NO. 22-174

In the
Supreme Court of the United States

GERALD E. GROFF,
Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

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

BRIEF FOR THE SIKH COALITION, MUSLIM ADVOCATES, THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, SUR LEGAL COLLABORATIVE, AND LEGAL AID AT WORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States working 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 rights. Since its inception, the Sikh Coalition has litigated numerous cases to protect the rights of Sikhs who have been discriminated against in both the public and private sector workplaces including retaliation, hostile work environments, segregation, and the denial of religious accommodations. The Sikh Coalition continues to work towards a world where Sikhs may have equal access to employment and a safe workplace environment across America.

Muslim Advocates is a national civil rights organization litigating, educating, and advocating 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,

[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.

promoting the full and meaningful participation of Muslims in American public life.

The Islam and Religious Freedom Action Team (IRF) of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

The Sur Legal Collaborative was founded to address the need for community-based legal advocacy at the intersection of immigrant and worker rights in the Deep South. Sur seeks to empower immigrant and working-class communities with the resources necessary to advocate for their rights. Sur's Labor Rights Program provides representation and legal education on workers' rights regardless of legal status.

Legal Aid at Work (LAAW) is a San Francisco-based, nonprofit legal services organization whose mission is to protect and expand the employment rights of low-wage and other underrepresented workers. In a case litigated with the EEOC in the Northern District of California, LAAW represented an observant Muslim woman who was fired from her job with a national clothing retailer because she refused

to remove her hijab in compliance with the employer's "Look Policy." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F.Supp.2d 949 (N.D. Cal. 2013). LAAW has an interest in the instant matter in that *Hardison*'s "more than de minimis" standard has limited its ability to vindicate the rights of the communities it represents to have their religious practices reasonably accommodated in the workplace.

Amici are deeply concerned by the ability of employers to discriminate against those requiring accommodations—including discrimination in such a manner that allows for segregation, failure to hire, and situations creating a retaliatory or hostile work environment—and how this workplace discrimination disproportionately affects minority communities by failing to provide for equal access to employment opportunities. The issues at stake in this case relate directly to the right of practitioners of minority faiths in America to avail themselves of employment opportunities on equal terms. Amici submit this brief in support of Petitioner Gerald E. Groff in the hope that this Court will protect the religious rights of all Americans in the workplace.

SUMMARY OF ARGUMENT

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against employees on the basis of religion and have a duty to reasonably accommodate an employee's sincerely held religious beliefs or practices unless such accommodation would impose an "undue hardship" on the employer's business. 42 U.S.C. §§ 2000e–2000e-17.

In 1977, 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). *Hardison* is undeniably incorrect, and a growing chorus of judges and commentators—including three current members of this Court—have recognized that the de minimis rule has no grounding in the statutory language of "undue hardship." This misreading of Title VII "effectively nullif[ied]" the accommodation scheme Congress created to protect religious employees. *Id.* at 89 (Marshall, J., dissenting).

More recently, 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." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). However, *Hardison*'s 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, no matter how small or trivial.

While *Hardison*'s misinterpretation of Title VII eviscerates the right to workplace accommodations for practitioners of all faiths, it has especially damaging effects for religious minorities. Adherents to minority faiths more often require workplace accommodations because their religious traditions are not already accommodated. As Justice Marshall accurately predicted in his dissent, the de minimis standard 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, employees who are members of minority faiths are more likely to wear religious clothing, like a headscarf or turban, that conflicts with a company's uniform policy. *See id.* at 88. Because *Hardison* strips Title VII of any meaningful accommodation requirement, employees whose religious practices include 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 may require modest accommodations in some workplaces. Yet, pursuant to *Hardison*, courts and employers have rejected Sikh and Muslim workers' requests for reasonable accommodations in case after case under the de minimis rule—often because of a speculative harm or small financial cost. The scope of this discrimination and the burden it places on Sikh and Muslim employees is immeasurable; however, in many cases, it is avoidable given the protections these employees should be

afforded. Far too many Muslims, Sikhs, and other religious minorities will continue to face the "cruel choice of surrendering their religion or their job" unless this Court corrects *Hardison*'s misinterpretation of Title VII. *Id.* at 87. This has been especially true for Sikhs, Muslims, and other religious minority groups throughout the COVID-19 pandemic. As a result of the pandemic, many employers have put in place updated religious accommodation policies to address changing health and safety needs that, in practice, do not actually make reasonable accommodations for members of minority religious faiths. Rather, members of these communities are too often forced to choose between practicing their faith and staying employed.

