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 U.S. SENATORS TED CRUZ AND JAMES LANKFORD, CONGRESSMAN MIKE JOHNSON, AND TEN OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SARAH E. CHILD
NELSON MADDEN BLACK LLP
475 Park Avenue South
Suite 2800
New York, NY 10016
(212) 382-4306
schild@nelsonmaddenblack.com

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Rules**



**Regulatory Materials**

**Legislative History**



**Court Filings**

**Other**

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are 13 members of the United States Senate and House of Representatives who implore this Court to reject the atextual definition of "undue hardship" it adopted in the 1977 decision of *TWA v. Hardison* and replace it with one that does not blatantly contradict the words Congress unanimously enacted in the 1972 amendments to Title VII.

The 1972 amendments required that an employer accommodate its religious employees unless it demonstrated an "undue hardship" on the conduct of its business, which the Court in *Hardison* inexplicably defined as "more than a de minimis cost."[2] This interpretation, which no party advanced[3] and the *Hardison* Court did not attempt to justify, is nowhere in the statute and has severely impacted the very individuals the 1972 amendments were meant to protect the most.

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici* 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 *amici*'s counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *TWA v. Hardison*, 432 U.S. 63, 84 (1977).

[3] *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Gorsuch, J., and Thomas, J., concurring in the denial of certiorari) (explaining that "no party in [*Hardison*] advanced the de minimis position"); Br. for Pet'r at 41, 47, *TWA v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126); Br. for Resp't at 8, 21, *TWA v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126).

As United States Senators and Representatives, *amici* have a strong interest in ensuring that federal laws are interpreted according to their text. Several *amici* also sit on Committees that deal with issues implicated in this case, such as the Senate Judiciary Committee and Subcommittee on the Constitution, as well as the Homeland Security and Government Affairs Committee which has jurisdiction over Respondent United States Postal Service. *Amici* are therefore uniquely positioned to explain that the standard the Supreme Court announced in *Hardison* contravened the words Congress enacted, created constitutional problems that Congress could never have intended, has been openly rejected by Congress in subsequent legislation, and is at odds with Congress' purpose to overturn harmful precedents and validate protective EEOC guidance. As such, *amici* submit this brief to ask this Court to correct its error before any more persons of faith, like Gerald Groff, are forced to decide between their job and their God.

*Amici* are:

**United States Senate**

Ted Cruz (TX), Member of the Senate Judiciary Committee and Ranking Member of the Subcommittee on the Constitution

James Lankford (OK), Member of the Homeland Security and Government Affairs Committee and Ranking Member of the Subcommittee on Government Operations and Border Management

Mike Lee (UT), Member of the Senate Judiciary Committee and Member of the Subcommittee on the Constitution

Tom Cotton (AK), Member of the Senate Judiciary Committee

Marsha Blackburn (TN), Member of the Senate Judiciary Committee

Marco Rubio (FL)

**United States House of Representatives**

Mike Johnson (LA)

Michael Guest (MS)

Jeff Duncan (SC)

Ralph Norman (SC)

Joe Wilson (SC)

August Pfluger (TX)

Wesley Hunt (TX)

## INTRODUCTION AND SUMMARY OF ARGUMENT

Since it was decided 45 years ago, *Hardison* has been a thorn in the side of religious adherents seeking to honor their religious convictions while also maintaining gainful employment. This case continues *Hardison*'s disastrous legacy, stripping a devout Christian of his job for observing the Sabbath while leaving his employer unscathed, contrary to the text and purpose of the 1972 amendments to Title VII of the Civil Rights Act of 1964.

*Hardison* gutted the then newly added section 701(j) of that act—which made it unlawful for an employer to fail to accommodate a religious employee unless it demonstrated "undue hardship" on the conduct of its business—by defining "undue hardship" as merely "more than a de minimis cost." *TWA v. Hardison*, 432 U.S. 63, 84 (1977). While this reasoning was only dicta, lower courts have continuously applied it to the severe detriment of religious individuals of all kinds.

