No. 22-174

In the
Supreme Court of the United States

GERALD E. GROFF,
Petitioner,
v.

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

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

BRIEF OF *AMICUS CURIAE* OVER 400 PHYSICIANS, SURGEONS, NURSES, AND MEDICAL PROFESSIONALS WHO SUPPORT RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

ERIN ELIZABETH MERSINO
Counsel of Record
RICHARD THOMPSON
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48105
(734) 827-2001
emersino@thomasmore.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Who Support Religious Liberty, submits this brief.[1] *Amicus Curiae* is an organization devoted to medical decisions only being made within the bounds of the Constitution, its principles which are protected by federal statutes, and based upon reliable scientific and medical evidence. *Amicus Curiae* cares deeply about the impact of employers improperly punishing and usurping an individual's control over his/her sincerely held religious beliefs and moral convictions and his/her decisions grounded upon those beliefs and convictions.

Indeed, the physicians, surgeons, nurses, and medical professionals have faced the loss of their careers, unpaid suspensions from work, and the denial of religious exemptions—not based on the sincerity of their religious convictions or any real impact on their workplace, but due to categorical denials of any religious exemptions at their places of work and unfair discriminatory practices. Many support their families with their paychecks and fear if they will be able to earn a living due to being publicly ostracized by their government and their employers for following their sincerely held religious

[1] Pursuant to this Court's Rule 37.6, counsel for *Amicus Curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amicus Curiae*'s counsel has made a monetary contribution to the preparation or submission of this brief.

convictions. Many have experienced their employers sharing confidential medical information with their co-workers. Many have faced rigorous and inappropriate questioning and insults from their employers regarding their religious beliefs. Some have even been denied religious accommodations when they work remotely, without any effect on co-workers. All have faced unjust persecution.

Amicus Curiae has personally felt the backlash of draconian employer mandates. The ongoing debate regarding how sincere religious objections to COVID-19 policies should be treated has exacerbated the discrimination and hardship *Amicus Curiae* have faced and continue to face. It has also revealed how hostile some Americans can be toward minority religious beliefs and religious beliefs to which they disagree. Ironically, it is *Amicus Curiae*'s religious beliefs that drew them to careers of service in the medical field and inspire them to care for sick individuals despite the potential risk doing so could pose to themselves and their families. *Amicus Curiae* is concerned by the ongoing irreparable harm to the healthcare field by forcing physicians, surgeons, nurses, and medical professionals to work in and undergo conditions that violate their religious conscience. *Amicus Curiae* believes that decisions regarding one's adherence to his/her religious tenets should not be defined by the demands or bullying of their employer but should be informed by the bounds of one's religious conscience.

Amicus Curiae has undergone rigorous schooling, boards, residencies, and have significant debt to pay

for their schooling. Yet, due to forced employer mandates, they have faced the inability to earn an income. *Amicus Curiae* oppose the punishment of individuals due to exercising one's sincerely held religious beliefs. Doing so minimizes the importance of religious liberty and welcomes religious discrimination. Indeed, *Amicus* has experienced this firsthand and is living it presently.

Amicus Curiae files this brief to encourage this Honorable Court to not justify the legal fiction created by *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)—which *ultra vires* abated the "undue hardship" standard of Title VII, causing unjust, and at times even absurdly hostile treatment of religious exercise in the workplace. The holding in *Hardison* was wrong when it was decided, it is still wrong over forty years later, and, undoubtedly, it continues to catalyze religious discrimination for not just *Amicus Curiae* and the Petitioner, but for all privately employed people of faith.

BACKGROUND

Title VII of the Civil Rights Act of 1964 deems it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1), (2). In 1972, Congress broadened Title VII's definition of religion to protect "all aspects of religious observance and practice, as well as belief,

unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j)). The 1972 amendment issued a legislative response to the courts, which Congress believed had curtailed the religious exercise of employees too far in two recent decisions. *See* 118 Cong. Rec. 705-06 (1972) (citing that *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972) "clouded" the understanding of religious discrimination). In *Dewey*, the plaintiff alleged wrongful discharge and sought reinstatement and backpay. 429 F.2d at 327. As part of his collective bargaining agreement, plaintiff was required to work overtime on Sunday or find another qualified worker to do so. *Id.* at 327-28. Plaintiff asserted that his religious beliefs prevented him from working on Sundays as it was his Sabbath, and he could also not participate in others working on the Sabbath by requesting that his co-workers cover his shift. *Id.* Plaintiff's employer eventually discharged him for non-compliance with his overtime work obligations. *Id.* at 328. And although the Sixth Circuit found that the plaintiff did not work on Sundays "because of his religious beliefs," it held that the employer's failure to accommodate the plaintiff's religious exercise did not violate Title VII. A divided Court upheld the Sixth Circuit's decision. 402 U.S. 689.

