both the words "hardship" and "undue" indicate that the statute's exception applies only to costs that far exceed *de minimis* levels. Moreover, *Hardison*'s error was profoundly significant. As this case illustrates, equating undue hardship with any cost more than *de minimis* deprives religious employees of protection in all but the most limited circumstances. This is an important and recurring issue that this Court should address.

A. "Undue Hardship" Does Not Mean "Anything More Than a *De Minimis* Cost."

When interpreting Title VII or any other statute, this Court looks to "the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). The relevant terms of Title VII are clear. "Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013). But *Hardison* ignored this clear text, choosing to "re-

write the statute that Congress has enacted." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016).

Hardison declared that anything "more than a *de minimis* cost" is an "undue hardship." 432 U.S. at 84. But "simple English usage" does not permit that reading. *Id.* at 92 n.6 (Marshall, J., dissenting). Justice Brennan joined this dissent in full.

Then as now, *de minimis* meant "very small or trifling," *Black's Law Dictionary* (5th ed. 1979). It means "trifling, negligible." *Id.* (11th ed. 2019). A *de minimis* cost or wrong is one the law will not notice or correct: *de minimis non curat lex*. This familiar maxim is usually translated, somewhat loosely, as "The law does not concern itself with trifles." *Ibid.* Thus, under *Hardison*'s reading, an "undue hardship" occurs whenever a religious accommodation generates any cost for an employer that is more than a trifle. A trifle plus a dollar cannot be reconciled with the words "undue hardship."

As the petition notes, sources contemporaneous with the provision's enactment define hardship as "a condition that is difficult to endure," "suffering," "deprivation." Pet. 17 n.6 (quoting dictionaries). A "hardship"—a cost that is "difficult to endure"—far exceeds a trifle. If there were any question about that, the modifier "undue" further emphasizes Congress's meaning. *See Black's Law Dictionary* (5th ed. 1979) (defining "undue" to mean "more than necessary; not proper; illegal"); *id.* (11th ed. 2019) ("excessive or unwarranted"). Not just any hardship will suffice, but only one that is "undue"—more than necessary, disproportionate to the religious-liberty problems to be solved for the employee.

Moreover, employers have the burden of proof. They must "demonstrate[]" undue hardship, 42 U.S.C. §2000e(j), which means to "meet[] the burdens of production and persuasion." §2000e(m).

As a matter of ordinary meaning at the time of enactment, the phrase "undue hardship" in Title VII resembles the subsequent definition of that phrase under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*. In provisions directly analogous to Title VII's religious-accommodation provision, the ADA requires an employer to make "reasonable accommodations" for an employee's disability unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. §12112(b)(5)(A). Under the ADA, undue hardship means "an action requiring significant difficulty or expense," and factors to be considered include a proposed accommodation's cost, an employer's financial resources, and the accommodation's impact on the employer's business. 42 U.S.C. §12111(10). And as the concurrence below noted, both Congress and the courts have offered similar interpretations of the phrase in other contexts as well. *See* Pet. App. 10a.

By ignoring the clear text of Title VII, the Court in *Hardison* substituted its own preference for the statute Congress enacted.

B. *Hardison*'s Misreading of the Statute Has Greatly Harmed Religious Minorities.

Hardison's flagrant misinterpretation of Title VII's "undue hardship" exception has allowed employers to escape liability whenever a religious accommodation generates anything more than the most trivial inconvenience.

As the petition notes, the Equal Employment Opportunity Commission receives thousands of religious discrimination complaints each year, including more than five hundred accommodation claims. Pet. 22 (citing two reports from the EEOC). Under *Hardison*'s permissive standard, all but a handful of these accommodation claims are "dead on arrival." *Id.* at 23. It is no exaggeration to say, as Justice Marshall did, that *Hardison* "effectively nullif[ies]" and "makes a mockery" of Title VII's protection, and that it "seriously eroded" this country's "hospitality to religious diversity." *Hardison*, 432 U.S. at 88-89, 97 (Marshall, J., dissenting). This situation—and especially its impact on religious minorities—raises an "important question of federal law" that merits this Court's review. Sup. Ct. R. 10(c).