The standard suffers from multiple deficiencies, requiring this Court to act. First, and most importantly, it completely contravenes the plain text of the statute, as "more than a de minimis cost" is not a natural or ordinary definition of the phrase "undue hardship." The standard thus falls prey to First Amendment challenges and has been eroded by legislation in which Congress abandoned *Hardison*'s test for a "significant difficulty or expense" standard. Second, the standard is irreconcilable with the Congressional purpose of Title VII, embracing the

reasoning of precedents Congress sought to overturn and flouting the protective 1967 EEOC guidelines Congress sought to validate. These flaws require an explicit course correction by this Court to adopt a "significant difficulty or expense" standard which aligns with the statute's words and purpose.

## ARGUMENT

### I. The *Hardison* Standard Is Irreconcilable with the Text of Title VII

The "more than a de minimis cost" definition the Court assigned to the term "undue hardship" in *Hardison* stretches credulity, as it contradicts "simple English." *Hardison*, 432 U.S. at 92 n.6. (Marshall, J., dissenting). Specifically, it is inconsistent with the ordinary meaning of "undue hardship" as understood in 1972, its extratextual nature causes constitutional problems, and it has been undermined by the "significant difficulty or expense" standard set forth in later statutes. As a result, this Court must reject this interpretation and return to the text Congress enacted. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018) (Sotomayor, J.) (refusing to adopt statutory interpretation that is "completely unmoored from the statutory text.").

#### A. *Hardison*'s Standard Does Not Comport with the Natural or Ordinary Meaning of "Undue Hardship"

In statutory construction cases, this Court always "[s]tart[s] . . . with the statutory language . . . ." *Advocate Health Care Network v. Stapleton*, 137 S.

Ct. 1652, 1658 (2017) (Kagan, J.). The statutory text of Title VII of the Civil Rights Act of 1964 states that it is 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 . . . religion[.]" 42 U.S.C. § 2000e-2(a)(1). The phrase "undue hardship" was added to the statute when Congress defined "religion" in its 1972 amendments:[4]

> [t]he term "religion" includes 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.

*Id.* § 2000e(j). "Undue hardship" was undefined.

"Where Congress does not furnish a definition of its own, [the Supreme Court] generally seek[s] to afford a statutory term 'its ordinary or natural meaning,'" *HollyFrontier Cheyenne Ref., LLC v.*

---

[4] *TWA v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting) (explaining that the 1972 amendments were "unaminously [sic] approved by the Senate on a roll-call vote, [*Dewey v. Reynolds*, 402 U.S. 689, 731 (1971)], and [were] accepted by the Conference Committee, H.R. Rep. No. 92-899, p. 15 (1972); S. Rep. No. 92-681, p. 15 (1972), whose report was approved by both Houses, 118 Cong. Rec. 7169, 7573 (1972).").

*Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021) (quoting *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994)), as understood from "the time Congress enacted the statute," *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). This Court should thus look to how dictionaries defined "undue hardship" at the time Congress passed the 1972 amendments.

"Any definition of a word that is absent from many dictionaries . . . is hardly a common or ordinary meaning." *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012); *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (Kagan, J.) (dismissing definition that was "foreign to any dictionary" in the Court's awareness).

In *MCI Telecommunications Corporation v. AT&T Corporation*, Justice Scalia rejected the proposed definition of the word "modify" as making a fundamental change when "[v]irtually every dictionary [the Court was] aware of says that 'to modify' means to change moderately or in minor fashion." *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 225 (1994) (superseded by statute on other grounds). An "accepted alternative meaning[] shown . . . by <u>many</u> dictionaries," *id.* at 227 (emphasis added), as opposed to the sole dictionary the petitioners offered in support, would have "indicate[d] that the statute is open to interpretation," *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992). But it was not to be.

Here, the "more than a de minimis cost" definition the Court declared is not supported by even

one source, let alone "many" of them, and is in fact in conflict with the common or ordinary meaning of the terms "undue" and "hardship."

In 1972, the word "undue" was ordinarily defined as "unwarranted" or "excessive," *The Random House Dictionary of the English Language* 1433 (1968), while "hardship" was ordinarily defined as "a condition that is difficult to endure; suffering; deprivation; oppression," *id.* at 602. The American Heritage Dictionary of the English Language,[5] The Concise Oxford Dictionary of Current English,[6] and Webster's New Illustrated Dictionary[7] all concur.

