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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States. One of the purposes of the Institute is to advance the preservation of the freedoms our nation affords its citizens – in this case, the right of employees to receive religious accommodations in their employment when doing so would not cause a genuine undue hardship on their employers.

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[1] Counsel of record for both parties received timely notice of The Rutherford Institute's intention to file this *amicus curiae* brief in accordance with Rule 37.2(a), and each party has filed a blanket consent for the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

This case warrants the Court's review not only for the reasons stated in the Petition for a Writ of Certiorari, but also because it presents an excellent vehicle for the Court to address – and eliminate – the circuit split over how employers may respond to requests for religious accommodations and what constitutes an undue hardship in connection with such accommodations. This case also allows the Court to clarify what, if any, impact a religious accommodation may have on the employer's other employees – as opposed to the employer itself – for the accommodation to amount to an undue hardship.

Furthermore, if the Petition is granted, the Court will have the opportunity to disapprove its frequently criticized and often unworkable holding in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), that any hardship on an employer that is more than *de minimis* is sufficient to deny a religious accommodation.

Finally, by granting the Petition, the Court will be able to provide courts and the Equal Employment Opportunity Commission ("EEOC") with appropriate standards and guidance in addressing numerous similar cases in the future.

ARGUMENT:

The Court Should Grant the Petition to Resolve Circuit Splits and Protect Employees' Rights to Religious Accommodations in the Workplace

A "principal purpose" of the Court's certiorari jurisdiction is to resolve circuit splits. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Here, *Amicus Curiae* joins in the arguments made in the Petition for a Writ of Certiorari, but writes separately to advise the Court of the circuit split in how courts interpret Title VII in religious accommodation cases, which stems largely from the Court's holding in *Hardison*. Accordingly, this case represents an excellent vehicle for the Court to clarify – or disapprove – *Hardison* and provide much-needed clarity to courts and the EEOC that address religious accommodation cases across the nation.

Title VII of the Civil Rights Act of 1964 requires employers to "reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). The 1972 amendment to the Civil Rights Act, which introduced the "reasonable accommodation" and "undue burden" provisions to the statute, provides no guidance to determine whether an accommodation is reasonable or whether the hardship on the employer's business is undue. This is compounded by the fact that the 1972 amendment was passed with little legislative history, making it difficult for courts to determine what those terms

require. *See* 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) (commentators note that the lack of helpful legislative history to the 1972 amendment makes the determination of "reasonable accommodation" and "undue hardship" difficult).

While courts and the EEOC should of course have some discretion in determining whether an individual's religious observance or practice may be accommodated and what constitutes an "undue burden" on an employer, courts have strayed far from the statute's plain language and interposed a variety of other conditions. This is, at least in part, due to the Court's holding in *Hardison*, where the Court interpreted "undue hardship" to mean anything more than a *de minimis* cost to the employer. *See* 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."). *See also* Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII*, 78 Fordham L. Rev. 1331, 1359 (2009) ("The conflict over the scope of preferential treatment seems to stem from courts' differing interpretations of *Hardison* and the breadth of its authoritative value."). In effect, the Court's decision in *Hardison* "place[d] a low evidentiary burden on employers to satisfy the undue burden standard," Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 Am. Bus. L.J. 467, 481 (2006), and "dramatically revised—

really, undid—Title VII's undue hardship test," *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting in denial of certiorari). Against this background, it is no surprise that circuit splits have arisen.

First, while some courts have typically held that an undue hardship to an employer needs to be more than merely speculative to relieve the employer of a duty to accommodate, other courts have held that a hypothetical hardship can constitute an undue hardship. For example, the First Circuit noted that "[c]ourts are 'somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice.'" *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)). On the other hand, the Fifth Circuit has held that a hypothetical hardship can constitute an undue hardship. *See, e.g.*, *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 274-75 (5th Cir. 2000) ("Roadway's hypotheticals regarding the effects of accommodation on other workers are not too remote or unlikely to accurately reflect the cost of accommodation."). The Court should take the opportunity to clarify that employers must show actual – as opposed to hypothetical or speculative – harms to avail themselves of the statute's safe harbor.

Second, courts are split on whether an undue hardship may be found when an accommodation adversely affects the requesting employee's co-workers, despite the absence of such a provision in the statute or supporting language in the legislative

history. This has frequently arisen in the context of whether an infringement on co-workers' shift preferences may be considered more than a *de minimis* hardship. As discussed below, some circuits have found an undue hardship on the employer in accommodating an employee's request to change shift for religious reasons when doing so may impact the shift preferences of other employees. Other circuits disagree.

For example, in *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982), the Fifth Circuit held that evidence of complaints from other employees about an Orthodox Jewish employee's request not to work from sundown Friday to sundown Saturday constituted preferential treatment and thus an undue hardship on the employer. *See id.* at 147 (requesting a shift-based religious accommodation "underestimates the actual imposition on other employees in depriving them of their shift preferences at least partly because they do not adhere to the same religion as Brener."). Later, in *Weber*, the Fifth Circuit found that the "mere possibility" of shift changes on co-workers was sufficient to justify finding an undue hardship on the employer. 199 F.3d at 274.

