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 THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA, THE ATLANTIC UNION CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE NORTH PACIFIC UNION CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND THE NATIONAL COUNCIL OF YOUNG ISRAEL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTERESTS OF THE *AMICI*[1]

The Seventh-day Adventist Church in Canada, the Atlantic Union Conference of Seventh-day Adventists, and the North Pacific Union Conference of Seventh-day Adventists are parts of the larger Seventh-day Adventist Church responsible for the work of the Church in their respective territories. The Church and its members often confront religious accommodation issues because a core tenet of their faith is to keep the Sabbath holy from sundown on Friday to sundown on Saturday.

As part of the Church's longstanding commitment to religious liberty, these entities provide Sabbath accommodation assistance to Adventists and others in their territories. All of these entities have within their territory jurisdictions where *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), is not the governing rule and join this brief to share their experience under a standard more protective of religious accommodations.

- The Seventh-day Adventist Church in Canada has over 74,000 members in 395 churches. First organized in 1901, it oversees the Church's work in Canada.
- The Atlantic Union Conference of Seventh-day Adventists serves Adventists in the northeastern part of the United States including New

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. This brief was prepared in part by a clinic operated by Yale Law School but does not purport to represent the School's institutional views, if any.

York. The Atlantic Union Conference has more than 129,000 members spread over 604 churches.

- The North Pacific Union Conference of Seventh-day Adventists serves the northwestern United States, including Oregon. The North Pacific Union Conference is comprised of 448 churches and 102,000 members.

The National Council of Young Israel ("Young Israel") is a Jewish synagogue organization that provides resources and services to more than 100 synagogues and their more than 25,000 member families throughout the United States. Young Israel was founded in 1912 as an attempt to address some of the difficulties facing American Orthodox Jews at the time, including mandatory Saturday labor at the workplace. Young Israel seeks to advance Torah-true Judaism and promote the values of Judaism, believing that traditional faith is compatible with good citizenship.

For Orthodox Jews, faithful adherence to Jewish law (halacha) is critical. This adherence includes observing the Sabbath by refraining from work from sunset on Friday until night begins on Saturday. Because faithful Sabbath observance made it difficult for many Jews to find employment, Young Israel created its Employment Bureau specifically for Sabbath observers. Young Israel's constitution and bylaws further specify that only Sabbath observers can hold leadership positions in Young Israel-affiliated synagogues. Young Israel is committed to religious liberty and has filed amicus curiae briefs with this Court on the issue of religious liberty in the past.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Hardison* got the law wrong. Its *de minimis* gloss on the undue hardship standard added by Congress to Title VII in 1972 is indefensible as a matter of textual interpretation. In practice, *Hardison* fares no better. It has gutted workplace protections for religious minorities and has subordinated employees' sincere religious exercise to employers' desire to minimize inconvenience and cost. There is another way. *Amici*'s experience confirms that businesses can still thrive while protecting the rights of religious minorities in the workplace. This Court should overturn *Hardison* and restore the plain meaning of Title VII, which requires employers to accommodate employees' religious exercise absent significant difficulty or expense.

The burden imposed by *Hardison* falls hardest on religious minorities. Employees with uncommon religious beliefs and practices are more likely to need an accommodation. They are, therefore, also more likely to be denied an accommodation, as *Hardison* allows employers to cite any administrative inconvenience or small cost to justify the denial. This strain on minority faiths will continue until *Hardison*'s grave error is corrected.

Despite *Hardison*'s inexcusable shortcomings, some would have this Court maintain the *Hardison* standard for fear that a "significant difficulty or expense" standard will require employers to permit disruptive religious speech and nettlesome proselytizing in the workplace. Real-world experience in jurisdictions that have expressly repudiated the *Hardison* standard, however, makes clear that hewing to the plain meaning of "undue hardship" will do no such thing.

Just the opposite in fact: jurisdictions that have adopted a "significant difficulty or expense" standard have had great success in fostering religious pluralism and avoiding unnecessary litigation over religious accommodations. In short, overturning *Hardison* and reviving Title VII's promise of protection for the faithful will not open Pandora's box. Instead, it will ensure that workers of minority faiths are not unfairly forced to choose between their faith and their livelihood.