Reasonable accommodations for religious practices are feasible in the workplace. In fact, the kinds of modest accommodations the de minimis standard often denies members of minority faiths—such as an exemption from a uniform policy; the purchase of suitable, alternative personal protective or other equipment; or an adjustment to the ordinary break schedule—are provided under other accommodation schemes, like the Americans with Disabilities Act (ADA) of 1990 and federal and state religious freedom restoration acts. If this Court corrects *Hardison*'s error and applies the plain language of Title VII, then these other accommodation schemes show that employers will not be forced to shoulder a burden greater than that which is already imposed and afforded to other employees.

ARGUMENT

As shown by the experiences of Sikh and Muslim employees, the de minimis standard causes serious harm to adherents of minority faiths.

A. Sikh employees routinely 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*, The Sikh Coalition (2008), https://tinyurl.com/sikhcoalition2008.

Sikhs outwardly display their commitment to these principles and 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 (Kesh); a small comb usually placed within one's hair (Kanga); soldier shorts traditionally worn as an undergarment (Kachera); a swordlike instrument worn with a shoulder strap (Kirpan); and a bracelet worn on one's wrist (Kara). *Accommodating Sikhs in the Workplace: An Employer's Guide*, The Sikh Coalition (2022), https://tinyurl.com/sikhcoalition2022.

These 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. 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 Sikh employees. The examples below illustrate how *Hardison*'s de minimis standard forces adherents of minority faiths 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 grooming policy. 530 F.Supp. 86, 88 (N.D. Ga. 1981), *superseded on another ground*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074. The court approved this rejection of employment because "the wearing of a beard . . . or headwear" did "not comply with the public image that Sambo's ha[d] 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.* 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 89–91.

This case illustrates how the de minimis standard can lead to a segregated workplace, which is contrary to 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 other employees 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 quite simple for an employer to show it is "too costly" for Sikhs to be seen in the workplace. And so Sikh employees are all too often sent to work where they are hidden from the public eye.

Such workplace segregation was upheld in *Birdi v. UAL Corp.*, where a district court concluded that 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). More recently, Walt Disney Parks and Resorts segregated a Sikh employee 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, 11:52 AM), https://tinyurl.com/nbc071315.

Such a dynamic—where perceived public bias can relegate practitioners of minority faiths to less

desirable or visible 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). Further, if there is no out-of-view position available, members of minority faiths 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 employers to deny religious accommodations because of incorrect perceptions of danger, a biased interpretation of policies, or because safe alternatives are deemed to be more expensive.

To be sure, correctly interpreting 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. As a result, Title VII rarely requires accommodations for safety protocols, even when safe

and affordable alternatives are available or possible.[2] This practical reality leads to serious barriers for Sikhs seeking employment—especially in sectors that typically use safety equipment, like construction, emergency services, law enforcement, or medicine.

As an example, Sikh healthcare professionals during the early stages of the COVID-19 pandemic struggled under *Hardison*'s de minimis standard. *See Update: Sikh Medical Professionals and PPE*, The Sikh Coalition (May 13, 2020), https://tinyurl.com/sikhcoalition051320. A significant challenge resulted from an interpretation of regulations issued by the Centers for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA) on the wearing of certain types of Personal Protective Equipment (PPE), such as the N95 respirator, by bearded people. *See* Written Testimony of Amrith Kaur, Legal Director, The Sikh Coalition, Written Testimony from the EEOC Meeting on Workplace Civil Rights Implications of the

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[2] The paltry de minimis standard emboldens employers to deny accommodations imposing no costs at all. For example, a trucking company denied Sikh applicants employment for declining 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, 6:10 PM), https://tinyurl.com/latimes111516. Similarly, it required years of litigation in federal court for a national automotive parts retailer to grant a Sikh employee a minor accommodation of wearing a turban and kara (bracelet). *See AutoZone Settles Religious Discrimination Suit with Winthrop Man*, WBUR News (Apr. 3, 2012), https://tinyurl.com/wbur040312.

