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 *AMICI CURIAE* ALABAMA CENTER FOR LAW AND LIBERTY AND CONSTITUTIONAL ATTORNEYS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") is a nonprofit public-interest firm based in Birmingham, Alabama, dedicated to the defense of limited government, free markets, and strong families. Believing that religious liberty is a value that should be defended, ACLL has represented numerous employees who were fired in violation of Title VII's command to accommodate the employees if it could be done without undue hardship. *Amicus Curiae* Constitutional Attorneys is a group of two First Amendment attorneys in Montgomery, Alabama: John Eidsmoe, a retired United States Air Force Judge Advocate and currently serves as Professor of Constitutional Law for the Oak Brook College of Law & Government Policy, and Talmadge Butts. *Amici* believe that *Trans World Airlines v. Hardison* has not done justice to the text of Title VII and should be overruled.

SUMMARY OF THE ARGUMENT

This brief focuses on whether *Trans World Airlines v. Hardison* should be overruled under the Court's *stare decisis* factors. Petitioners' opening brief also

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[1] Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

discusses this issue. *See* Groff br. at 19-25. However, this brief is still desirable for three reasons. First, *Amici* address, as an original matter, whether the *stare decisis* factors should apply to statutory analysis at all. Second, this brief compares how the language "undue hardship" has been applied in other statutes and compares it to Title VII, demonstrating how *Hardison* stripped Title VII of the force that Congress gave it. Finally, since Petitioners' analysis is limited to six pages due to briefing constraints, the Court may find more detail helpful in walking through the *stare decisis* analysis than what Petitioners alone could provide.

The lower court's decision in this case relies on this Court's decision in *Hardison*. ***Hardison*, in turn, has faulty reasoning, proffers an unworkable standard, is grossly inconsistent with other areas of the law, and is not only wrong but egregiously wrong, both as an original matter and under this Court's *stare decisis factors*.**

As a threshold matter, *Amici* agree with Justice Thomas's view of *stare decisis*. If a decision is demonstrably erroneous in light of the written text of a statute, this Court should not follow it. *See Gamble v. United States*, 139 S. Ct. 1960, 1984-85 (2019) (Thomas, J., concurring). This Court has held that *stare decisis* has a stronger effect on statutory interpretation than constitutional interpretation, reasoning that Congress can amend a statute easier than the Country can change the Constitution. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004). But as

Justice Thomas observes, the fundamental problem is that the judicial branch is duty-bound to follow the written words of the law, regardless of whether that law was passed by the legislature or ratified by the People. Thus, this Court should not apply the *stare decisis* factors to *Hardison* but simply ask whether it was demonstrably erroneous. If so, this Court should overrule it.

The Court reached its decision in *Hardison* by looking to the language of Title VII and interpreting the phrase "undue hardship" to mean "de minimis" cost. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). The Court failed to articulate any discernable reason why the scales should be weighted heavily against the employee, even when the employer bears the burden under Title VII to demonstrate that accommodating the religious beliefs of an employee would result in an undue hardship. *See* 42 U.S.C. § 2000e(j). The *Hardison* Court created the "de minimis" standard out of thin air, as the parties before the Court did not argue for the standard, the standard is nowhere within Title VII, and is not found in the decisions of the lower courts.

Because the *de minimis* standard exists as a single sentence without any supporting factors or definitions, lower courts have been left to speculate regarding the line between "de minimis" costs and costs which would place an undue hardship upon the business of the employer. *Hardison* has transformed Title VII into a facts-and-circumstances test, which allows speculative harm and any economic harm to constitute

undue hardship, even though the word "undue" implies that there is some hardship that is permissible. Lower courts also disagree on whether negative impact on other employees constitutes undue hardship. Because some courts have determined that the *de minimis* standard places only a "slight burden" on employers to accommodate the religious beliefs of an employee*, see EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021), according to some circuits, that burden becomes an undue hardship when other employees suffer loss of morale or shift changes. *See, e.g.*, *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981). *Hardison* provides no answer to this question.

