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 ASMA T. UDDIN AND STEVEN T. COLLIS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Steven T. Collis
Counsel of Record
Law & Religion Clinic
University of Texas
School of Law
727 E. Dean Keeton St.
Austin, TX 78705
512-475-9090
Steven.collis@law.utexas.edu

QUESTION PRESENTED

Whether *Trans World Airlines v. Hardison* should be overruled.

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INTEREST OF *AMICI*

Amici Asma T. Uddin and Steven T. Collis are religious-liberty scholars. Both professors are members of minority religious groups, both have experience practicing employment law, specifically religious-discrimination employment law, and both have an interest in improving the law in this field. Professor Collis is the founding faculty director of The University of Texas's Bech-Loughlin First Amendment Center and its Law & Religion Clinic. Earlier in his career, he was an equity partner at Holland & Hart LLP, where he chaired the firm's nationwide religious institutions and First Amendment practice group and was a member of the firm's employment practice group. Professor Uddin is a Visiting Assistant Professor at Catholic University's Columbus School of Law. Earlier in her career, she practiced as legal counsel at the Becket Fund for Religious Liberty.[1]

SUMMARY OF ARGUMENT

I. The Court should consider the distorting chilling effect of the *Hardison* rule.

A. For too long, debates over the rule declared in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), have ignored the chilling effect the decision has had on vulnerable employees. The ruling has allowed employers to avoid any need to accommodate

[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. All parties have granted blanket consent for the filing of *Amicus Curiae* briefs in this matter, and all parties' received ten days' notice of intent to file this brief.

the religious needs of their employees, discouraging plaintiffs from even considering bringing claims.

This chilling effect manifested almost immediately after *Hardison* and has remained firmly in place since. In the spring of 1978, the EEOC held hearings to address how businesses were accommodating employees' religious needs. Religious leaders testified that it had become more difficult since *Hardison* to find attorneys willing to represent potential plaintiffs facing religious discrimination. Potential plaintiffs began to feel there was no use in filing Title VII claims.

Objective studies show contingency fee lawyers are likely to reject matters when they doubt they can prove liability. And they agree to take employment discrimination claims at a staggeringly low rate. The chilling effect appears across substantive areas. This includes medical malpractice where, due to tort reform capping damages, only a fraction of potential plaintiffs file claims because they cannot find attorneys to represent them. Whether the source is a Supreme Court decision or tort reform, where there is a low likelihood of liability for defendants, plaintiffs will not find representation.

The facts of this case illustrate the effect. When the Post Office adopted Sunday delivery, many of its Rural Carrier Associates ("RCA") quit rather than seek religious accommodations. Groff was the exception—the only RCA willing to stay and fight for an accommodation. But his experience has once again sent a signal that potential plaintiffs need not bother filing claims because they will fail.

B. The chilling effect is even worse for minority employees for two reasons. First, they are more likely to have what the rest of society considers "unusual" practices, so they make up a disproportionate share of accommodation claims. Second, people of minority faiths are less likely to have the resources or sympathetic support they need to find an attorney. With fewer people in the country who share their views, they have a smaller pool of attorneys willing to represent them. For these reasons, most suffer in silence, having to choose between their jobs and their religion.

II. Despite assumptions made by some, research shows plaintiffs rarely win under the *Hardison* standard. If the rule were properly calibrated, we would expect to see many cases where courts found an accommodation was not an undue burden and many they found it was. This is not the case. Notably, and consistent with the chilling effect, neither type of case abounds in great numbers. In the few decisions we have, the majority found an accommodation too burdensome under the *Hardison* standard, but very few found the opposite. And in the few cases where courts ruled in favor of the religious observer, the judges often held that the accommodations had no negative impact on the employer—in those decisions, the *Hardison* decision played no role at all.

A better measure of whether the *Hardison* rule offers adequate protection would be to review cases where an accommodation would impose *some* hardship, but the burden on the employer was less than "de minimis." There are only a handful of cases where courts have arrived at that conclusion but, compared to the plentiful examples to the contrary,

they seem more like outliers than testaments to the *Hardison* rule's fairness. In contrast, judges have found sometimes comically minor hardships (like asking an employer to help a plaintiff find someone to exchange shifts) to satisfy the *Hardison* standard. These cases highlight how difficult it is for a plaintiff to succeed under the *Hardison* rule.