The facts of this case illustrate the problem. Jason Small is a practicing Jehovah's Witness, a religious tradition whose members make up less than one percent of the national population. Pew Research Center, *America's Changing Religious Landscape* 4 (May 12, 2015).[2] When an injury forced him to seek a new assignment, Small asked his employer, Memphis Light, Gas & Water, for a position that would allow him to continue attending religious services mandated by his faith. Pet. App. 2a. MLGW was indifferent to his needs. It threatened Small with termination if he did not accept an assignment that presented a clear conflict with his religious obligations. Pet. 9 (citing Pet. App. 2). It refused his requests to be considered for other positions, even when lower-performing employees could be considered for

[2] https://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf.

those positions. Pet. App. 22a & n.7. It rebuffed his requests to avoid mandatory overtime that conflicted with his religious services, even after he offered to use his vacation time to solve the problem. Pet. 11 (citing record).

Yet the courts below cited *Hardison*'s *de minimis* standard and held that accommodating Small would impose an undue hardship—notwithstanding MLGW's resources as "the largest three-service public utility in the nation." Pet. 7 (quoting Memphis Light, Gas and Water, *About/How MLGW Is Governed*).[3]

Unfortunately, cases like this one are not unusual. As another group of *amici* recently demonstrated, adherents of minority religions with unusual practices make up a hugely disproportionate share of undue-hardship cases. *See* Brief of *Amici Curiae* Christian Legal Society *et al.* 24, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349) (noting that 62 percent of cases since 2000 focusing on the undue-hardship issue at summary judgment involved Jews, Muslims, other non-Christian faiths, or small Christian sects that observe a Saturday Sabbath).

The results in individual cases confirm *Hardison*'s destructive impact on these claimants and others. Scheduling accommodations like the one that Small requested play an essential role in ensuring that religious workers are not forced to choose between "surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Yet under *Hardison*, employers can often reject those requests out of

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[3] http://www.mlgw.com/about/governed [https://perma.cc/XRC3-RQEB].

hand, even if the cost of accommodation would be modest.

Consider a few examples. One court dismissed claims by a Muslim seeking to attend a Friday prayer service. The court said that under *Hardison*, requiring an employer to pay *any* amount of overtime—even just two hours—would be undue hardship as a matter of law. *El-Amin v. First Transit, Inc.*, 2005 WL 1118175 at *8 (S.D. Ohio May 11, 2005). Applying *Hardison*, another court held that a Seventh-day Adventist was not entitled to a scheduling accommodation to observe his Sabbath, because the administrative change to facilitate it would have cost his employer—the Chrysler Corporation—roughly "$1,500 per year." *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992). Still another court recently observed that under *Hardison*, "payment of premium wages goes beyond an employer's obligation to provide a reasonable accommodation," and that the employer is not required "even to assist the plaintiff in finding someone to swap shifts." *Logan v. Organic Harvest, LLC*, 2020 WL 1547985 at *5 (N.D. Ala. Apr. 1, 2020).

Religious claimants also suffer under *Hardison*'s callous standard in cases about grooming policies and dress codes. Applying *Hardison*, one court reluctantly held that exempting a Rastafarian from a grooming policy at the auto-repair shop where he worked would pose an "undue hardship," because doing so might "adversely affect the employer's public image." *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 15 (D. Mass. 2006) (quoting *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004)). Another concluded, for the same reason, that accommodating a Muslim employee's request to wear a hijab would result in undue

hardship under *Hardison*. *Camara v. Epps Air Service, Inc.*, 292 F. Supp. 3d 1314, 1330-32 (N.D. Ga. 2017).

All of this is disturbing. But it is not surprising. As Congress realized, neutral employer policies inevitably favor the majority's preferences with respect to schedules, appearance, and similar matters. Workers whose religious practices fall outside the mainstream consequently suffer disproportionate harm under the typical employer's rules and under *Hardison*'s flimsy standard.

Nor did any of these rulings result from judicial misinterpretation of *Hardison*. On the contrary, in *Hardison* this Court found its *de minimis* standard satisfied when "one of the largest air carriers in the Nation" refused to provide a religious accommodation that would have cost the company a mere "$150 for three months." 432 U.S. at 91, 92 n.6 (Marshall, J., dissenting).