COVID-19 Pandemic (Apr. 28, 2021), https://tinyurl.com/eeoc042821. While both the CDC and OSHA regulations require certain employees to be fitted for N95 respirators prior to being able to wear them in the workplace, neither agency's regulations allow individuals to be fit tested if they have any amount of facial hair coming between the face and the seal of the mask/respirator. *Id.*; *see* 29 C.F.R. § 1910.134(g)(1)(i)(A) (2021) (OSHA's Respiratory Protection Standard). This posed a problem because medical professionals are often required to wear PPE to prevent the virus's spread and many are required to use the low-cost N95 mask. *See* Written Testimony of Amrith Kaur, *supra.*

However, some employers continue to disallow male healthcare workers, corrections officers, and others with religiously mandated facial hair from working because they cannot properly wear N95 masks, even though reasonable alternatives and workable solutions exist. For example, powered air purifying respirators and controlled air purifying respirators or beard-bands[3] work just as well as N95s, but may cost more, and thus may be found to impose more than a de minimis burden on employers to provide. *See Sikh Medical Professionals and PPE*, *supra*; *see also* Letter of Interpretation for Respiratory Protection Standard from Kimberly A. Stille, Acting

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[3] *See* R. Singh, et al., *Under-Mask Beard Cover (Singh Thattha Technique) for Donning Respirator Masks in COVID-19 Patient Care,* 106 J. Hosp. Infection 782 (2020), https://tinyurl.com/ncbi100320; S. Prince et al., *Assessing the Effect of Beard Hair Lengths on Face Masks Used as Personal Protective Equipment During the COVID-19 Pandemic,* 31 J. Exposure Sci. Env't Epidemiology 953 (2021), https://tinyurl.com/nature051821.

Director, Directorate of Enforcement Programs, OSHA, to Amrith Kaur Aakre, Legal Director, The Sikh Coalition (Dec. 16, 2021), https://tinyurl.com/osha121621 (acknowledging that loose-fitting powered air-purifying respirators are effective for workers with facial hair). As a result, employers have threatened Sikh doctors, nurses, technicians, and corrections officers with suspension or termination if they refuse to violate their faith by shaving or cutting their hair. *Sikh Medical Professionals and PPE*, *supra*;[4] *see also Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383–84 (9th Cir. 1984) (affirming summary judgment for employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven, where the policy was based on the necessity of being

[4] In October 2022, the EEOC sued several emergency transport companies for failing to accommodate first responders with beards for religious reasons. *See* Press Release, EEOC, EEOC Sues Global Medical Response and American Medical Response for Religious and Disability Discrimination (Oct. 26, 2022), https://tinyurl.com/eeoc102622. Since at least December 2018, applicants and employees in the Emergency Medical Technician (EMT) and paramedic positions requested accommodations from the emergency transport companies to be allowed to wear facial hair due to their religious beliefs. *Id.* These employers have a "no facial hair" policy for their EMTs and paramedics related to their wearing of respirators that the employers contend will not fit properly if the employee has facial hair. *Id.* However, these employers denied the applicants and employees the use of a respirator that would have allowed them to maintain their facial hair and perform their jobs safely. *Id.* As a result of this denial of accommodations to these first responders, some were forced to shave in violation of their religious beliefs to keep their jobs, while those who would not shave or complained their rights were being violated due to the companies' policy were fired. *Id.*

able to wear a respirator with a gas-tight face seal due to potential exposure to toxic gases); *Kalsi v. N.Y.C. Transit Auth.*, 62 F.Supp.2d 745, 760 (E.D.N.Y. 1998) (affirming summary judgment for employer after concluding that a turban created an undue hardship because it prevented wearing a hard hat during hazardous work), *aff'd*, 189 F.3d 461 (2d Cir. 1999).

