No. 22-174

In The Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

V.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

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

BRIEF OF THE THOMAS MORE SOCIETY AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Thomas Brejcha
Counsel of Record
Stephen M. Crampton
Thomas More Society
309 W. Washington St.
Suite 1250
Chicago, IL 60606
(312) 782-1680
tbrejcha@thomasmoresociety.org

Howard Slugh
Jewish Coalition
for Religious Liberty
2400 Virginia Ave., N.W., C619
Washington, D.C. 20037
(954) 328-9461
hslugh@jcrl.org

B. Tyler Brooks
Law Office of
B. Tyler Brooks, PLLC
100 E. Lake Drive, Suite 6
Greensboro, NC 27403
(336) 707-8855
btb@btylerbrookslawyer.com

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The **Thomas More Society (TMS)** is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Based in Chicago, Illinois, the Thomas More Society defends and fosters support for these causes by providing high quality pro bono legal services from local trial courts to the United States Supreme Court. Throughout its history, the Thomas More Society has worked to eliminate discrimination against persons of faith, and this has included representation of clients in cases brought under Title VII of the Civil Rights Act of 1964.

The **Jewish Coalition for Religious Liberty** (JCRL) is a non-denominational organization of Jewish communal and lay leaders, seeking to protect the ability of Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square in which all supporters of freedom are free to flourish.

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[1] Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs. Pursuant to S. Ct. Rule 37.2, *amici* state that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amici* state that no counsel for a party wrote 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. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

As originally enacted and as subsequently amended in 1972, Title VII was intended to provide strong protections to workers against discrimination in employment due to an employee's religion. This Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), however, caused religion to receive substantially less protection than other statutory bases protected by Title VII, such as race and sex. Indeed, the "*de minimis* standard" that has developed from *Hardison* often provides little defense against religious discrimination and has led to results that are inconsistent with the idea of preventing workplace discrimination on the basis of religious belief and practice. Returning to an understanding of "undue hardship" based in Title VII's text would restore the balance that Congress intended to strike in this area and that has been upset by *Hardison*'s atextual and otherwise unsound approach. This petition presents a clear opportunity to correct *Hardison*'s error, and these *amici* therefore respectfully urge that it be granted.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI SO THAT RELIGION MAY RECEIVE THE ROBUST PROTECTION GUARANTEED BY TITLE VII.

Title VII protects against discrimination on several bases: "race, color, *religion*, sex, [and] national origin." 42 U.S.C. § 2000e-2(a) (emphasis

added). And yet, one of these categories—religion—is currently given a lower level of protection than the others. The petition currently before the Court presents an ideal opportunity to address, and remedy, this difference in treatment.

That religion was meant to be given the same level of protection as, for example, race or sex should have been obvious enough from the plain text of Title VII when it was enacted, given that all of its protected categories are listed in the very same sentence. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also* A. Scalia & B. Garner, READING LAW 167 (2012) ("The text must be construed as a whole"); *cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (2015) ("[A] word is known by the company it keeps (the doctrine of *noscitur a sociis*).").

In 1972, Congress made its intended scope of protections even clearer. It added definitional language making it indisputable that religious *practices* were protected as much as an employee's religious beliefs: "The 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." 42 U.S.C. § 2000e(j). By amending Title VII in this manner, Congress ensured that "religious practice is one of the

protected characteristics that cannot be accorded disparate treatment and must be accommodated." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

Despite this legislative action to protect against religious discrimination, this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), reduced the level of protection for religion under Title VII. In *Hardison*, the Court clawed back the protections enacted by Congress and replaced them with the *de minimis* standard. *See Hardison*, 432 U.S. at 84 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."). This Court effectively gutted Title VII's religious protections while leaving its other identically worded protections intact. Petitioner here has explained well the manner in which this approach deviates from the text and uses a flawed approach to statutory interpretation. *See* Petitioner's Br. at pp 12-25. These *amici* agree with that analysis.

Courts after *Hardison* embraced its articulation of the *de minimis* standard, even though the language was *dicta*. *See Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part) ("Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline . . . *Hardison*'s comment about the effect of the 1972 amendment was thus entirely beside the point."); s*ee also Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting) ("The

Court announced that standard in a single sentence with little explanation or supporting analysis. Neither party before the Court had even argued for the rule."). Thus, even though the legal prohibition against race discrimination in employment remains vigorous, the prohibition against discrimination on the basis of religion is literally *de minimis*.

These post-*Hardison* decisions are hard, if not impossible, to square with the idea that Title VII protects against religious discrimination in the workplace. *See, e.g., Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., with Thomas and Gorsuch, J.J., concurring in the denial of certiorari) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship[.]'"); *see also Hardison*, 432 U.S. at 92 n.6 (calling it "seriously question[able] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost'") (Marshall, J., dissenting). Examples of such cases are as follows:

- It has been held that requiring an employer to shift a meal break for Muslim employees during Ramadan would be an undue hardship. *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018).

- It has been held that requiring an employer to provide an employee *any* space in an office building in which to pray would be an undue hardship. *Farah v. A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, 2013 U.S. Dist.

LEXIS 164930, at *23-25 (D. Kan. Nov. 20, 2013).

- It has been held that a "*mere possibility* of adverse impact" from adjusting work schedules constitutes an undue hardship. *George v. Home Depot*, 2001 U.S. Dist. LEXIS 20627, at *28 (E.D. La. Dec. 6, 2001) (citations omitted).