## ARGUMENT

### I. THE *HARDISON* STANDARD DISPROPORTIONATELY HARMS THE ABILITY OF RELIGIOUS MINORITIES TO PRACTICE THEIR FAITH.

Replacing *Hardison* with a "significant difficulty or expense" standard is of special significance to Saturday Sabbath observers. American history is littered with examples of these observers facing persecution—criminal penalties, imprisonment, and fines—for adhering to their belief that they must rest on *their* Sabbath. With this history in mind, Congress amended Title VII in 1972 to require religious accommodations by employers absent an undue hardship. *See* 42 U.S.C. §2000e(j). *Hardison*, however, demolished the decades of progress that culminated in this amendment by interpreting the phrase "undue hardship" to mean anything more than a *de minimis* cost.

While *Hardison*'s hostility to the very religious practice the 1972 amendment was intended to protect has been problematic from the day it was decided, correcting it now is more crucial than ever. Growing religious hostility in the workplace—and increasing

antisemitism in particular—means that religious employees are less able to rely on their coworkers' benevolence for an accommodation. It therefore falls to this Court to ensure that religious minority employees no longer continue to suffer the consequences of *Hardison*'s error.

### A. *Hardison* weighs heavy on Saturday Sabbath observers.

***Saturday Sabbath.*** Saturday Sabbath observance is a core part of many religious traditions, including Judaism and Seventh-day Adventism. Protecting its practice is critical to religious expression. Rabbi Samson Raphael Hirsch explained that desecration of the Sabbath through "the slightest, least arduous productive activity on the Sabbath implies the denial of God as Creator and Lord." Samson Raphael Hirsch, *The Nineteen Letters* 87 (Jacob Breuer ed., Bernard Drachman trans., 1969).

Prominent Jewish theologian Rabbi Abraham Joshua Heschel similarly described Judaism as "a religion of time aiming at the sanctification of time" and explained that keeping the Sabbath weekly by refraining from labor, was the primary way to accomplish this sanctification, connecting humanity and the divine. Abraham Joshua Heschel, *The Sabbath* 8, 16 (paperback ed. 2005). While other traditions venerated sacred spaces, objects, or persons, Heschel declared that in Judaism "[t]he Sabbaths are our great cathedrals." *Id* at 8.

Seventh-day Adventists share this deep reverence for the Sabbath. Ellen G. White, one of the founders of Seventh-day Adventism, taught that "[w]hen the foundations of the earth were laid, then was also laid the foundation of the Sabbath" and believed that

Sabbath-keeping was especially significant among the Ten Commandments. Ellen G. White, *Life Sketches of Ellen G. White: Being a Narrative of Her Experience to 1881 as Written by Herself; With a Sketch of Her Subsequent Labors and of Her Last Sickness* 96 (1915). Faithful membership in these religious groups requires the ability to refrain from labor on the Sabbath.

***A history of persecution.*** Saturday Sabbath observers have frequently been persecuted for their religious beliefs. Throughout American history, Jews have faced repeated instances of discrimination and the denial of basic civil rights. Britt P. Tevis, *"Jews Not Admitted": Anti-Semitism, Civil Rights, and Public Accommodation Laws*, 107 J. Am. Hist. 847 (2021). State laws denying Jews the right to vote persisted until as late as 1877. Leonard Dinnerstein, *Antisemitism in America* 15 (1994). That same year, the New York State Bar refused to admit a candidate on the grounds that he was Jewish. *Id.* at 38. Indeed, large law firms remained segregated along religious lines through the 1960s. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 Stan. L. Rev. 1803, 1811 (2008).

Similarly, Seventh-day Adventists—devout Saturday Sabbath observers—routinely faced criminal prosecution, fines, and imprisonment for their refusal to follow state "blue laws," which required businesses to close on Sundays, the Sabbath observance of different religious adherents. The Supreme Court of Arkansas, for example, upheld the conviction of John Scoles in 1886 for violating the Sabbath after he "was found painting a church on a Sunday." *Scoles v. State,* 1 S.W. 769, 770 (Ark. 1886). And Robert King, a farmer, was imprisoned in 1891 for plowing his

field on a Sunday. *In Re King*, 46 F. 905, 906 (Cir. Ct. W.D. Tenn. 1891). Four years later, eight more Adventist men were jailed in Tennessee for not keeping the Sabbath on Sunday. Am. Sentinel, *Adventists in Jail in Tennessee* 217 (Jul. 11, 1895). In 1889, after taking part in successful efforts to stop Congress from instituting national Sunday Sabbath observance, Seventh-day Adventists founded the National Religious Liberty Association to oppose adoption of federal or state of religiously- based legislation. Douglas Morgan, *Adventism and the American Republic: The Public Involvement of a Major Apocalyptic Movement* 47 (2001).