In *Riley*, the plaintiff was a Seventh Day Adventist who held religious beliefs forbidding him from working after sundown on Friday until sundown on Saturday. 330 F. Supp. 583, 584 (M.D. Fla. 1971). After working for six months without issue, the defendant re-scheduled plaintiff to work Fridays after sun-down. *Id.* Plaintiff advised his employer of his religious objections and was informed that company policy required him to work during this time. *Id.* After leaving during his shifts to observe this tenet of his faith, plaintiff's employer fired him for insubordination. *Id.* The District Court applied the holding in *Dewey* and reached the same outcome, but by the time the Fifth Circuit heard the appeal Congress had passed the 1972 Amendment. 464 F.2d 1113, 1116-18 (5th Cir. 1972). The Fifth Circuit, citing to Senator Randolph who sponsored the amendment, stated that "it was designed to resolve the issue left open by the equal division of" this Court in *Dewey*. *Riley*, 464 F.2d at 1116. The amendment aimed to clarify that "[f]ailure to make [a religious] accommodation would be unlawful unless an employer can demonstrate that he cannot reasonably accommodate such beliefs, practices, or observances without undue hardship on the conduct of his business." *Id.* at 1117. Senator Randolph espoused:

> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act. I think in the Civil Rights Act we thus intended to protect the same rights in

> private employment as the Constitution protects in Federal, State, or local governments.

118 Cong. Rec. 705 (1972). The amendment sought to protect First Amendment liberty and passed unanimously in the Senate and similarly in the House. *Riley*, 464 F.2d at 1117. "Title VII require[d] religious accommodation, even though unequal treatment would result." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). But a mere five years later, this Court reverted to "the *Dewey* decision in direct contravention of congressional intent." *Hardison*, 432 U.S. at 91 (Marshall, J., dissenting).

Larry Hardison worked at the Trans World Airlines (TWA) maintenance base in Kansas City, Missouri. *Id.* at 66. Like the plaintiffs in *Riley* and *Dewey*, Hardison had signed a collective bargaining agreement. *Id.* at 67. TWA's agreement required scheduling be based on employee seniority and recognized that TWA's base needed manpower twenty-four hours a day, seven days a week. *Id.* Hardison's faith required a scheduling accommodation—his Sabbath began at sunset on Friday and lasted through sunset on Saturday. *Id.* Hardison agreed to work holidays in exchange for having Saturdays off for the Sabbath. *Id.* at 67-68. However, when Hardison's employment switched to a different building that worked day shifts, he worked with more experienced employees who had more seniority, and TWA was no longer able to accommodate his religious beliefs due to its seniority-

based scheduling policy. *Id*. at 68. In reaching its holding, this Court stated that while Senator Randolph generally sought for the 1972 amendment "to assure that religious discrimination in the employment of workers is for all time guaranteed by law, . . . he made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied." *Id*. at 74-75. Then, toward the end of its opinion, this Court determined that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id*. at 84. The standard adopted by the Court is not in the text of Title VII, nor was it advocated for by either TWA or Hardison. It is nothing more than an anomaly. In his scathing dissent, Justice Marshall characterized majority's opinion in *Hardison* as "def[ying] both reason and common sense." *Id*. at 91 (Marshall, J., dissenting). And *Hardison* has not improved with the passage of time.

SUMMARY OF THE ARGUMENT

This *Amicus Curiae* brief addresses two reasons why *Hardison*'s "de minimis" test should be overruled.

First, the test bears no relationship to the text of Title VII. Under this Court's analysis in *Bostock,* Title VII's terms are to be construed in context with their plain meaning at the time it was amended in 1972. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). Accordingly, the term "undue hardship" would not have been understood to have

meant "de minimis cost." Furthermore, no other statutory scheme interprets the "undue burden" standard in a capacity that renders it as meaningless as in *Hardison*. There is no viable method of statutory analysis that supports the creation of *Hardison*'s de minimis test. The test is a judicially constructed legal fiction that is inapposite to the text, meaning, and purpose of Title VII.