- It has been held that an employer could reject outright, and not be required to explore at all, a female employee's proposed alternative of an ankle-fitting skirt rather than pants in a factory setting. *EEOC v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C H/G, 2001 U.S. Dist. LEXIS 15621, at *41-42 (S.D. Ind. Aug. 27, 2001).

- It has been held that the possibility an accommodation may create "hard feelings" among coworkers was sufficient justification to deny an accommodation. *Leonce v. Callahan*, No. 7:03-CV-110-KA, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008).

- *Hardison* has been cited frequently in denying accommodations for Sabbatarians—an issue of particular importance to Jewish employees. *See e.g., Dalberiste v. GLE Assocs., Inc.,* 814 F. App'x 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (2021); *E.E.O.C. v. Thompson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d 738, 746-47 (E.D.N.C. 2011).

Such cases illustrate the extreme leniency given to the *de minimis* standard by many courts, which ultimately results in exclusion of a certain employees from the workplace because of their religious beliefs.

Recognition by this Court of the proper textually-based "undue hardship" standard, rather than *Hardison*'s aberrant reading of Title VII, would restore prohibitions on religious discrimination to their proper place of equal station in the scope of Title VII's protections.

II. RETURNING TO A DEFINITION OF "UNDUE HARDSHIP" THAT IS FAITHFUL TO THE TEXT OF TITLE VII WOULD GIVE EFFECT TO THE BALANCE CONGRESS ATTEMPTED TO STRIKE FOR AMERICA'S DIVERSE AND PLURALISTIC SOCIETY.

In Title VII, Congress struck a legislative balance between the employer's interests and the interests of an employee to be free of discrimination based on religion. *See* 42 U.S.C. § 2000e(j). "The ultimate tragedy . . . [of *Hardison* is that] one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded." *Hardison*, 432 U.S. at 96 (Marshall, J., dissenting). As such, that balance was, and continues to be, upset.

A return to a textually faithful interpretation would hardly open up the floodgates of litigation. First, Title VII itself only applies to employers with fifteen or more employees. 42 U.S.C. § 2000e(b).

Moreover, to trigger protection, an employee's religious beliefs must be "sincere." *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65-66 (1986). Claims of discrimination under Title VII generally must be administratively exhausted through the EEOC, and the time for filing with the EEOC is as brief as 180 days in some instances. *See* 42 U.S.C. § 2000e-5(b), (e)(1); *see also Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843 (2019). The total amount of compensatory and punitive damages available under Title VII is also capped based on the number of individuals employed. 42 U.S.C. § 1981a(b)(3).

The *de minimis* standard from *Hardison*, however, places too much control in the hands of employers. Compared to the employee, an employer will have superior knowledge of how its business runs, and so the employer will be all too able to proffer a reasonable sounding, though potentially pretextual, justification for its rejection of an accommodation. *Cf. Davis v. Fort Bend Cnty.*, 765 F.3d 480, 488 (5th Cir. 2014) (reversing District Court grant of summary judgment on issue of undue hardship). Courts have come close to saying as much: "[Employer] was in a better position than [Employee] to know whether [an accommodation could be made and] . . . the Court does not substitute the speculation of an employee for the judgment of an employer." *Farah*, 2013 U.S. Dist. LEXIS 164930, at *24.

Ultimately, the *de minimis* standard casts aside the goal of protecting persons based on religion. As the nation's population becomes more pluralistic and

generally less religious,[2] there arise more and more opportunities for religious beliefs to conflict with an employer's requirements. When that happens, employees will be faced with a choice of adhering to their religious beliefs, but losing their jobs, versus keeping their jobs at the expense of violating their religious beliefs. Granting the petition and correcting the errors wrought by *Hardison* would facilitate greater protection of religion under Title VII in such situations, as was intended by Congress.

CONCLUSION

For the above-stated reasons, these *amici* respectively submit that the petition for writ of certiorari should be granted.

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[2] *See, e.g.,* "In U.S., Decline of Christianity Continues at Rapid Pace," Pew Research Center (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ ("[T]he religiously unaffiliated share of the population, consisting of people who describe their religious identity as atheist, agnostic or 'nothing in particular,' now stands at 26% [in 2019], up from 17% in 2009."); *see also* Scott Neuman, "Fewer Than Half of U.S. Adults Belong to a Religious Congregation, New Poll Shows," NPR.org (Mar. 30, 2021), https://www.npr.org/2021/03/30/982671783/fewer-than-half-of-u-s-adults-belong-to-a-religious-congregation-new-poll-shows ("Fewer than half of U.S. adults say they belong to a church, synagogue or mosque, according to a new Gallup survey that highlights a dramatic trend away from religious affiliation in recent years among all age groups.").

Respectfully submitted,

Thomas Brejcha
Counsel of Record
Stephen M. Crampton
Thomas More Society
309 W. Washington St., Suite 1250
Chicago, Illinois 60606
Telephone: (312) 782-1680
Facsimile: (312) 782-1887
tbrejcha@thomasmoresociety.org

Howard Slugh
Jewish Coalition for Religious Liberty
2400 Virginia Ave, N.W., C619
Washington, D.C. 20037
Telephone: (954) 328-9461
hslugh@jcrl.org

B. Tyler Brooks
Law Office of B. Tyler Brooks, PLLC
100 E. Lake Drive, Suite 6
Greensboro, North Carolina 27403
Telephone: (336) 707-8855
Facsimile: (336) 900-6535
btb@btylerbrookslawyer.com

Counsel for *Amici Curiae*