Other Sikh articles of faith have also caused safety-based concerns, with a common example involving the kirpan, which is the Sikh article of faith resembling a knife or sword that obligates a Sikh to uphold justice for all people. Many kirpans are not dangerous (usually, they are not sharp and are 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, 329–30 (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 disregarded 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 Religious Freedom Restoration Act statutes[5] permitting an employee to carry one—Title VII's de minimis standard was just too weak to require the accommodation. *See id.* at 331.

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.

B. Muslim employees are routinely denied accommodations for trivial reasons under *Hardison*'s de minimis standard.

Many Muslims believe that their faith requires them to engage in certain practices. Observances 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*

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[5] Religious freedom statutes, found at the federal level and in twenty-one states, offer an 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 (RFRA) of 1993, 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). Under such 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).

Religious Practices, Council on American-Islamic Relations (2005), https://tinyurl.com/cair2005. Islam prescribes that both men and women dress modestly. Many Muslim men wear beards for religious reasons, and some wear a small head covering called a kufi. *Id.* Likewise, many Muslim women wear a head covering, such as a hijab, while some others may cover their face. *See id.*

Like Sikhs, some observant Muslims also display commitment to their religious principles in an outwardly visible manner, which results in Muslim employees similarly being vulnerable to workplace discrimination. When applying *Hardison*, courts routinely allow employers to deny workplace accommodations for these Islamic religious practices. Astonishingly, while Muslim Americans comprise just 1% of the U.S. population, 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. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, Wash. Post (June 21, 2016, 4:39 PM), https://tinyurl.com/washpost062116.

Because the de minimis standard is so easy to satisfy, courts have permitted tenuous theories of undue hardship to override the religious needs of Muslim employees. Some of these theories have been based on the negative feelings of customers or other employees, trivial financial cost to the employer, or hypothetical "threats" to safety. 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 standard, negative reactions of customers or other employees to the appearance of Muslim employees can amount to an undue hardship. *See Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009) ("Both economic and non-economic costs can pose an undue hardship upon employers . . . .").

For instance, in *United States v. Board of Education for School District of Philadelphia*, a Muslim public school teacher was denied a teaching assignment on the basis of an 1895 "Pennsylvania Garb Statute" that was enacted with the objective of preserving an "atmosphere of religious neutrality" in the public school system. 911 F.2d 882, 885, 890 (3d Cir. 1990). The Third Circuit rejected the teacher's Title VII claim on the ground that requiring the school board to accommodate her would constitute an undue hardship. *Id.* at 890–91.

As another example, in *Camara v. Epps Air Service, Inc.*, an employer denied a Muslim woman's request to wear a hijab while employed as a customer service representative and then fired her when she insisted on adhering to her faith. 292 F.Supp.3d 1314, 1318–19 (N.D. Ga. 2017). The district court approved this termination after the employer argued that the hijab "did not project the image he sought for his company" and that customers may have "negative reactions" when seeing a woman in a hijab. *Id.* at 1319. 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. *See EEOC v. JBS USA, LLC*, 339 F.Supp.3d 1135, 1182 (D. Colo. 2018). The court relied, in part, on testimony 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 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.*

Similarly, another 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. 10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013). In these cases, the de minimis standard allowed the hypothetical impact on the "morale" of non-Muslim workers to override Muslim

employees' requests for a reasonable accommodation, without 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 accommodations. Instead, the burden is shifted to Muslim employees to incur the immense cost of either surrendering their religious practices or their employment.