"De minimis" on the other hand, was defined by Black's Law Dictionary at the time as "very small or trifling," tantamount to a "fractional part of a penny." *Black's Law Dictionary* 482 (4th ed. 1968).

It cannot seriously be contended that a "very small" or "trifling" cost is the same as one that causes "excessive suffering" and "deprivation." In fact, "more than a de minimis" cost may not even cause suffering, let alone "excessive suffering." Yet that is what the Court in *Hardison* held, setting a destructive

---

[5] *The American Heritage Dictionary of the English Language* 1398 (1969) (defining "undue" as "exceeding what is appropriate or normal; excessive"); *id.* at 601 (defining "hardship" as "[e]xtreme privation; adversity; suffering").

[6] *The Concise Oxford Dictionary of Current English* 1268 (6th ed. 1976) (defining "undue" as, *inter alia*, "excessive"); *id.* at 489 (defining "hardship" as "severe suffering or privation").

[7] *Webster's New Illustrated Dictionary* 723 (1968) (defining "undue" as "improper, excessive, more than is reasonable"); *id.* at 279 (defining "hardship" as "privation, anything hard to bear").

precedent that Congress does not mean what it says it means, even in the clearest of cases, and making it very easy for employers to deny requests for religious accommodation.[8]

---

[8] The standard is so easy to satisfy that employers are more likely to use it as a pretext, further contravening the statute's text and purpose. *E.g.*, Consolidated Am. Compl. ¶¶ 690-731, *Keil v. City of New York*, 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022) (1:21-cv-07863) (Seventh Day Adventist seeking religious exemption from vaccination mandate who already held a *remote* teaching position instructing medically fragile students via online classroom was denied accommodation of *remote work* and terminated due to "undue hardship"), appeal argued *sub nom*. *New Yorkers for Religious Liberty v. City of New York*, 22-1801 (2d Cir. Feb. 8, 2023); Decls. of Krista O'Dea, *New Yorkers for Religious Liberty v. City of New York*, 1:22-cv-00752, ECF Nos. 15 and 53 (E.D.N.Y. Sept. 6, 2022) (paramedic who worked unvaccinated through the worst of the pandemic including performing lifesaving procedures on cardiac victim was discharged for religious objections to vaccine during staffing shortage due to "the potential for undue hardship"), appeal argued, 22-1801 (2d. Cir. Feb. 8, 2023); Mot. for New Trial, *Carter v. Transp. Workers Union of Am. Local 556*, 353 F. Supp. 3d 556, 577 (N.D. Tex. July 14, 2022) (seeking jury instruction that "potential adverse impacts on co-workers" constitute an undue burden in case in which Southwest employee posted pro-life messages on her personal Facebook page and sent them to union president, even when no employee other than union president complained and "undue hardship" was asserted for the first time in litigation), appeal filed, 23-10008 (5th Cir. Jan. 5, 2023); *Kluge v. Brownsburg Cmty. Sch. Corp*., 548 F. Supp. 3d 814 (S.D. Ind. 2021) (affirming termination of professor and university's recission of his "last-names only" accommodation for addressing transgender students, even when there was no disruptions to the classroom, because isolated complaints constituted an "undue hardship"), appeal argued, 21-2475 (7th Cir. Jan. 20, 2022).

On the other hand, a "significant" or "measurably large"[9] difficulty or expense is consistent with the natural and ordinary understanding of the phrase, which Congress has confirmed over and over throughout the United States Code, as discussed in Section II.D.

"Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.). Yet the *Hardison* majority acts as if Congress did exactly this, hiding an alternate definition within the text of "undue hardship." It is "past time for the Court to correct it." *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., joined by Alito, J, dissenting from the denial of certiorari).

### B. *Hardison*'s Departure from the Text Causes Grave Constitutional Problems

The "undue hardship" standard's susceptibility to as-applied Free Exercise challenges is one casualty of *Hardison*'s failure to adhere to Title VII's text. This Court must therefore overrule *Hardison* to rectify this constitutional problem.