III. Thawing the *Hardison* chilling effect will not cause a flood of claims. The ADA has provisions that mirror Title VII's religious accommodation provision, but under the ADA, "undue hardship" means "an action requiring significant difficulty or expense." And courts must take into consideration not just the cost of an accommodation but also an employer's financial resources when deciding if an accommodation imposes an "undue hardship." Even under this rigorous standard, employers have still managed to operate their businesses while accommodating disabled employees.

This is not because there are few disabilities in the United States. In 2008, Congress instructed courts that "disability" should be understood broadly, and courts have obeyed. Courts have interpreted the amended ADA as broadly as possible and construed the ADA's exclusions narrowly. As a result, the number of recognized disabilities has ballooned. Some examples of court-recognized disabilities include gender dysphoria, social anxiety, depression, injuries that will fully heal, intermittent spikes in blood pressure and visual loss, and post-traumatic stress disorder. These are in addition to conditions the regulations interpreting the ADA explicitly mention as disabilities.

The number of religions in the United States is comparable, if not lower. The American populace is divided into seventeen major religious categories: sixteen recognized religions and those who identify with no religion. Those who subscribe to no religious beliefs will rarely require accommodation, and adherents of most religions will not need any. Those who do will generally be members of minority faiths who represent a fraction of the United States' population.

Even with more robust protection for religious employees' needs, employers will be able to function and thrive—as they do now while respecting disabled employees' needs.

ARGUMENT

Title VII demands that employers "reasonably accommodate" employees' religious practices, unless doing so would impose an "undue hardship" on the employers. 42 U.S.C. § 2000e(j). The *Hardison* court interpreted the statute to mean that an employer faces an "undue hardship" any time an accommodation would cause "more than a *de minimis* cost." 432 U.S. at 84.

The Court is well aware of the criticism *Hardison* has faced over the decades. It began with Justice Thurgood Marshall noting in dissent that the Court's interpretation of "undue hardship" erodes "one of this Nation's pillars of strength—our hospitality to religious diversity." 432 U.S. at 97. He concluded, "All Americans will be a little poorer until today's decision is erased." *Id.* In the years since *Hardison*, its critics have been vocal and consistent.

This brief does not seek to add to the well-established arguments that the *Hardison* interpretation is atextual, inconsistent with similar language in contemporary statutes, based on a flawed understanding of the Establishment Clause, and grounded in misguided fears of religious favoritism. All those arguments are true, the Court has heard them before, and it will no doubt hear them again in this case.

This brief instead seeks to provide further evidence that Justice Marshall's initial fears were correct: *Hardison* has been devastating to religious minorities in the workplace. 432 U.S. 87. For too long, the ruling has distorted the behavior of plaintiffs and their would-be lawyers by discouraging them from

even attempting to seek accommodations or bring claims under Title VII. The petition should be granted and the interpretation of Title VII's religious accommodation language revisited.

I. The Court Should Consider the Distorting Chilling Effect of the *Hardison* Rule.

A. The *Hardison* Rule Chills Plaintiffs from Even Considering Bringing Claims.

Hardison's application in the lower courts has allowed employers to escape liability and avoid, in many instances, any need whatsoever to accommodate the religious needs of their employees.

As the cert petition explains, over the years, lower courts have ruled time and again that employers hardly ever need to accommodate their religious employees, as long as employers can show even a minor inconvenience. Pet. 25–26. As the law has become settled that employers almost never face liability, employees seeking religious accommodations have come to face a variation of the same answer nearly every time they turn to plaintiff-side employment lawyers for help: "Your cause is just, but there is nothing I can do for you."

That chilling effect manifested itself almost immediately after *Hardison*. In the spring of 1978, prompted by what it called the "troubling" *Hardison* decision, the EEOC held hearings in New York, Los Angeles, and Milwaukee to address how businesses were (or were not) accommodating employees' religious needs. *Hearings Before the U.S. Equal Emp't Opportunity Comm'n on Religious Accommodation*, 95th Cong. 1 (1978). The EEOC was particularly concerned with religious minorities. *Id.* Their stated

goal was to assess the state of religious accommodations and use that information to determine how to respond to *Hardison*. *Id.* at 2; *see* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 381–85 (1997) (providing a useful summary of the 1978 hearings). During the hearings, the EEOC heard from religious leaders who reflected on *Hardison*'s chilling effect.