***The 1972 Amendment.*** It was against this backdrop that Congress in 1972 amended Title VII. Pub. L. No. 92-261, 86 Stat. 103 (1972). The 1972 Amendment's author, West Virginia Senator Jennings Randolph, was a Seventh-day Baptist. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 584 (2000). Randolph introduced the 1972 Amendment to, *inter alia*, protect the rights of Saturday Sabbath observers such as Seventh-day Baptists, Orthodox Jews, and Seventh-day Adventists, communities which Randolph explained "think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening." Subcomm. on Labor of the S. Comm. on Labor & Public Welfare, 92d Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, 712 (1972) (quoting Jennings Randolph). Randolph decried the "partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly re-

quire them to abstain from work . . . on particular days." *Id.*

***Hardison*'s impact.** *Hardison* shattered the 1972 Amendment's promise of Saturday Sabbath accommodation. Because of *Hardison*, Saturday Sabbath observers must depend on their employers' and coworkers' goodwill to swap shifts if they are scheduled to work on their Sabbath. *E.g.*, *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143-44 (5th Cir. 1982) (accommodating an Orthodox Jew's request to switch shifts was an undue burden because it caused a "morale problem" amongst his colleagues). *Hardison* thus gave coworkers effective veto power over religious accommodations, a dynamic that is particularly troubling in light of growing antisemitism in the workplace.

### B. Increasing antisemitism makes effective religious accommodations even more important.

The lack of legal recourse for the denial of Sabbath accommodations is just as pressing today because antisemitism in the United States generally and in the workplace in particular has dramatically increased over the past several years. Arianne Cohen, *On the Rise in the U.S., Antisemitism is Seeping into the Workplace*, L.A. Times (Jan. 11, 2023), https://perma.cc/9JBE-VM2T. The Anti-Defamation League Center for Extremism tracked 2,717 antisemitic incidents in the United States in 2021, the highest recorded since the organization began keeping data in 1979. ADL Center on Extremism, *Audit of Antisemitic Incidents 2021* 5 (Apr. 2022), https://perma.cc/42R3-AWDF. The number of incidents has more than doubled in less than a decade,

and includes cases of harassment, vandalism, and violent assault. *Id.* at 6.

The Federal Bureau of Investigation's 2021 statistics on hate crimes reports that Jews were the group most likely to be the victims of religiously motivated bias-motivated crimes. DOJ, *2021 Hate Crimes Statistics*, (Feb. 14, 2023), https://perma.cc/NE8M-EMEM. A 2022 survey conducted by the American Jewish Committee indicates that twenty-six percent of American Jews report that they have been victims of antisemitic remarks or conduct during the past year. Am. Jewish Comm., *The State of Antisemitism in America 2022: AJC's Survey of American Jews* (2023), https://perma.cc/HYU5-LG43.

Antisemitism is also prevalent in workplaces and becoming more common. A 2022 study of 11,356 employees found that over half of Jewish respondents reported being discriminated against while at work. Rachel C. Schneider et al., *How Religious Discrimination is Perceived in the Workplace: Expanding the View*, 8 Socius, 1, 5 (2022). A targeted survey of 1,131 hiring managers found that twenty-six percent of those surveyed reported they would be less likely to hire a Jewish applicant; the same percentage claimed they made assumptions about whether candidates were Jewish based on physical appearance, while twenty-nine percent reported that antisemitism is acceptable in their company. Resume Builder, *1 in 4 Hiring Managers Say They Are Less Likely to Move Forward With Jewish Applicants* (Jan. 19, 2023), https://perma.cc/8EQ5-U3P6. One in four hiring managers also say they are less likely to move forward with Jewish applicants. *Id.*

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Today, Americans are more likely than ever before to encounter different religious beliefs and practices in their workplace. Robert P. Jones et al., *The 2020 Census on American Religion* 11 (2021), https://perma.cc/7GDU-BWXY. How employers and colleagues react to diverse (and especially minority) faith traditions will depend in part on what the law requires. *See* Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 Iowa L. Rev. 609, 666 (2006) ("Law shapes culture. Law can elevate culture or pervert it."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2043 (1996) ("A large point of law may be to shift social norms and social meaning."). *Hardison* reinforces a societal view that workplace religious differences need not be accommodated—this Court should reject that grave and harmful error.