The First Amendment, applied to the states through the Fourteenth Amendment,[10] forbids the government from "prohibiting the free exercise" of

---

[9] *Significant*, Merriam Webster (2023), https://www.merriam-webster.com/dictionary/significant.

[10] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

religion. U.S. Const. amend. I. And while "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted), discretionary and subjective governmental decisions regarding whether to grant a religious accommodation request are generally afforded no such deference.

That is because such an inquiry constitutes what this Court described as a "mechanism for individualized exemptions" in *Fulton v. City of Philadelphia*—one kind of non-generally applicable policy that is subject to strict scrutiny under the First Amendment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1872 (2021); *Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."). And under strict scrutiny, the employer must demonstrate that the denial "serves a compelling interest and employs the least restrictive means of doing so." *Dr. A. v. Hochul*, 142 S. Ct. 552, 557 (2021) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

But how can the government show that its denial of a religious accommodation is the "least restrictive means" of furthering a "compelling government interest" if that denial is based on only a "very small or trifling" cost? The simple answer is that

it cannot. *Hardison*'s pronouncement means the government will likely violate the First Amendment whenever the asserted cost is only slightly more than de minimis. Congress surely did not envision a rule that would violate these first principles nearly every time.

Assume, for example, that Hardison was a federal employee, like Mr. Groff. There, it would have cost TWA—one of the largest airlines in the world—only $150 for three months to pay another employee to take Hardison's shift. *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). It defies reason to suggest that TWA's denial furthered a compelling government interest, and that it had no less restrictive alternatives than to burden Hardison's religious exercise when it could have just paid the trivial sum itself without disrupting its payroll or other financial systems.

The employer in *Groff*, which actually is a state actor, fares no better. Here, speculation about the impact accommodating Groff would have on his co-workers convinced the court below that the United States Postal Service would suffer an undue hardship in accommodating him. This would not pass muster under the natural and ordinary meaning of Title VII, or under First Amendment standards, yet it was deemed to constitute an undue hardship. This is the dilemma in which *Hardison*-compliant government employers will continue to find themselves until *Hardison* is overturned.[11]

---

[11] *E.g.*, Br. & Special App. at 114, *New Yorkers for Religious Liberty v. City of New York*, 22-1801 (2d Cir. argued Feb. 8, 2023)

However, if an employer must demonstrate a "significant difficulty or expense" to justify denying a religious accommodation, it is more likely to pass strict scrutiny. That is because an *actual* "undue hardship," or "significant difficulty or expense," is more likely to constitute a "compelling government interest" than a "de minimis" burden. And denying an accommodation causing an *actual* undue hardship is more likely to be the least restrictive means of furthering the government's interest.

The Court must remedy this constitutionally significant problem and return the standard to the text Congress enacted.

### C. *Hardison* Has Been Eroded by Subsequent Legislation

---

(alleging that blanket "undue hardship" denials of thousands of municipal workers' requests for religious exemptions to vaccine mandate violated First Amendment); Compl., *Kloosterman v. Metro. Hosp.*, 1:22-cv-00944-JMB-SJB (W.D. Mich. filed Oct. 11, 2022) (alleging both First Amendment and Title VII violations for failure to accommodate physician's assistant who was fired for her religious objection to providing gender-reassignment drugs when accommodations were given to other employees for secular reasons); First Am. Compl., *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823 (S.D. Ind. 2019) (1:19-cv-02462) (alleging both First Amendment and Title VII violations for school's rescission of professor's "last-names only" accommodation for addressing transgender students in the classroom), appeal argued, 21-2475 (7th Cir. Jan. 20, 2022); *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 820 (9th Cir. 2017) (explaining that plaintiff football coach alleged both First Amendment and Title VII violations after his termination for offering private prayers at 50-yard line following games).