Hardison improperly substituted the Court's judgment for Congress's. It also demonstrated a breathtaking indifference to the rights of religious workers—an indifference that threatens "our hospitality to religious diversity" and leaves "[a]ll Americans … a little poorer" as a result. *Id.* at 97. The Court should not hesitate to correct such an obvious error, one so destructive of the civil rights of those whom Title VII was intended to protect. *See Monell v. Department of Social Services*, 436 U.S. 658, 695 (1978) (declining to "place on the shoulders of Congress the burden of the Court's own error").

II. *Hardison*'s Reasons for Misinterpreting Title VII Were Erroneous.

Hardison's misinterpretation of Title VII's text, and the harm it has visited on religious claimants, are reasons enough for this Court to grant the petition. But there is more.

Hardison misapplied background legal principles at the time, and the law's subsequent development has made those errors ever more apparent. Employment law, the law of the Establishment Clause, and the law of statutory interpretation have all evolved in important ways since 1977.

Little need be said about the law of statutory interpretation. Everyone understands that the Court pays far closer attention to statutory text in 2020 than it did in 1977. *E.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (noting the "fundamental canon of statutory construction" that a statute's words should be interpreted according to their ordinary meaning). It is almost unimaginable that today's Court would distort the key statutory term "undue hardship" to mean something so radically different as anything more than *de minimis* cost.

Developments in employment law and religious-liberty law deserve further exploration. *Hardison*'s briefly stated reasons in defense of its departure from statutory text are deeply inconsistent with the subsequent "growth of judicial doctrine" and with "further action taken by Congress." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015). *Hardison* has become a "doctrinal dinosaur or legal last man standing." *Ibid.* The Court should not continue to

allow a ruling so far out of step with current law to frustrate Title VII's protections.

A. The Court's Fear of Religious Favoritism Was Unfounded in 1977 and Is Even Less Plausible Today.

Hardison suggested that enforcing Title VII as written would be "anomalous," because it would result in "unequal treatment" of religious and non-religious employees. 432 U.S. at 81. "[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id*. at 84. But that suggestion badly misunderstood religious accommodation, and it has become even more implausible under more recent employment law.

By its terms, Title VII treats religion differently from other categories protected under the statute. It defines "religion" to encompass not just status, but also activity—"all aspects of religious observance and practice"—and requires employers to reasonably accommodate this activity unless doing so is an undue hardship. 42 U.S.C. §2000e(j). As this Court recently observed, "Title VII does not demand mere neutrality with regard to religious practices …. Rather, it gives them favored treatment." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2034 (2015). This observation is true in an important sense: Congress required that employees in need of religious accommodations be treated differently. But in another, equally important sense, the accommodation requirement is entirely neutral. See *infra* section II.B.1.

Hardison treated this aspect of Title VII as "anomalous," going so far as to suggest that it required "discrimination … directed against majorities." *Hardison*, 432 U.S. at 81. But that assertion badly misunderstood the problem that Title VII's religious-accommodation provision addresses. An employer's neutral scheduling policies, dress codes, and similar workplace rules rarely impose disproportionate burdens on employees because of categories like race or sex. But such policies routinely codify majority practices and preferences, and as a result, they regularly "compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Id.* at 87 (Marshall, J., dissenting).

To note just one example, an employer policy forbidding hats at work does not systematically exclude women or racial minorities or otherwise harm the average worker. But it effectively bars any Jew or Muslim whose religion requires wearing a kippah or hijab. *See Abercrombie*, 135 S. Ct. at 2034 (noting this example). *Hardison* ignored this reality in favor of an implausible concern about anti-majoritarian discrimination, distorting Title VII's undue-hardship exception as a result.

The Court worried that accommodating an employee's request to refrain from Saturday work in accordance with his religion might be achieved "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Hardison*, 432 U.S. at 81. But that kind of zero-sum accommodation will rarely if ever be required under Title VII as written.

Title VII explicitly declares that "[n]otwithstanding any other provision of this subchapter" (thus not-

withstanding its religious-accommodation provision), it is not unlawful to apply a "bona fide seniority or merit system." 42 U.S.C. §2000e-2(h). The statute thus guarantees that employees operating under collective-bargaining agreements will never be deprived of these important "contractual rights" for the sake of an accommodation. *Hardison*, 432 U.S. at 81. Moreover, as Small's case illustrates, scheduling accommodations can often be provided far short of "undue hardship." An employer can transfer religious workers to comparable positions with different schedules, facilitate a voluntary trade of shifts, or pay a modest premium to induce another employee to voluntarily accept a shift that his seniority would allow him to refuse.