## II. OVERTURNING *HARDISON* WILL PROTECT RELIGIOUS MINORITIES WITHOUT OVERBURDENING EMPLOYERS.

Practical experience confirms that rejecting *Hardison* and returning to the plain meaning of Title VII's "undue hardship" standard—requiring employers to make reasonable accommodations for religious beliefs absent "significant difficulty or expense"—offers greater protections to religious minority employees. Such experience also confirms that a "significant difficulty or expense" standard would not compromise employers' ability to operate their businesses effectively and efficiently.

Several states already have adopted legislation requiring employers to demonstrate "significant difficulty or expense" before they are absolved of their le-

gal duty to accommodate an employee's religious practice. Canada offers similar protections under its laws. Looking to these real-world laboratories of democracy shows that where this "significant difficulty or expense" standard has been road-tested, it has worked. Given the experience of these jurisdictions, this Court need not heed the alarmist warnings that correcting *Hardison* will overwhelm courts with religious accommodation requests. *See, e.g.*, *Hardison*, 432 U.S. at 84 n.15 (concerned that other employees might request a religious accommodation too); *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1016 (D. Ariz. 2006) (employer claiming that permitting religious accommodation "open[s] the floodgates" to more requests).

Instead, this Court should take note of the experience of jurisdictions that have adopted "significant difficulty or expense" standards. These positive reports of a workable accommodation scheme are "extra icing on a cake already frosted" and further confirm the prudence of overturing *Hardison*. *Van Buren v. United State*s, 141 S. Ct. 1648, 1661 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).

### A. Several states have successfully road-tested the "significant difficulty or expense" standard.

Many states have successfully adopted a "significant difficulty or expense" standard in their respective religious accommodation statutes. New York was the first to reject *Hardison* and explicitly adopt this standard in its religious accommodation statute. N.Y. Exec. Law § 296(10)(a); *id.* § 296(2)(d)(iii) (defining "undue hardship" to mean "significant difficulty or expense").

As reported by then-Attorney General Eliot Spitzer, the law did not trigger a spike in litigation. *See* H.R. 1445, *The Workplace Religious Freedom Act of 2005: Hearing Before the H. Comm. on Educ. & the Workforce*, 109th Cong. 9 (2005) (Statement of Rep. Mark E. Souder). Spitzer further attested that the state law "has not proven to either burden businesses or imperil civil rights." *Id.* at 19 (Statement of Dr. Richard Land, President, Ethics & Religious Liberty Comm'n, S. Baptist Convention).

Noting New York's success, California, Oregon, New Jersey, and Arizona adopted similar standards in their respective religious accommodation statutes. *See* Cal. Gov't Code § 12940(*l*)(1); *id.* § 12926(u) ("'Undue hardship' means an action requiring significant difficulty or expense"); Or. Rev. Stat. Ann. § 659A.033(4)(a)-(f) ("A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense"); N.J. Stat. § 10:5-12(q)(3)(a) ("'[U]ndue hardship' means an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement"); Ariz. Rev. Stat. § 41-1461(14)-(15)(a) ("Undue hardship [m]eans an action requiring significant difficulty or expense").[2]

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[2] New York City adopted a similar policy in 2011, seeking to provide *even greater* protections for religious employees than the New York State law. *See* N.Y.C. Admin. Code §§ 8-102; 8-

California's experience is particularly telling because it changed its standard in part to reduce the State's litigation costs.[3] Associated Press, *California Assembly OKs Measure to Add More Protections for Religious Freedom*, Deseret News (May 31, 2012), https://perma.cc/4S4T-Q2SC. The California legislation was broadly supported by minority religious groups who suffered most under the *Hardison* standard. Despain, *supra*, at 408-409. But more importantly, "no organizations formally opposed" the legislation and the business community "willingly worked to pass a workable bill." *Id.* at 422-23. The adopted language was even celebrated as a compromise position. *Id.* at 422-23. Notably, in the years immediately following passage of the legislation, no deluge of complaints materialized. *See generally* Sarah Parvini, *Are California's Laws Prohibiting Workplace Religious Discrimination Enough?*, KCET (Sept. 15, 2014), https://perma.cc/ZV8C-TY44.

In fact, California Department of Fair Employment and Housing (CDFEH) statistics show that complaints filed with the Department are lower in recent years than they were before the 2012 legislation was

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107. Moreover, Washington State has adopted, through administrative rules, the "significant difficulty or expense" standard with regard to public employees. Wash. Admin. Code § 82-56-020.