In so doing, the Fifth Circuit placed "excessive emphasis on the lowering of morale and coworker unhappiness surrounding a proposed accommodation." Birnbach, *Love Thy Neighbor*, 78 Fordham L. Rev. at 1372. Under the Fifth Circuit's approach, "even if there is no financial cost to the employer, pointing to other employees' unhappiness with the accommodation will virtually always relieve an employer of the duty to accommodate." *Id.* at

1372-73. Not only does the Fifth Circuit's approach find no support in the text of Title VII or the legislative history accompanying the passage of the amendment, but such an approach effectively allows a heckler's veto to eliminate appropriate religious accommodations. *See id.* at 1373 ("[I]mposing societal notions of fairness into the balancing of interests creates unpredictable results, possibly dependent on a given judge's idea of equity, and can lead to a loss of meaningful religious protection for a large portion of religious observers, an end result that was surely not intended by the drafters of § 2000e(j).").

Moreover, such concerns are not limited to the Fifth Circuit. In *Equal Employment Opportunity Commission v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018), for example, the court held that a request by Muslim workers to move the start time of a meal break "to coincide with sunset would have constituted an undue hardship during the relevant period" because other employees preferred a later meal break. *Id.* at 1182.

Not only are decisions such as these clearly in conflict with this Court's mandate that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation," *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015), but they are in conflict with the approach taken in other circuits. For example, the Ninth Circuit has focused on whether other employees have any contractual entitlement to shift and job preferences that may be infringed upon due to a religious accommodation, holding that "[i]f relief under Title VII can be denied merely because the majority group of employees,

who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'" *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976)).

Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996) further demonstrates the split. There, a Seventh Day Adventist requested an accommodation in his shifts to allow him to celebrate the Sabbath. In reversing the district court's grant of summary judgment in favor of the employer, the Ninth Circuit found that "the scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually-established seniority rights or privileges, or indeed of any contractually-established rights or privileges of any kind." *Id.* at 1470. The Ninth Circuit went on to hold that there was no evidence that "the proposed shift-scheduling arrangement would, in the end, have granted Opuku–Boateng a privilege or imposed more than a *de minimis* burden on other employees." *Id.* As such, contrary to holdings in the Fifth Circuit and elsewhere, the Ninth Circuit found that an employer's claim of undue hardship must be supported by more than co-workers' unhappiness with a religious accommodation.

In practice, "courts have been relatively inconsistent when adjudicating failure-to-accommodate claims that hinge on negative impact of coworkers' shift preferences." Birnbach, *Love Thy Neighbor*, 78 Fordham L. Rev. at 1372. Accordingly, not only does this split warrant the Court's review,

but, post-*Hardison*, "many courts have set the bar on what constitutes preferential treatment very low, effectively allowing an employer to show minimal impact of coworkers to be relieved of its accommodation obligation." *Id.* at 1371. Such decisions are particularly troubling given the language and legislative history of the 1972 amendment to the Civil Rights Act, as well as the EEOC guidelines which do not contemplate providing any weight to co-workers' interests. While granting religious accommodations might be an inconvenience to employers and co-workers at times, it is important that employees not be compelled to violate their conscience and religious convictions to maintain their livelihood,[2] and thus employers

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[2] For Groff and others who seek a certain day of the week off from work for a designated time of worship, this can be significantly important to their religious beliefs. After the people of Israel were prevented by Pharaoh from being allowed to leave to worship God, *Exodus* 5:1-9, the Ten Commandments required believers to "remember the Sabbath day, to keep it holy. Six days you shall labor, and do all your work, but the seventh day is a Sabbath to the LORD your God. On it you shall not do any work . . . ." *Exodus* 20:8-10 (English Standard Version). Many Christians believe this designated day changed from Saturday to Sunday because it was on Sunday when they believe Jesus rose from the dead and appeared to his followers. *Matthew* 28:1-10; *Luke* 24:13-49. It was then the following Sunday when Jesus is recorded to have appeared again to his followers, *John* 20:26-29, and it is believed to have been on a Sunday when John experienced his

should not be able to claim an undue burden to refuse such requests for accommodations without genuine justification. The Court should grant certiorari to remedy this.

Finally, in addition to resolving the circuit split, certiorari is warranted to assist the EEOC, which would benefit from clarity on the matter. Employees who believe their rights under Title VII have been infringed must first file a charge with the EEOC. The EEOC hears more than 2,000 charges based primarily on religious discrimination each year.[3] Accordingly, the EEOC must make determinations as to what represents a "reasonable accommodation" and what constitutes an "undue burden." Absent clarification from the Court, the EEOC will continue to be guided by conflicting opinions that could cause thousands of individuals to be denied the right to religious accommodations based on impermissible considerations.

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revelation of Jesus, *Revelation* 1:10-18. Thus, many believers think that having to work rather than worship on such days is disobedient and sinful, and causes them to miss revelations and fellowship with God. This can weigh heavily on a believer's conscience, as it appeared to do so with Groff.

[3] U.S. Equal Employment Opportunity Commission, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021.

CONCLUSION

For the foregoing reasons, and those described by Petitioner, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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