The "more than a de minimis cost" interpretation of "undue hardship," while never endorsed by Congress, has been further eroded by subsequent legislative action adopting a textually consistent definition of "undue hardship." As Justice Gorsuch explained,

> time [has not] been kind to *Hardison*. In the intervening years, Congress has adopted additional civil rights laws using the "undue hardship" standard. And when applying each of those laws, courts are far more demanding. The Americans with Disabilities Act of 1990 (ADA) requires a covered employer to accommodate an employee's "known physical or mental limitations" unless doing so would impose an "undue hardship." 104 Stat. 332, 42 U. S. C. §12112(b)(5)(A). The Uniformed Services Employment and Reemployment Rights Act (USERRA) obliges an employer to restore a returning United States service member to his prior role unless doing so would cause an "undue hardship." 38 U. S. C. §§4303(10), 4313(a)(1)(B), (a)(2)(B). And the Affordable Care Act (ACA) provides that a covered employer must provide a nursing mother with work breaks unless doing so would impose an "undue hardship." 124 Stat. 577, 29 U. S. C. §207(r)(3). Under all three statutes, an employer must provide an accommodation unless doing so would

> impose "significant difficulty or expense" in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities. *See* ADA, 42 U. S. C. §12111(10)(A) (added 1990); USERRA, 38 U. S. C. §4303(15) (added 1994); ACA, 29 U. S. C. §207(r)(3) (added 2010); *cf.* 11 U. S. C. §523(a)(8); 28 U. S. C. §1869(j).

*Small*, 141 S. Ct. at 1228 (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari). Congress' response is resounding; each time it has defined "undue hardship" after *Hardison*, it has assumed the ordinary meaning of the phrase, rather than the extratextual one espoused in *Hardison*.

Moreover, Congress explicitly distanced itself from *Hardison*'s interpretation of "undue hardship" in contemplating the ADA. Both the House and the Senate stated that "[t]he Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977) are not applicable to this legislation." S. Rep. No. 101-116, at 33 (1989); H.R. Rep. No. 101-485, pt. 2, at 68 (1990) (same); *see also* H.R. Rep. No. 101-485, pt. 3, at 40 (1990) (footnote omitted) (stating that "a definition was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of [T]itle VII in *TWA v. Hardison*," and that "the definition of 'undue hardship' in the ADA is intended to convey a significant, as opposed to a *de minimis* or insignificant, obligation on the part of employers.").

This is not a situation where the responsibility rests on Congress to "correct [its] mistakes through legislation," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978), because Congress did not make the mistake here. Congress' intent in enacting the "undue hardship" standard was quite clear in the text: employers have to pass a high bar to restrict religious observance in the workplace. The watered-down definition in *Hardison* contradicts this intent and is *this* Court's mistake. It would simply not be appropriate to "place on the shoulders of Congress the burden of the Court's own error." *Girouard v. United States*, 328 U.S. 61, 69-70 (1946); *James v. United States*, 366 U.S. 213, 220 (1961) (the Supreme Court is authorized to "re-examin[e] and correct[]" its "own errors" of statutory interpretation). This Court thus has a duty to rectify its misinterpretation of the "undue hardship" standard before it wreaks any more havoc on religious employees.

In sum, the *Hardison* Court's blatant disregard for Title VII's text, which is by far the "best indicator" of Congressional intent,[12] *by itself* justifies this Court's correction of the standard. This Court can and should overturn *Hardison* on this point alone.

## II. The *Hardison* Standard Is Irreconcilable with the Purpose of Title VII

The Court need not go further than Title VII's text to determine that *Hardison*'s standard cannot stand. But should the Court seek to derive Congress' purpose from other sources, statements in the

[12] *Nixon v. United States*, 506 U.S. 224, 232 (1993).

legislative record also indicate that *Hardison* "adopt[ed] the very position that Congress expressly rejected in 1972, as if [it was] free to disregard [C]ongressional choices that a majority of th[e] Court thinks unwise." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Specifically, Congress denounced precedents that did not require accommodation under Title VII and validated protective 1967 EEOC guidelines requiring accommodation of religious practices. But *Hardison* discounts all of this. This Court should therefore overrule *Hardison* and adopt a "significant difficulty or expense" standard to align with the text of the statute.