[3] California also sought to avoid a *Hardison*-like blunder after a state court posited in *dictum* that it was inclined to follow *Hardison's* lead. Jason Despain, *A Peculiar Clause of Political Compromise for California's Religious Minorities*, 21 Rutgers J. L. & Religion 390, 419-21 (2021) (exploring the effect of *Soldinger v. Nw. Airlines*, 51 Cal. App. 4th 345 (1996), on the 2012 legislation).

enacted.[4] Nor has there been an increase in civil complaints filed by the Department.[5]

California's experience demonstrates that the "significant difficulty or expense" standard neither upset existing workplace balances nor imposed problematic administrative burdens on the state. The intent of the legislation's supporters—to "level the playing field" rather than dramatically shift the burden to employers—was vindicated. Despain, *supra*, at 424.

In each of these states, the "significant difficulty or expense" test has not resulted in upheaval. In fact, there are vanishingly few reported decisions stemming from these laws. This absence of caselaw suggests that, under this more protective standard, employers and employees are able to call balls and strikes without asking the courts to play umpire.

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[4] *Compare* CDFEH, *2008 Annual Report* 3, https://perma.cc/67M2-NLBQ (579 complaints); CDFEH, *2009 Annual Report* 4, https://perma.cc/XS42-FMDC (533 complaints); *with* CDFEH, *2020 Annual Report* 21, https://perma.cc/4FHF-ZLXN (208 complaints). These statistics exclude Right-to-Sue notices, which were not separately reported in earlier Annual Reports around the time of AB 1964's passage.

[5] CDFEH, *Report to the Joint Legislative Budget Committee*, 11-18 (March 2015), https://perma.cc/7FXT-4Y4N (one civil complaint in 2012 and no reported civil complaints in 2013-2014); CDFEH, *2016 Annual Report* 25, https://perma.cc/7X3Z-7L2D (no civil complaints reported); CDFEH, *2017 Annual Report* 20 (https://perma.cc/X2XT-HRYB (one civil complaint); CDFEH, *2018 Annual Report* 19, https://perma.cc/SY9T-Q8D8 (same); CDFEH, *2019 Annual Report* 17, https://perma.cc/8JGM-VRG3 (no civil complaints).

Taken together, experience from these laboratories of democracy is evidence that overturning *Hardison* does not credibly risk fallout. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

In fact, this experience reveals another reason to overturn *Hardison*: its restrictive interpretation of "undue hardship" hamstrings states' abilities to deliver on the promises of their own carefully crafted religious antidiscrimination statutes. As explained *supra*, some states have amended their religious accommodation statutes to explicitly avoid a situation where state courts kneecap state religious accommodation laws by following *Hardison*. *See* Despain, *supra*, at 418-419.

One state that has been unsuccessful in avoiding *Hardison*'s gravitational pull, however, is Massachusetts. There, the state legislature was denied the ability to "innovat[e] and experiment[]" *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), by a state court that hastily imported the faulty logic of *Hardison* into a different—and more religiously protective—state statute. *See Mass. Bay Transp. Auth. v. Mass. Comm'n Against Discrimination*, 879 N.E.2d 36 (Mass. 2008).

Massachusetts' religious accommodation statute releases employers from their duty to accommodate only under limited circumstances, including "the inability of an employer to provide services which are required by and in compliance with . . . law[]" or where the employee's presence is "indispensable," can't be performed by another employee, or is otherwise necessary given "an emergency situation." Mass. Ann. Laws ch. 151B, § 4(1A). Glossing over this "notably different" statutory framework, the Massachusetts Supreme Court clipped the wings of this "broader" religious accommodation, forcing it into the cramped confines of *Hardison*'s *de minimis* burden regime. *See* 879 N.E.2d at 45.

Thus, experience in the states demonstrates two truths: *First*, correcting *Hardison*'s error will not flood courts with new religious accommodation claims. In states that have better accommodated religious workers, experience suggests that disputes barely trickle into the courts. *Second*, *Hardison*'s faulty logic hamstrings states' attempts to escape *Hardison*'s orbit, scuttling efforts to fight religious discrimination at the state level.

### B. Canada similarly imposed a more stringent religious accommodation standard on employers and found it effective and sustainable.