For instance, Ralph K. Helge, general counsel for the Worldwide Church of God, testified that, in the wake of *Hardison*, the church found it increasingly difficult to find attorneys willing to represent congregants facing religious discrimination in the workplace. *Id.* at 146, 149. In testimony, Helge demonstrated how, post-*Hardison*, a conversation with a potential lawyer typically went:

> We call the attorneys, "Look can you represent this man on a contingency fee basis? You will get one-third of what is collected." At first they were willing to do this. Now, we begin to find, after *Hardison*, they look the case over and, rightfully, they say, "Look, pal, you just don't have too much of a case. I have to back out of it." So, it is hard to find representation.

Id. at 149. Other religious leaders also noted *Hardison*'s effect on would-be plaintiffs. W. Melvin Adams, the General Conference of Seventh-day Adventists' director of Public Affairs and Religious Liberty, observed that "*Hardison* hit us like an earthquake." *Id.* at 29. Following *Hardison*, many Seventh-day Adventists decided that filing Title VII claims was not even worth the time. *Id.* at 29–30. Adams explained, "[W]e have to realize that many of

our people feel that this is just something that has to be endured and neither file charges and many times do not even take time to go through EEOC report to the church." *Id.* Gordon Engen, a Seventh-day Adventist representative, echoed Adams's remarks, noting that "[a] number of people have just said well there is no use in filing a charge, and so it has had a chilling effect, I would think, on the charges that have actually been filed since that time." *Id.* at 41.

All of this is troubling, but it is not surprising. Plaintiffs' lawyers often work on a contingency fee basis. Most employees cannot afford to pay attorneys by the hour, so the contingency model is the only way they can find representation. But contingency fee lawyers must feel confident they can recover at least something from employers before they agree to take cases. In the case of religious accommodations, the problem is magnified: often, employees suffer non-pecuniary injuries, making attracting an attorney even more difficult from the outset.

Studies bear this out. In 2002, Dr. Herbert M. Kritzer published the results of a survey of contingency fee lawyers in Wisconsin. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739, 741–43 (2002). One of his primary objectives was to explore the myth that contingency fee lawyers agree to work with every client that approaches them. *Id.* at 754–58. He found that, on average, would-be clients seeking representation had only a thirty-four percent chance of getting a contingency fee lawyer to take their cases. *Id.* at 755. When Dr. Kritzer asked the lawyers why they tended to turn down cases, he found that the primary reason involved concerns about liability. *Id.*

at 756. Contingency fee lawyers reject matters when they question whether the defendant will be held liable.

Dr. Kritzer's findings are not unique. Other research has shown similar trends for plaintiffs' side lawyers working on a contingency fee basis. In 1999 and 2000, scholars Stephen Daniels and Joanne Martin conducted a survey of Texas lawyers "for whom plaintiffs' work done on a contingency fee basis accounted for at least 25% of their caseload at the time of [the] survey or at some time during the five previous years." Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1784 (2002). Lawyers with average case values of $14,999 or lower accepted 35.1% of cases brought to them. *Id.* at 1786, 1789. Among lawyers whose average case values are between $37,001 and $200,000, an average of just 26.8% of prospective client calls led to representation. *Id.*

These are not high numbers, but the situation is noticeably worse for potential plaintiffs with employment discrimination claims. Plaintiff-side lawyers accept an average of five percent of those cases that come through their doors. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 (4) DISP. RESOL. J. 40, 44 (Oct.–Dec. 1995). "In other words, 19 out of every 20 employees who feel that they have an employment discrimination claim against an employer are unable to obtain the representation of an attorney to pursue that claim in court." *Id.* (italics omitted).

The chilling effect can be seen across substantive areas of the law as well. In the medical malpractice realm, although there are between 44,000 and 98,000 deaths and potential claims per year, fewer than two percent of those potential plaintiffs file claims. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 153 (2014). These plaintiffs do not file claims because they cannot find attorneys to represent them. *Id.* State-level tort reforms have capped the damages that plaintiffs in medical malpractice suits can recover, leading plaintiff-side attorneys to reject cases. *Id.* at 171–72. Accepting these victims as clients does not make financial sense for the attorneys. *Id.* Though this is the product of tort reform and not a Supreme Court decision, the logical conclusion is the same: where potential defendants face no or little potential liability, potential plaintiffs will not find representation. This may or may not be a desirable outcome in the world of tort reform, but when it is the result of an ill-informed and misguided decision of this Court, the Court's opinion should be revisited.