In the rare case where such solutions are not available, courts interpreting similar statutes have had little trouble rejecting accommodation claims, all the while employing the straightforward definition of "undue hardship." *See, e.g.*, *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (concluding that an employee's proposed accommodation qualified as undue hardship under the Americans with Disabilities Act where his employer could not reallocate job duties "among its small staff of fifteen to twenty-two police officers")

At bottom, *Hardison*'s concern over religious favoritism rested on the idea that in almost any circumstance, requiring an employer to provide a religious accommodation amounted to "unequal treatment of employees on the basis of their religion." 432 U.S. at 84. But that misses the point of employment-related accommodations, which are now commonplace in the United States Code.

As this Court has observed with reference to the Americans with Disabilities Act, "[b]y definition, any special 'accommodation' requires the employer to treat an employee … differently, *i.e.,* preferentially." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). But on any reasonable understanding, requiring employers to accommodate workers with disabilities is not discrimination against the non-disabled.

Since *Hardison*, Congress has enacted laws requiring employers to provide allowances for disabled employees, for pregnant employees, and for employees needing time off to care for a sick family member. *See* Americans with Disabilities Act, 104 Stat. 327 (1990), 42 U.S.C. §12101 *et seq.*; Pregnancy Discrimination Act, 92 Stat. 2076 (1978), 42 U.S.C. §2000e(k); Family and Medical Leave Act, 107 Stat. 6 (1993), 29 U.S.C. §2601 *et seq*. But it would be inaccurate and reductive to say that these laws require discrimination against the able bodied, the non-pregnant, or those who have been spared family illness. Like Title VII's religious-accommodation provision, these laws provide protection for important needs that are under protected by standard employment practices—not special favors that discriminate against employees without these individual needs.

Hardison's equation of accommodation with discrimination was wrongheaded from the start and has been rendered even more implausible by the additional statutes that now command similar allowances. When the "theoretical underpinnings of [a] decision" have been thus "called into serious question," this Court should consider setting the matter right. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997).

B. Any Establishment Clause Concern That May Have Motivated *Hardison* Is Also Unfounded.

Hardison's concern with preferential treatment misunderstood the law of religious liberty as badly as it misunderstood the role of accommodations in employment law. The Court did not explicitly invoke the Constitution or the constitutional-avoidance canon. But TWA and the union had argued that the accommodation provision violated the Establishment Clause. 432 U.S. at 70; *id.* at 89-90 (Marshall, J., dissenting). That argument cannot justify the Court's departure from statutory text. A deeper understanding of religious neutrality, the original public meaning of the Establishment Clause, and this Court's decisions since *Hardison* all clarify that religious exemptions from otherwise generally applicable rules do not violate the Establishment Clause.

1. Accommodating Employees' Religious Practices Is Neutral, Because It Creates Religiously Neutral Incentives.

It is not discriminatory to take account of the special needs of religious minorities—needs that their more mainstream coworkers do not have. And in Title VII, Congress defined it as discriminatory *not* to take account of these special religious needs. Just as it is discriminatory to treat like cases differently, so, Congress judged, it can be discriminatory to treat different cases alike.

Hardison's comments about preferential treatment reflected a concern with neutral *categories*—with treating religious and nonreligious workers alike without regard to whether their situations were the

same or different. When this Court said approvingly that Title VII does not demand "mere neutrality," but requires "favored treatment" for religion, *Abercrombie*, 135 S. Ct. at 2034—and when it said that all accommodations require preferential treatment, *Barnett*, 535 U.S. at 397—it was also focused on the neutrality of categories.

An equally coherent and more liberty-protecting conception of neutrality focuses on neutral *incentives*. Government acts neutrally when it seeks "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990). When government creates religiously neutral incentives, it leaves individuals and their voluntary associations free to make their own religious choices and act on their own religious commitments.

This goal of neither encouraging nor discouraging religion is the meaning of neutrality that the Court implicitly applied when it said that religious exemption "reflects nothing more than the governmental obligation of neutrality in the face of religious difference." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); *see also Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561-65 (1993) (Souter, J., concurring in part and in the judgment) (contrasting different meanings of neutrality).