The Supreme Court of Canada—not unlike the states described above—has articulated a standard requiring employers to demonstrate significant difficulty or expense before they are absolved of legal obligations to accommodate religious practice. Canada's decades of experience with these religious accommodation requirements that are akin to (and sometimes more demanding than) the "significant difficulty or

expense" standard further confirms the workability of a textual interpretation of Title VII.

In a religious accommodation case mirroring the fact pattern in *Hardison,* Canada's Supreme Court took a different approach. The court demanded some showing of "*[s]ubstantial departure from the normal operation* of its conditions and terms of employment," rather than asking merely whether an employer postulated some greater-than-*de minimis* inconvenience. *Cent. Okanagan Sch. Dist. No. 23 v. Renaud*, [1992] 2 S.C.R. 970, 972 (Can.) (emphasis added). The court also explained that inconvenience to fellow employees should be considered, of course, but only cautiously, as "[o]bjections based on attitudes inconsistent with human rights . . . are irrelevant." *Id.*

*Renaud* builds on earlier Canadian precedent in which the Canadian courts, while declining to provide a "comprehensive definition of what constitutes undue hardship," laid out a number of factors to be considered and offered the bottom-line conclusion that employers' accommodation efforts must be "significant." *Cent. Alta. Dairy Pool v. Alta. (Hum. Rts. Comm'n*), [1990] 2 S.C.R. 489, 498 (Can.) ("(1) interchangeability of work force and facilities; (2) disruption of a collective agreement; (3) problems of morale of other employees; and (4) costs."). The Alberta Human Rights Commission has since interpreted this standard to demand a showing that an accommodation would create "*onerous* conditions," "*intolerable* financial costs," or "*serious* disruption to the business." Alta. Hum. Rts. Comm'n, *Duty to Accommodate* (Feb. 21, 2020), https://albertahumanrights.ab.ca/employment/employee_info/accommodation/Pages/duty_to_accommodate.aspx (emphasis added).

Like the states discussed in Section II.A, *supra*, Canadian provinces have, through legislation, adopted religious accommodation schemes that impose the strict standard set out in *Renaud*. For example, Ontario's Human Rights Code, R.S.O. 1990, c. H.19, requires that costs to employers—before they are released from the duty to accommodate creed or religion—be "[s]o *substantial* that they would *alter the essential nature* of the enterprise, or *substantially affect* its viability." Ont. Hum. Rts. Comm'n, *The Duty to Accommodate*, https://perma.cc/U8UM-XMZJ (emphasis added).

In fact, the Ontario Code provides that "undue hardship" can *only* be demonstrated by considering a limited class of factors, including costs, health, or safety. *Id*. Business inconvenience, morale of employees, and third-party preferences, for example, are legally irrelevant. *See McDonald v. Mid-Huron Roofing,* 2009 HRTO 1306, para. 42 (CanLII).

Despite its more searching inquiry into employers' efforts to accommodate religion, of course, the Canadian business landscape is none the worse: empirical data show that the "Canadian approach to promoting pluralism has been successful," Lorne Sossin, *God at Work: Religion in the Workplace and the Limits of Pluralism in Canada*, 30 Comp. Lab. L. & Pol'y J. 485, 503 (2009), and the distribution of efforts and expenses to accommodate religion in the workplace has particularly benefited minority religions such as Canadian Muslims. *Id*. Religious accommodation "has been interpreted more broadly under Canadian law . . . than in the American legal system" because Canadian courts and legislatures view the principal as an avenue to transform rules and institutions to be "more welcoming towards all members of society

by respecting the needs of their specific religions." Julie Ringelheim et al., *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, 17 Maastricht J. of Eur. & Compar. L. 137, 139, 159 (2010). Accordingly, in Canada, "employers will find religious accommodation to be one of the least complicated and burdensome equality obligations." Peter Bowal & Maxim Goloubev, *Religious Accommodation in the Workplace*, 35 LawNow 19, 22 (2011); *accord* George Vuicic, *Religious Accommodation in the Workplace: Keeping the Faith Between Employers, Employees, and Unions*, Arbitration 2008 89, 110 (2008), https://perma.cc/FNN9-6LRV.

Requiring employers to show a significant difficulty or expense before escaping their duty to accommodate religion will not disrupt workplaces or encumber employers. In fact, one Canadian study on religious accommodation "suggests that the Canadian institutions and economic actors have all in all successfully integrated the mechanism of reasonable accommodation." Ringelheim et al., *supra*, at 161.