The facts of this case demonstrate the point. Mr. Groff is a Christian who observes a Sunday Sabbath. Pet. 5. When the USPS opted to adopt Sunday delivery, many of its RCA's were unhappy, in part for religious reasons. As time passed, they quit, rather than seek religious accommodations. Brief for Defendant-Appellee at 12–13, *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022) (No. 21-1900), 2021 WL 3857947. Groff was the exception. He alone began the arduous process of seeking a religious accommodation. And he alone faced the consequences of the *Hardison* interpretation of Title VII. His experience has once

again sent a signal to employees and the lawyers they approach: when faced with a choice between job and faith, employees' only options are to leave one or the other behind.

There are two separate stages where employees receive the message that pursuing accommodations is not worth their time. We have already discussed the first, when plaintiffs' attorneys turn them away. The second comes from the EEOC. Thousands of religious discrimination complaints reach the EEOC every year, and more than five hundred of those are accommodation claims. *Religion-Based Charges (Charges filed with EEOC) FY1997–FY2019*, EEOC, https://www.eeoc.gov/statistics/religion-based-charges-filed-eeoc-fy-1997-fy-2019 (last visited Sept. 21, 2022); *Bases by Issue (Charges filed with EEOC) FY2010–FY2019*, EEOC, https://www.eeoc.gov/statistics/bases-issue-charges-filed-eeoc-fy-2010-fy-2019 (last visited Sept. 21, 2022). Almost none of these claims ever gains any ground with the EEOC. The signal is unmistakable: under *Hardison*, employees need not bother to try to vindicate their rights.

B. The Chilling Effect Is Worst for Minority Employees.

The chilling effect is worse for adherents of minority religions. First, they, more than people of majority faiths, tend to have what the rest of society considers "unusual" practices. That they make up a disproportionate share of accommodations claims should come as no surprise. Sixty-two percent of cases that focused on the undue hardship question since the year 2000 involved Muslims, Jews, Jehovah's Witnesses, the non-religious, Rastafarian, Sikh,

various African religions, or Christians with Saturday sabbath days. *See* Brief for *Amici Curiae* Christian Legal Society *et al*. at 24–25, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349), 2018 WL 5098484. They are the most likely to need accommodations because of their unique practices, and they are also the most likely to find their claims rejected again and again.

Second, although they make of the vast majority of claimants, people of minority faiths are less likely to have the resources or sympathetic support they need to find an attorney. Latter-day Saints represent just 1.6% of the American populace; Orthodox Christians, 0.5%; Jews, 1.9%; Muslims 0.9%; Buddhists, 0.7%; Hindus, 0.7%; Unitarians and adherents of similar faiths, 1.0%; and adherents of Native American religions, 0.3%. *Religious Landscape Study*, PEW RESEARCH CENTER (2014), https://www. pewresearch. org/religion/religious-landscape-study/. With so few people in the country who share their religious views, these religious minorities have fewer options for finding attorneys who will represent them or even take their claims seriously. When their relative lack of resources is combined with a legal standard that makes their claims nearly impossible to win, most suffer the impossible dilemma of having to choose between their jobs and their religion.

II. Research Shows Plaintiffs Rarely Win Under the *Hardison* Standard.

There may be a temptation to assume, as some have done, that plaintiffs are winning enough under the *Hardison* rule and so no chilling effect is occurring. Reality undermines that assumption.

If the *Hardison* rule did, in fact, offer religious observers sufficient protection, there would be ample evidence of courts requiring employers to accommodate employees' religious practices. Indeed, if the rule were calibrated properly, we would expect to see many examples on both sides of the coin: cases where courts have found a requested accommodation does *not* impose an undue burden, and cases where it does. Instead, we see the opposite. There are scores of cases in which courts have found an employee's requested accommodation too burdensome. Meanwhile, courts have found the opposite in only a handful of cases over the decades.[2] Notably, and consistent with the chilling effect, neither type of case abounds in great numbers.

In most of the few examples where courts have found in favor of religious observers, the judges held that the requested accommodations had no negative impact whatsoever on employers. In other words, these cases do not demonstrate that the *Hardison* standard protects religious observers. No matter how "undue hardship" is interpreted, these plaintiffs would have won because no hardship was imposed at all. The cases do not provide evidence of the *Hardison* rule's workability and should have no bearing on the analysis.