Second, *Hardison*'s "de minimis" cost standard has proven detrimental to the exercise of religious liberty. It runs counter to the principle at the heart of the First Amendment—the preservation of religious pluralism. Congress, when amending Title VII in 1972, sought to preserve First Amendment freedoms and expand employer accommodations of religious exercise. To the contrary, Title VII under *Hardison* has allowed employers to discriminate against religious individuals without requiring employers to make any real attempt to accommodate religion in the workplace. The "de minimis" cost standard negates the statutory requirement of showing an undue hardship and has been used by the courts to perpetuate religious discrimination in the workplace. Employees are left with no recourse.

In sum, the "de minimis" cost standard has no basis in law, enables religious discrimination in the workplace, and should be abandoned.

ARGUMENT

I. *Hardison*'s "De Minimis" Test is a Frankenstein Created by the Judiciary, Not the Result of Title VII's Statutory Construction.

In Mary Shelley's Frankenstein, she describes the origin of Dr. Frankenstein's creature as assembled from old body parts and strange chemicals, animated by a mysterious spark. This could also characterize the origin of *Hardison*'s "de minimis" test. The test is not derived from Title VII, defies traditional notations of statutory interpretation, and seems to appear at the end of the *Hardison* decision with an impromptu spark, almost like the scientific myths of spontaneous generation.

The origin of *Hardison*'s "de minimis costs" seems as much open for debate as it is prone to intense criticism. The test directly conflicts with the words of Title VII. In *Bostock*, this Court affirmed that a statute must be construed "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). This is because "only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* By deviating from the original meaning of the words in a statute, judges risk engaging themselves in the legislative process by deviating from Congress' meaning and intent. *Id.* In Title VII, Congress did not define the term "undue hardship," therefore the term must be interpreted according to its ordinary

meaning when Congress amended Title VII in 1972. *Id.* At that time, Black's Law Dictionary defined *de minimis* as "very small or trifling," even comparable to "a fractional part of a penny." *Black's Law Dictionary* 482 (4th ed. 1968). The definition of "de minimis" stands in stark opposition to the meaning of "undue hardship. *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) ("I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost.'"). Indeed, a dictionary available in 1972 would have defined "hardship" as "suffering" or "a thing hard to bear." *The American Heritage Dictionary of the English Language* 601 (1969). And "undue" meant "exceeding what is appropriate or normal . . . excessive." *Id.* at 1398. Therefore, the understood definition of "undue hardship" would mean something more along the lines of "excessively" "hard to bear." *Id.* at 601, 1398. The plain meaning of Title VII's "undue hardship" is inapposite of *Hardison*'s holding, which only requires an employer to undergo a cost so miniscule as to have no legal importance. In *Hardison*, this Court held that the monetary impact of offering a religious accommodation that would cost TWA $150 met this low burden, even though TWA was one of the largest airlines in the world at the time. 432 U.S. at 92, n. 6 (Marshall, J., dissenting).

For Petitioner Groff, the Respondent claims accommodating Sundays would create "more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale at both

the Holtwood Post Office and the Lancaster Annex hub." Pet. App. at 24a. Yet, Respondent was not required to prove these claims by providing evidence. Pet. App. at 30a n. 4. The lower court also held that providing an accommodation would violate the USPS's seniority-based scheduling policy. Pet. App. at 56a, 58a-59a. In sum, the lower courts treated the "undue hardship" requirement in Title VII as if it did not exist and issued decisions mirroring *Dewey* and *Riley* which pre-date the 1972 amendment. Justice Marshall was correct to opine that *Hardison*'s de minimis standard "effectively nullif[ies]" the purpose of Title VII's 1972 amendment. 432 U.S. at 88-89 (Marshall, J., dissenting).

In no other context, other than under the guise of the protection of religious liberty in Title VII, is the "undue hardship" standard translated so meaninglessly. After *Hardison*, Congress has defined the term "undue hardship" to mean "an action requiring significant difficulty or expense," 42 U.S.C. § 12112(b)(5)(A), (10), "extreme inconvenience," 28 U.S.C. § 1869(j), and "significant difficulty or expense," 29 U.S.C. § 207(r)(3), *see also* 38 U.S.C. § 4303(15).

Given the *Hardison* Court's definition of "undue hardship", one might even ask why Congress would have bothered to amend Title VII if its intent were *only* to protect religious exercise in the event it did not impose a de minimis burden on an employer. The most reasonable answer is: it did not. *See Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the

denial of certiorari). Congress is not in the practice of amending federal statutes to address de minimis costs. *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) ("*de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.").