### A. *Hardison* Embraced Precedents That Congress Rejected

Congress explained that Title VII was intended to "resolve by legislation" court decisions regarding religious accommodation that had "clouded the matter with uncertainty." 118 Cong. Rec. 705-706 (1972). The cases to which Congress referred were the Sixth Circuit's decision (and the Supreme Court's equally divided affirmance)[13] in *Dewey v. Reynolds Metals Company*,[14] and the Middle District of Florida's decision in *Riley v. Bendix Corporation*.[15] *Id.* at 706, 711.

In *Dewey,* the Sixth Circuit maintained that Mr. Dewey's employer did not discriminate against

---

[13] *Dewey v. Reynolds Metals Co.,* 402 U.S. 689 (1971).

[14] *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 336 (6th Cir. 1970).

[15] *Riley v. Bendix Corp*., 330 F. Supp. 583, 591 (M.D. Fla. 1971).

him by requiring him to work overtime on Sundays pursuant to a collective bargaining agreement because it "was equal in its application to all employees and was uniformly applied, discriminating against no one." *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 336 (1970). The Court warned that "acced[ing] to Dewey's demands would require [his employer] to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey," and emphasized that an "employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." *Id.* at 330, 335 (emphasis added).

In *Riley*, the federal district court found that no discrimination under Title VII occurred when a Seventh-day Adventist was terminated for his refusal to work on Saturdays because the shift assignment "came in the usual and normal conduct of the [employer]'s business" and the policy also applied equally to all employees. *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971). Title VII simply did not require accommodation, since "[i]f one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment." *Id*. at 590.

Under these precedents, neutral employment practices that applied across the board did not constitute religious discrimination and giving religious adherents exceptions to such practices would constitute impermissible preferential treatment.

By broadly defining "religion," in the 1972 amendments, Congress abandoned this reasoning, making it clear that Title VII does not just protect employees from discrimination against their religious beliefs, but also from discrimination against their religious practices, including through the use of generally applicable policies. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting).

Nevertheless, *Hardison* was "strikingly similar" to *Dewey* and *Riley*, stating that it would be "anomalous" to conclude that "Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights" in order to accommodate religious adherents. *Hardison*, 432 U.S. at 81. This set the stage for its "fatal blow to all efforts under Title VII to accommodate work requirements to religious practices," *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting), in which the Court concluded that

> [t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. . . . [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.

*Hardison*, 432 U.S. at 84.

*Hardison*'s grave pronouncement echoed *Dewey* and *Riley*'s concerns about giving preferential

treatment to religious adherents and outright rejection of any employer obligation to accommodate. But it did not reflect Congress' text or intent.

Far from anomalous, Congress' purpose to give preferential treatment to religious adherents was finally recognized by this Court's 2015 decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, which further undermined *Dewey* and *Riley*, and took the legs out from under *Hardison*. There, this Court found that failing to hire an applicant because her religiously required headscarf ran afoul of the employer's neutral employee dress policy constituted discrimination under Title VII, even if the employer did not have direct knowledge that the applicant was a Muslim. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770, 773-74 (2015).

Reversing course, this Court opined that "Title VII does not demand mere neutrality with regard to religious practices," but instead "gives them favored treatment[.]" *Id.* at 775. As a result, "when an applicant requires an accommodation as an aspec[t] of religious . . . practice,"—like the employees in *Dewey*, *Riley*, *Hardison*, and here—"it is no response that the subsequent fail[ure] . . . to hire was due to an otherwise-neutral policy." *Id.* (internal quotation marks removed). TWA's justification that accommodating Hardison would improperly give him a benefit due to his religion is thus no longer viable when "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

It is evident that *Dewey* and *Riley* no longer have any precedential value, yet the "more than a de

minimis cost" legacy they birthed lives on. Hence, this Court should honor the purpose of the 1972 amendments and retire the "more than a de minimis cost" standard for good.