When an employer fires or penalizes an employee for something he does, the employer's purpose and effect is to discourage or eliminate that behavior among its employees. If that behavior is religious for some employees, the penalties discourage religion. Loss of employment is a powerful disincentive to practicing one's faith. It is very far from neutral.

Accommodating such employees does little or nothing to encourage the accommodated religious practice. It is true that other employees might like a reason to demand a day off. But becoming a Jehovah's Witness, a Seventh-day Adventist, or an observant Jew comes with many obligations or burdens that far outweigh not working on Saturday—burdens that would often be meaningless apart from the religious faith that gives them meaning. Accommodating Small's religious practices will not encourage other employees to join his demanding faith.

Accommodating Small's religious practice provides incentives as close to neutral as an employer can come. It is far more neutral than firing Small for his faith. Congress acted to implement religiously neutral incentives when it required reasonable accommodation of employees' religious practices.

2. The Original Public Meaning of the Establishment Clause Casts No Doubt on Reasonable Accommodation.

Religious exemptions were common in the founding era. They were no part of the surviving colonial establishments; the established churches were closely allied with the state and had no need of exemptions. Rather, exemptions protected religious minorities. They were part of the transition to free exercise and

disestablishment. Exemptions from military service, swearing oaths, and taxes assessed for the established churches were universal or nearly so, and some colonies enacted exemptions from marriage laws and from removing hats in court. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1803-08 (2006).

The exemption from military service was controversial and widely debated, and substantial parts of these debates have been preserved. The demand to disestablish the surviving religious establishments was also widely debated. But hardly any eighteenth-century Americans suggested that religious exemptions raise establishment issues. *See id.* at 1808-30. The only exception that has been found is a single sentence, in a specific context raising issues not present here—issues that the colonies had successfully addressed without eliminating the exemption.[4] The

[4] The exception is Rep. Jackson's statement in the 1790 debate on the Uniform Militia Act, 1 Stat. 271 (1792). He said that an exemption from military service, with no requirement for alternative service or payment of a commutation fee, would create such an incentive to become a Quaker that "it would establish the religion of that denomination more effectually than any positive law could any persuasion whatever." 2 Annals of Cong. 1822 (Dec. 22, 1790) (p.1869 in some printings).

Exemptions that align too closely with secular self interest are indeed a special case. From Rhode Island in 1673, to the end of the modern draft in 1973, the solution with respect to military service has been to require alternative service in non-combatant roles or payment of a commutation fee, a special tax, or a substitute. *See* Laycock, 81 Notre Dame L. Rev. at 1807, 1817-21. *See also* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 911-15 (2019) (analyzing the Militia Act debate). The special

original public meaning of the Establishment Clause casts no doubt on religious accommodation.

3. This Court's Decisions Since *Hardison* Confirm That the Establishment Clause Allows Reasonable Accommodation.

Hardison was decided in 1977, at the height of the *Lemon* era's misapplication of Establishment Clause doctrine. The *Lemon* test called for government neutrality—neither advance nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). But under many of the *Lemon*-era decisions applying that test, neither categories nor incentives were religiously neutral.

That era is long past. This Court has since clarified—repeatedly and unanimously—that "there is ample room for accommodation of religion under the Establishment Clause," and that religious accommodations need not "come[] packaged with benefits to secular entities." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Eight Justices reaffirmed *Amos* in *Texas Monthly, Inc. v. Bullock*.[5] Justice White had no comment, but he had written *Amos*. The Court also unanimously agreed that religious accommodations are generally valid in *Cutter v.*

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issues posed by exemptions from military service have little relevance in the Title VII context, where accommodating religious practices creates no remotely comparable incentives. See *supra* section II.B.1.

[5] 489 U.S. 1, 18 n.8 (1989) (plurality); *id.* at 28 (Blackmun, J., concurring in the judgment); *id.* at 38-40 (Scalia, J., dissenting).

Wilkinson,[6] *Board of Education v. Grumet (Kiryas Joel)*,[7] and *Employment Division v. Smith*.[8]

Religious accommodations remain valid even when they incidentally generate non-trivial costs for others, and especially so if these costs can be broadly distributed by government or a large employer. As Justice Marshall noted in *Hardison*, this Court has repeatedly permitted or required religious exemptions involving military service, unemployment compensation, and other matters, all of which "placed not inconsiderable burdens on private parties." 432 U.S. at 90, 96 n.13 (Marshall, J., dissenting).