Over 80 million Americans and almost 40 million Canadians already live in jurisdictions that have rejected *Hardison*. The sky undoubtedly has not fallen. Businesses still operate efficiently while minority faith practitioners are accommodated in the workplace. These "facts on the ground" should remove any doubt that correcting *Hardison*'s error will have negative effects on the business community.

## III. UNLIKE SATURDAY SABBATH OBSERVANCE, MOST RELIGIOUS SPEECH IS ALREADY ACCOMMODATED UNDER *HARDISON*.

There is no shortage of dire predictions that overturning *Hardison* will require employers to tolerate harassing religious speech like repeated, unwanted proselytizing of customers and coworkers.[6] But these fears are unfounded, in part because religious speech is categorically different from most other forms of workplace religious accommodations. For other types of religious accommodations, employers can offer numerous alternative reasonable accommodations, and workplace policies can impose various gradations of burdens on an employee. For religious speech, however, an employer's choice is between permitting and denying the speech—there is typically no half measure. Experience further confirms this duality, as religious speech claims similarly cluster at two extremes: either the religious speech imposes essentially no burden on the employer or coworkers (such that it is already accommodated under *Hardison*) or it imposes a significant hardship (such that employers would not have to accommodate it even under a significant difficulty or expense standard). Few cases fall between.

The result? The vast majority of religious speech cases—already a small fraction of religious accommo-

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[6] *E.g.*, Laura W. Murphy & Christopher E. Anders, *ACLU Letter on The Harmful Effect of S. 893, The Workplace Religious Freedom Act, On Critical Personal and Civil Rights*, ACLU (2003), https://perma.cc/M9TC-C2E7.

dations claims to begin with—will come out the same way even if *Hardison* is overturned.

### A. Religious speech claims are a small percentage of Title VII religious accommodation claims.

As an initial matter, religious speech claims make up a very small percentage of requests for religious accommodations. This is so for at least two reasons. First, Title VII does not apply to all religious speech in the workplace. Employees must show a "bona fide religious belief that conflicts with an employment requirement." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (citing cases); *see also EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1305-06 & n.2 (11th Cir. 2002) (collecting cases). In other words, the religious speech itself must be or stem from a religious belief or practice that conflicts with a workplace policy. More than merely being speech *about* the employee's faith, the speech itself must play a role in the employee's faith. This test screens out many religious speech claims.

Second, a review of the caselaw shows that only a small percentage of religious accommodation claims involve speech. In the 25-year-period after *Hardison* was decided, employees brought 228 religious accommodation claims in which a federal court considered whether the employer had already offered a reasonable accommodation, or the requested accommo-

dation imposed more than a *de minimis* cost.[7] Of these cases, 146 involved Sabbath accommodations or other religious absences from employment. Of the other 82 cases, only 20 involved religious speech, defined as both verbal speech and written religious expression (*e.g.*, a pin with a religious message on it).

This paucity of religious speech claims—outnumbered 7 to 1 by Sabbath and religious absence claims—confirms that in the context of Title VII religious accommodation claims, too great a focus on religious speech is already a mistake. The religious speech tail should not wag the religious accommodation dog.

### B. Accommodating non-disruptive religious speech is already required by *Hardison*.

Many types of religious speech in the workplace are already protected under *Hardison*'s *de minimis* standard, and, consequently, would also be protected under a "significant difficulty or expense" standard. These types of speech do not burden the employer, partly because permitting religious speech in the workplace is inherently different from accommodating religious holidays and Sabbaths.

To illustrate, when an employer accommodates religious absences (as in Petitioner's case), it must real-

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[7] This figure includes all reported and non-reported religious accommodation cases filed by employees against their employer in federal court from June 16, 1977 (when *Hardison* was decided) to June 16, 2002. Some cases were decided on different grounds (such as failure to establish a *prima facie* case), but all involved an employee requesting an accommodation for a religious practice.

locate work among employees—not so when an employer accommodates religious *speech*. "To accommodate speech, the employer often needs to do no more than inform other employees not to be bothered or distracted by the speech." Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?* 22 Harv. J.L. & Pub. Pol'y 959, 978 (1999).

Put simply, non-disruptive religious speech has no impact on the ability of employees to get their work done. Employees may converse about religion during their lunch breaks, or they may wear religious jewelry such as a necklace with a cross or Star of David. In almost all cases, these actions have exactly zero impact on workplace efficiency.