There is no indication in the words of Title VII, in its legislative history, or in comparable statutes that Congress intended Title VII to be bound by *Hardison*'s de minimis cost standard. *Hardison* was decided wrongly and should be overruled.

II. *Hardison*'s De Minimis Cost Test Degrades the Principles of Religious Liberty That Congress Sought to Protect by Amending Title VII, It Endangers Religious Pluralism, and It Yields Unjust Outcomes.

One of the hallmarks of the human condition in America is religious pluralism. The First Amendment guarantees that "no official, high or petty, can prescribe what shall be orthodox in" matters of religious faith and exercise. *West Virginia Bd. of Ed. v. Barnette*, 319 US 624, 642 (1943). There is truly "much to admire" about "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019)

(Kagan, J., concurring) (quoting majority opinion at 2088). Our laws are at their best when interpreted with "sensitivity to and respect for this Nation's pluralism, and the values of . . . inclusion that the First Amendment demands." *Id*. at 2094 (Kagan, J., concurring). Congress sought to continue the inheritance of First Amendment pluralism by amending Title VII in 1972. 42 U.S.C. § 2000e(j); 118 Cong. Rec. 705 (1972). The 1972 amendment was meant to codify religious accommodation for faithful employees to celebrate the Sabbath. In *Hardison*, however, the Supreme Court "seriously eroded" Congress's efforts to protect "one of this Nation's pillars of strength" which is "our hospitality to religious diversity." *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting).

The *Hardison* Court's narrow interpretation of undue hardship has made it exceptionally difficult for an employee of faith to prevail on a religious discrimination claim. *See, e.g.*, Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII,* 76 Tx. L. REV. 317, 386 (1997). And it has hurt employees who practice minority religions more than those who celebrate "holy days on which most businesses are closed." *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting); *see also* Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 693, 721–22 (1992).

At times, this Court has departed from *Hardison* and required accommodation under Title VII in the face of unjust discrimination. *See EEOC. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) (stating that Title VII does not simply preserve neutrality but "give[s] way to the need for an accommodation."). But other times, Title VII has resulted in the untenable choice: violate your sincerely held religious beliefs or exit the workforce.[2]

---

[2] *See, e.g., Groff v. Dejoy*, 35 F.4th 162 (3d Cir. 2022) (finding the employer would have endured undue hardship by changing the employees' schedules to accommodate Petitioner's observance of the Sabbath); *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7 (D. Mass. 2006) (employer did not violate Title VII by requiring an employee, who could not shave his beard for religious reasons, to work only as a mechanic in the lower bay to minimize his contact with customers); *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021), *rev'd,* 142 S. Ct. 2407 (2022) (holding that a football coach's Title VII failure to accommodate claim against school district failed because allowing the coach to pray on the 50-yard line immediately following a game, in full view of students and spectators, would violate the Establishment Clause, and therefore, the school district could not reasonably accommodate the coach's religious exercise without undue hardship); *EEOC v. Univ. of Detroit*, 904 F.2d 331, 332–33 (6th Cir. 1990) (discussing accommodation for employee to abstain from funding a union that used his money to campaign for abortion rights); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (holding it would have been an undue hardship to allow an employee to post a biblical verse in his cubical); *Crider v. Univ. of Tenn.*, 492 Fed. Appx. 609 (6th Cir. 2012) (discussing termination of plaintiff because she could not work on Saturdays due to the Sabbath); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002) (employer did not need to give employee choice among accommodations, nor was employer required to demonstrate that alternative accommodations proposed by employee would have entailed undue hardship); *Turpen v. Missouri K. T. R. Co.*, 736 F.2d 1022 (5th Cir. 1984)

Title VII was never meant to be construed in that way. Justice Marshall's objurgation was correct. *Hardison* "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. . .. As a question of social policy, [*Hardison*] is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law [it] is intolerable." 432 U.S. at 86-87 (Marshall, J., dissenting).

CONCLUSION

Hardison's de minimus cost standard has been wrong for decades. Time and time again, the holding in *Hardison* has required employees to choose between following their sincerely held religious beliefs or earning a livelihood. It is time to overrule *Hardison*. "All Americans will be a little poorer until [the] decision is erased." 432 U.S. at 97 (Marshall, J., dissenting).

(allowing employers to prioritize seniority-based scheduling over religious based accommodation).

Respectfully submitted,

THOMAS MORE LAW CENTER

ERIN ELIZABETH MERSINO
Counsel of Record
RICHARD THOMPSON
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48105
(734) 827-2001
emersino@thomasmore.org

Counsel for Amicus Curiae Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Who Support Religious Liberty