To illustrate, 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. 04-CV-72, 2005 WL 1118175, at *6–8 (S.D. Ohio May 11, 2005). Despite the employee suggesting that the large company retain the trainer at another time to accommodate his religious needs, the court reasoned that requiring the company to pay overtime was more than a de minimis cost—thus sanctioning the Muslim employee's termination. *Id.* at *8.

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. 09CV41TSL–JCS, 2010 WL 384416, at *2 (S.D. Miss. Jan. 27, 2010). The court held that 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.*

These cases illustrate how the de minimis standard emboldens employers to deny reasonable

accommodation requests in order to save money. In a more recent example, the Council on American-Islamic Relations (CAIR) has alleged that Southwest Airlines refused to allow a Muslim ramp agent to attend obligatory Friday prayers and then terminated his employment rather than allowing him to work a different shift. Press Release, CAIR, CAIR Files EEOC Complaint Over Southwest Airlines Denial of Prayer Rights, Wrongful Termination of Maryland Muslim Worker (Feb. 14, 2023, 2:01 PM), https://tinyurl.com/cair021423.

Unfounded or hypothetical threats to safety. An accommodation imposes an undue hardship if it would put others in harm's way. Unfortunately, religious practices and customs of minority faiths may appear "threatening" to the unfamiliar, which has resulted in courts finding essentially any degree of hypothetical risk imposes 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.

Consider the example of *EEOC v. GEO Group, Inc.*, where 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 267–68, 272, 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 274–75; *accord Parker v. Ark. Dep't of Corr.*, No. 05CV00850, 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" (citation omitted)).

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

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.

As an 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.*, *Kaganovich v. McDonough*, 547 F.Supp.3d 248, 270 n.7 (E.D.N.Y. 2021) (noting that breaks are a recognized form of reasonable accommodation for diabetic employees); *see also Bracey v. Mich. Bell Tel. Co.*, No. 14-12155, 2015 WL 9434496, at *2, *6 (E.D. Mich. Dec. 24, 2015) (providing an altered break schedule for employee with irritable bowel syndrome).

Likewise, although Title VII does not currently require healthcare organizations and other workplaces that similarly require the wear of masks and respirators to purchase more costly respirators for

their Sikh 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 that an expenditure of $2,375 to install automated door openers was not an undue hardship).

Moreover, while some adult Sikh employees cannot bring their kirpans, which resemble a knife, to work due to "safety concerns," the RFRA has permitted even Sikh children to bring their kirpans to school. *Cheema v. Thompson*, 67 F.3d 883, 885–86 (9th Cir. 1995).[6] And while Sikhs regularly are denied accommodations for beards and head coverings that violate a company's uniform policy, RFRA suits compelled the United States Marine Corps to accommodate Sikhs during bootcamp and 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. Berger*,

[6] 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).

No. 22-5234 (D.C. Dec. 23, 2022)[7], *see also 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, 2:22 PM), https://tinyurl.com/wsj010617; Stephen Losey, *Air Force Officially OKs Beards, Turbans, Hijabs for Religious Reasons*, Air Force Times (Feb. 11, 2020), https://tinyurl.com/airforcetimes021120.

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

These other religious accommodation schemes do not only exist on the federal level. For instance, the California Workplace Religious Freedom Act of 2012 clarified that protected religious observance includes wearing religious clothing and hairstyles, and that these practices are entitled to reasonable accommodation at work, although not in a manner that would impose undue hardship on employers. *See* Cal. Gov't Code § 12926(q) (West 2018). The act also specifies that segregation is not a reasonable accommodation. *See Religious Freedom and*

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[7] Brad Dress, *Appeals Court Rules Sikh Recruits Can Keep Beards at Marine Boot Camp,* The Hill (Dec. 26, 2022, 3:01 PM), https://tinyurl.com/hill122622.

Accommodation: Hearing on Assemb. B. 1964 Before the Assemb. Comm. on the Judiciary, 2011–12 Reg. Sess. 2 (Cal. 2012), https://tinyurl.com/leginfo2012.

As these examples illustrate, greater religious protections for adherents to minority religions are possible without imposing unworkable burdens on employers.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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