Courts already recognize this lack of impact. For example, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, this Court observed that an employee wearing her hijab did not unduly burden her employer. Notably, in that case, the record was devoid of complaints, workplace disruption, or any noticeable effect on sales. 575 U.S. 768, 770 (2015). Likewise, in *Hickey v. State University of New York at Stony Brook Hospital*, the court found that accommodating an employee's "I <3 Jesus" lanyard would not constitute an undue hardship. No. 10-CV-1282, 2012 WL 3064170, at *9 (E.D.N.Y. July 27, 2012). The court in *Nichol v. ARIN Intermediate Unit 28* similarly suggested that accommodating religious jewelry did not present an undue hardship. 268 F. Supp. 2d 536, 555 (W.D. Pa. 2003). Finally, in *Banks v. Service America Corp.*, food servers who frequently served food along with a brief religious message (such as "God bless you," and "Praise the Lord") to customers did not impose even a *de minimis* burden on the employer. 952 F. Supp. 703, 705 (D. Kan. 1996). The court found that such

religious speech posed no undue hardship because there was no loss of contract or business to the company—any harm was purely speculative. *Id.* at 710.

There is no reason to believe that correcting *Hardison* will upset this pattern. Religious speech that does not impose even a *de minimis* cost on employers now under *Hardison* will *a fortiori* fail to impose a significant difficulty or expense.

### C. Accommodating disruptive religious speech is not required under a significant difficulty or expense standard.

By contrast, disruptive religious speech (such as speech that harasses coworkers, scares off customers, or creates a toxic workplace culture) is not accommodated now and would not be accommodated under a significant difficulty or expense standard.

*Hardison* does not require employers to accommodate truly disruptive religious speech in the workplace. For example, in *Chalmers v. Tulon Co. of Richmond*, 101 F.3d at 1014-15, a supervisory employee sent letters to two subordinates, criticizing them for their immoral behavior and inviting them to accept Christ. Language used in one letter was even (mistakenly) interpreted as accusing the employee of infidelity, which "caused him personal anguish and placed a serious strain on his marriage." *Id.* The company's upper management concluded that "the letters caused a negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy." *Id.* at 1017. The company then terminated the supervisor. She filed suit, alleging religious discrimination under Title VII. The Fourth Circuit held that even if the supervisor had established a *prima facie* case of religious discrimina-

tion, her request for an accommodation would nonetheless fail, because if the company were to accommodate her religious letters, "the company would subject itself to possible suits from [the other employees] claiming that [the supervisor's] conduct violated *their* religious freedoms or constituted religious harassment." *Id.* at 1021.

This reasoning holds even if this Court overturns *Hardison*. Applying the significant difficulty or expense standard, the company in *Chalmers* would be able to show that accommodating the supervisor's religious speech unduly burdens its business. If the supervisor were allowed to continue sending such letters to other employees, the letter recipients could hold the company liable under Title VII or other antiharassment laws, no doubt imposing substantial costs and burdens on the employer. *See generally* W. Cole Durham & Robert Smith, 2 Religious Organizations and the Law § 16:13 (2022) ("[W]hen an individual has given clear notice that speech is unwelcome, continuous proselytizing speech forcing the person to listen against his or her will, creates a hostile work environment, violating as religious discrimination the strictures of Title VII."); *see also Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 164 (2d Cir. 2001) (under Title VII, state employer need not accommodate sign language interpreter evangelizing clients while she was conducting state business); *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000) (holding that employer could require employee to cover KKK "Firey Cross" tattoo in the workplace despite claim that it was religious speech).

Accordingly, this Court should not fear that overturning *Hardison* would derail the workplace reli-

gious speech *status quo*. On the contrary, experience shows that religious speech—unlike most religious accommodation claims—falls into one of two buckets. Most religious speech imposes no burden because it simply can be ignored by coworkers or potential customers, a type of religious speech already largely accommodated under *Hardison*. Sometimes, however, pervasive or demeaning religious speech can create a hostile work environment or can be shown to hurt the bottom line by deterring customers and harming business operations. This type of religious speech would not be tolerated even under a significant difficulty or expense standard. Correcting *Hardison* will thus have a limited impact on religious speech claims.

## CONCLUSION

For the foregoing reasons, this Court should overturn *Hardison*'s interpretation of "undue hardship" and return to a plain interpretation of Title VII, requiring employers to make reasonable accommodations for religious beliefs absent significant difficulty or expense.

Respectfully submitted.

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