### B. *Hardison* Disregarded the 1967 Guidelines the "Undue Hardship" Standard Validated

As a preliminary point, the "more than a de minimis cost" standard announced in *Hardison* did not even interpret the actual text of Title VII. As Justice Thomas noted, it interpreted the 1967 EEOC guidelines in effect at the time, which contained the same "undue hardship" language. *Abercrombie*, 575 U.S. at 787 n. (Thomas, J., concurring in part and dissenting in part). This renders the reasoning merely dicta, although lower courts have failed to see it that way, instead using it to make religious protections in the workplace obsolete.

In any event, the history of that regulation (including its departures from the more restrictive regulation preceding it) and Congress' response in enacting the "undue hardship" standard indicate that the religious freedom protections in the amendments were intended to be far more robust than the *Hardison* majority found.

First, the history. In 1966, the EEOC issued regulations declaring that an employer had an obligation under the statute "to accommodate the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29

C.F.R. § 1605.1(a)(2) (1967) (effective June 15, 1966). However, that same guideline contained the following two provisions, rendering the accommodation requirement toothless:

> 1605.1(a)(3)
>
> an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees.
>
> 1605.1(b)(3)
>
> [t]he employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

In 1967, the EEOC amended its guidelines again, departing significantly from its previous iteration by omitting § 1605.1(a)(2)-(3) and § 1605.1(b)(3) entirely and adding an affirmative obligation for employers "to make reasonable

accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b) (1968) (effective July 10, 1967).

Next, Congress' response. Generally, when Congress "amend[s] the law without repudiating the regulation," it "'suggests its consent to the Commission's practice.'" *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (quoting *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981)). So too here, lending further support for overturning *Hardison*'s "more than a de minimis cost" standard.

After describing the amendments, the Chairman of the House Committee stated, "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as [the EEOC's 1967 guidelines][16] . . . challenged in *Dewey* . . . ." 118 Cong. Rec. 7167 (1972) (footnote added). And that is what it did, "tracking the language of the [1967] EEOC regulation" and "adopting [its] . . . position . . . ." *Hardison*, 432 U.S. at 86, 89 (Marshall, J., dissenting).

This position was far more protective of religious employees than the 1966 guidelines. It removed the 1966 regulation's requirement that employees' religious needs be "reasonable" to be

---

[16] *Id*. at 88 (Marshall, J., dissenting) (explaining that at least two courts including the Sixth Circuit in *Dewey* questioned whether the 1967 guidelines violated Title VII).

worthy of protection. It omitted its language that generally applicable policies need not make way for religious accommodation.[17] And it departed from the "serious inconvenience" standard, opting for an even higher bar of "undue hardship" for declining accommodation requests. Yet *Hardison* ignored all of this, returning to the pre-amendments, pre-EEOC guidelines wilderness where accommodation was never required and even the abandoned "serious inconvenience" standard of the 1966 guidelines is preferable to "more than a de minimis cost."

As a result, this Court should adopt a "significant difficulty or expense" standard, which would be consistent with the protective nature of the 1967 guidelines and the text of the statute.

---

[17] While the *Hardison* majority believed the 1967 guidelines did not change the 1966 guidelines' view that generally applicable work schedules that unequally burdened religious employees were valid, *Hardison*, 432 U.S. at 72 n.7,

> [t]he preface to the later guidelines, 32 Fed. Reg. 10298 (1967), states that the 'Commission hereby amends § 1605.1, Guidelines on Discrimination Because of Religion. . . . Section 1605.1 as amended shall read as follows . . . .' Thus the later guidelines expressly repealed the earlier guidelines. Moreover, the example of "undue hardship" given in the new guidelines and quoted in the text makes clear that the Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for religious observances.

*Hardison*, 432 U.S. at 86 n.1 (Marshall, J., dissenting).

## CONCLUSION

To restore the "undue hardship" standard to the text that Congress enacted, *amici* request that this Court overrule *Hardison*'s "more than a de minimis cost" standard and replace it with "significant difficulty or expense."

Dated: February 28, 2023

Respectfully submitted,

Sarah E. Child
Nelson Madden Black LLP
475 Park Avenue South
Suite 2800
New York, NY 10016
Telephone: 212-382-4306
schild@nelsonmaddenblack.com

*Counsel for Amici Curiae*