Even concentrated costs are acceptable when the countervailing religious-liberty interest is strong enough—most obviously when the person bearing those costs seeks or holds a position inside a religious organization, doing the work of that organization in accordance with its religious tenets. See *Amos*, where a Title VII exemption let religious employers force employees to choose between "conforming to certain religious tenets or losing a job opportunity." 483 U.S. at 340 (Brennan, J., concurring in the judgment); *see also id.* at 338-39 (opinion of the Court). Likewise, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court unanimously held that both Religion Clauses exempt

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[6] 544 U.S. 709, 719-26 (2005).

[7] 512 U.S. 687, 705 (1994); *id.* at 711-12 (Stevens, J., concurring); *id.* at 716 (O'Connor, J., concurring in part and in the judgment); *id.* at 723-24 (Kennedy, J., concurring in the judgment); *id.* at 744 (Scalia, J., dissenting).

[8] 494 U.S. 872, 890 (1990); *id.* at 893-97 (O'Connor, J., concurring in the judgment).

a religious organization from discrimination lawsuits brought by "those who will personify its beliefs," *id*. at 188, thus depriving aggrieved employees of the right to seek "reinstatement … frontpay … backpay, compensatory and punitive damages, attorneys fees, and other injunctive relief." *Id.* at 180.

Of course religious accommodations have limits. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), this Court invalidated a Connecticut statute that guaranteed employees an "absolute right not to work on their chosen Sabbath." *Id.* at 704-05. Such an "absolute and unqualified" accommodation violated the Establishment Clause by effectively commanding that "Sabbath religious concerns automatically control over all secular interests at the workplace." *Id.* at 709. But as the text of Title VII makes plain, Title VII's accommodation provision contains no such defects.

Unlike the statute in *Caldor*, Title VII does not create an "absolute and unqualified right" to religious accommodation in the workplace. Instead, it explicitly says that employers are obliged to provide only "reasonabl[e]" accommodations that do not impose "undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). Several Justices acknowledged that difference in *Caldor* itself. 472 U.S. at 711-12 (O'Connor, J., concurring) (observing that unlike the Connecticut statute in *Caldor*, Title VII demands "reasonable rather than absolute accommodation"). Moreover, unlike the law in *Caldor*, which singled out one religious practice for absolute protection, Title VII covers "all religious beliefs and practices rather than protecting only Sabbath observance." *Id.* at 712. Those differences are more than sufficient to alleviate

any possible Establishment Clause worries that may have motivated *Hardison*. And this Court's subsequent decisions further confirm that conclusion.

In *Cutter*, this Court unanimously rejected an Establishment Clause challenge to the prison provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1(a). In so holding, the Court noted that RLUIPA requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and provides a rule that would be "administered neutrally among different faiths." 544 U.S. at 720. The RLUIPA provision that requires governments to take account of burdens on others is the defense of compelling government interest and least restrictive means—a standard even more stringent than undue hardship.

Although *Cutter* observed that RLUIPA relieved "government-created burdens," *id.* at 720, this Court has never held that Congress's ability to provide religious accommodations extends only to burdens imposed by the state—burdens derived directly from state action. On the contrary, it has repeatedly said that government may "accommodate religion beyond free exercise requirements." *Cutter*, 544 U.S. at 713; *accord, Amos*, 483 U.S. at 334. The employment relationship is heavily regulated, often to protect employees, and Congress can certainly regulate to enable religious minorities to fully participate in the economy. Title VII aims at "assuring employment opportunity to all groups in our pluralistic society," while balancing this concern against other interests. *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring); *see also Hardison*, 432 U.S. at 90-91 (Marshall, J., dissenting) ("If the State does not establish

religion … by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.").

Indeed, to the extent that the Court's holding in *Hardison* may have been motivated by the Establishment Clause, it was exactly backward. As the concurrence below hinted, Title VII actually furthers Establishment Clause values by ensuring that adherents of small or unusual faiths may "worship … in their own way, and on their own time," without putting their job at risk, to the same extent as adherents of more familiar faiths that are less often burdened by employers. Pet. App. at 14a.

CONCLUSION

This Court should grant the petition.

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