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[2] *See Crider v. Univ. of Tenn., Knoxville*, 492 F. App'x 609, 613 (6th Cir. 2012); E.E.O.C. v. Ilona of Hungary, Inc., 108 F.3d 1569, 1576 (7th Cir. 1997); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134; (3d Cir. 1986); *Tooley v. Martin-Marietta Corp.,* 648 F.2d 1239, 1243 (5th Cir. 1981); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978).

A better measure for whether the *Hardison* rule provides adequate protection for employees seeking accommodation is to review cases where courts found an accommodation would impose *some* hardship, but that the burden on the employer was less than "*de minimis*." There are only a handful of examples where courts have applied *Hardison* and found in favor of the religious observer even though the accommodation imposed some level of hardship on the employer. *See*, *e.g.*, *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (5th Cir. 1981) (holding that a man who believed it was a sin to contribute to unions was to be accommodated by allowing him to donate to a mutually agreed-upon charity instead); *Crider v. Univ. of Tenn., Knoxville*, 492 F. App'x 609, 613 (6th Cir. 2012) (holding that "grumbling" by other employees is not sufficient to defeat a religious accommodation).

But when compared with the mountain of examples to the contrary, these cases seem more like outliers than testaments to the *Hardison* rule's purported fairness and flexibility. In contrast to the cases where courts have found an accommodation required, judges have found sometimes comically minor hardships satisfying the *Hardison* standard.

In one case, a court held that accommodating a Sikh employee's need to not shave his beard would cause an undue hardship by "offending certain customers and diminishing the 'clean cut' image of the restaurant." *E.E.O.C. v. Sambo's of Ga., Inc.*, 530 F. Supp. 86, 90 (N.D. Ga. 1981). In another, a court held that a cost of $1,500 per year was too much of a burden on an employer to provide a scheduling accommodation to a religious employee—the

employer was the Chrysler Corporation. *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992). The Fifth Circuit concluded that there was more than a *de minimis* burden when a counselor requested that she be allowed to swap with another counselor because a client wanted to discuss topics that violated her religious beliefs. *Bruff v. N. Miss. Health Services, Inc.*, 244 F. 3d 495, 500–01 (5th Cir. 2001). A district court ruled that "decreased efficiency" constituted an undue hardship. *George v. Home Depot, Inc.*, No. 00-2616, 2001 WL 1558315, at *10 (E.D. La. Dec. 6, 2001), *aff'd*, 51 F. App'x 482 (5th Cir. 2002).

The list goes on. One court held that an employer having to pay two hours of overtime amounted to an undue hardship under *Hardison*. *El-Amin v. First Transit, Inc.*, No. 1:04-CV-72, 2005 WL 1118175 at *8 (S.D. Ohio May 11, 2005). Another judge held that accommodating a Rastafarian's need to be exempted from a grooming policy was an undue hardship on the employer because it might adversely affect the employer's public image. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 15 (D. Mass. 2006). The employer was an auto shop. *Id.* For the same reason, a different court ruled that accommodating a Muslim woman's request to wear a hijab would result in an undue hardship. *Camara v. Epps Air Service, Inc.*, 292 F. Supp. 3d 1314, 1330–32 (N.D. Ga. 2017). In still another, a court held that even asking an employer to help a plaintiff find someone to exchange shifts was more than a *de minimis* burden. *Logan v. Organic Harvest, LLC*, No. 2:18-CV-00362-SGC, 2020 WL 1547985 at *5 (N.D. Ala. Apr. 1, 2020).

The paltry few cases where plaintiffs have won may be small beacons of hope for optimistic plaintiffs

hoping to be the exception to the rule. But for everyday Americans, and especially for religious minorities, they are a reminder of just how unlikely it is that they will be able to obtain the accommodations they seek, leading them to "feel that this is just something that has to be endured." *Hearings Before the U.S. Equal Emp't Opportunity Comm'n on Religious Accommodation*, 95th Cong. 29–30 (1978).

III. Thawing the *Hardison* Chilling Effect Will Not Cause a Flood.

Revisiting *Hardison* and thawing the chill it has caused will not result in a flood of claims. For years, the ADA has demanded that employers meet a high standard when accommodating their disabled employees. 42 U.S.C. § 12101 *et seq*. That has not caused an unmanageable situation for employers, and the Court can expect similar results in the context of religious accommodations.

In provisions that mirror Title VII's religious accommodation provision, the ADA requires employers to make "reasonable accommodations" for their disabled employees unless doing so will impose an "undue hardship" on the employer's business. *Id.* But under the ADA, in stark contrast to *Hardison*, "undue hardship" means "an action requiring significant difficulty or expense." *Id.* § 12111(10). And courts must consider not just an accommodation's cost, but also an employer's financial resources and how that cost might impact the employer's business. *Id.* In other words, a cost for an accommodation that is obviously more than *de minimis* may be irrelevant when considered against the bottom line of a huge, multinational corporation. Yet even with this expansive understanding of "undue hardship,"

employers have managed to operate successful businesses while accommodating disabled employees.

This result is not because there are few disabilities in the United States. Courts and Congress have given the word "disability" an expansive definition. In 2008, Congress instructed courts that "disability" "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the [ADA's] terms." *Id.* § 12102(4)(A). And courts have obeyed. They have interpreted the "amended [ADA] as broadly as possible." *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 332 (4th Cir. 2014). They have recognized that the amendments to the ADA were "intended to make it 'easier for people with disabilities to obtain protection.'" *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 572 (4th Cir. 2015) (quoting 29 C.F.R. § 1630.1(c)(4)). And judges have construed the ADA's exclusions narrowly. *See Alexander v. Carrington Mortgage Servs.*, LLC, 23 F.4th 370, 374 (4th Cir. 2022); *Williams v. Kincaid*, No. 21-2030, 2022 WL 336482, at *5 (4th Cir. Aug. 16, 2022).

As a result, the number of recognized disabilities has ballooned. For ADA purposes, gender dysphoria is a disability, *Williams*, 2022 WL 336842, at *9; social anxiety qualifies, *Jacobs*, 780 F.3d at 574; depression can meet the definition, *Pritchard v. S. Co. Servs.*, 92 F.3d 1130 (11th Cir. 1996); an injury that will fully heal suffices, *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013); as do intermittent spikes in blood pressure and visual loss, *id.*; and post-traumatic stress disorder, *Franklin v. City of Slidell*, 936 F. Supp. 2d 691, 709 (E.D. La. 2013). These are in addition to the conditions the

regulations interpreting the ADA explicitly mention as disabilities, including deafness, blindness, intellectual disability, mobility impairments, autism, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, bipolar disorder, obsessive compulsive disorder, and schizophrenia. 29 CFR § 1630.2 (j)(3).

The number of religions in the United States is comparable, if not lower. The American populace is divided into seventeen major religious categories: sixteen recognized religions and those who identify with no religion. *Religious Landscape Study*, PEW RESEARCH CENTER (2014), https://www.pewresearch.org/religion/religious-landscape-study/. Those who do not subscribe to any demanding religious beliefs will not require accommodations. And the adherents of most religions will not need religious accommodations. Those who do will generally be people of minority faiths who represent just a fraction of the United States' population. *Infra*, Part I.B.

Some may assume that religion is susceptible to insincere claims in a way disability is not—that employers can identify disabilities through physical markers but can only trust employees when it comes to their religious claims. This ignores the types of disabilities recognized in recent years, many of which are nearly impossible to verify through simple observation. It also does not recognize the role religion plays in many people's lives. Most people who make these requests are clearly living according to a religion that outsiders find strange, as often indicated by their dress, hairstyles, lifestyles, or other religious practices. They also tend to ask for accommodations that are rarely in their self-interest.

Returning the definition of "undue hardship" to its proper, pre-*Hardison* meaning will not change the numerical similarities between religions and disabilities and will not cause a flood of accommodation requests. If anything, the number of religion-related requests will likely remain lower than the number of disability-related requests.

In sum, the *Hardison* rule is on one end of a spectrum, representing the least protective standard for employees. On the opposite, most-protective end of that spectrum is the current interpretation of identical language in the ADA. Even with the more robust protection for employees with disabilities, employers have been able to thrive without drowning in a flood of accommodation requests. This Court can expect the same for religious accommodations if it returns the definition of "undue hardship" to its proper place.

CONCLUSION

The Court should reverse the judgment below, overrule *Hardison*'s interpretation of "undue hardship," and remand the case for consideration in light of the true meaning of that standard.

Respectfully submitted,

Steven T. Collis
Counsel of Record
Law & Religion Clinic
University of Texas
School of Law
727 E. Dean Keeton St.
Austin, TX 78705
512-475-9090

Steven.collis@law.utexas.edu

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