Hardison is also incongruent with other statutes passed by Congress after Title VII was enacted. Title III of the ADA provides heightened protection for disabled employees in the workplace by interpreting the words "undue hardship" to mean "significant" or "meaningful" expense or cost. 42 U.S.C. § 12111(10)(A). The Uniformed Services Employment and Reemployment Rights Act interprets the words "undue hardship" in the same manner to protect service members of the Armed Forces in the workplace. 38 U.S.C. § 4303(16). Even RFRA provides more protection for employees if the employer relies on a federal statute to justify failing to reasonably accommodate the religious beliefs of an employee.

Hardison not only missed the mark but missed it egregiously. Under the prevailing dictionary

definitions of the time, an "undue hardship" was one in which the employer would not just incur reasonable costs but significant costs. In contrast, by recognizing the *de minimis* standard as the rule, *Hardison* did the exact opposite of what the statute required. *Hardison*'s error therefore is not only error but egregious error, because it does the exact opposite of what the statute says and means.

Finally, this case presents a fitting opportunity for this Court to review *Hardison* after fifty years of contentious precedent. Unlike previous cases where this Court has denied certiorari, the Third Circuit's decision rests squarely upon the *de minimis* standard. The applicability of *Hardison's* biggest mistake is the sole issue in the Third Circuit's decision. This case also raises the question of whether negative impact on other employees in the workplace may constitute undue hardship, a question which has also gone unanswered in *Hardison*. This Court should therefore overrule *Hardison* and reverse the judgement of the Third Circuit.

ARGUMENT

I. If This Court Finds That *Hardison* Is Demonstrably Erroneous, It Should Overrule It.

As a threshold matter, *Amici* agree with Justice Thomas that the *stare decisis* analysis should be simpler: if a precedent is demonstrably erroneous in

light of the text of a statute, then it should be overruled. *See Gamble v. United States*, 139 S. Ct. 1960, 1984-85 (2019) (Thomas, J., concurring). As Justice Thomas thoroughly explained in *Gamble*, this Court's oath is ultimately to uphold the Constitution itself, not the Court's own precedents. *Id.* at 1985 (citing U.S. Const. art. VI, cl. 3). In the same way, the Supremacy Clause provides that the Constitution and the laws of the United States made in pursuance thereof – laws that have gone through the proper legislative process – are the supreme law of the land. U.S. Const. art. VI, cl. 2. The Supremacy Clause does not list judicial precedents as part of what constitutes the supreme law of the land. *See id.* Consequently, if the judiciary substitutes its opinions for what the legislative branch duly enacted, then the judiciary is not exercising mere judgment but also will, which is reserved for the legislature alone. *See Gamble*, 139 S. Ct. at 1985 (Thomas, J., concurring) (citing *The Federalist* No. 78 (Alexander Hamilton)).

The founding-era view of *stare decisis* compels the same result. Since this Court has held that the Constitution must be interpreted against the backdrop of the common law and has hailed Blackstone's *Commentaries* as the most satisfactory exposition of the common law, the Court should look to Blackstone in determining what the doctrine of *stare decisis* was during the Founding Era. *See Schick v. United States*, 195 U.S. 65, 69 (1904). Blackstone acknowledged the general rule "to abide by former precedents, where the same points come again in litigation[.]" 1 William

Blackstone, *Commentaries* *69. But Blackstone then explained why this rule was not absolute:

> Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was *bad law*, but that it was *not law*, that is that it is not the established custom of the realm, as has been erroneously determined….
>
> The doctrine of the law then is this: that precedents and rules must be followed, *unless flatly absurd or unjust* ….
>
> *Id.* at *69-*70 (last emphasis added).

Blackstone went on to explain that such an exception is needed because "*the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing, since it sometimes may happen that the judge may *mistake* the law." *Id.* at *71. Opinions of the court were not law itself, but the "general rule" was that "the decisions of the courts of justice are the *evidence* of what is common law." *Id.* at *71 (emphasis added, quotation marks omitted). But if such a decision was contrary to reason or divine law,

or flatly absurd or unjust, then such a precedent would not be followed. *Id.* at *69-*71.

The only difference between the common-law system and the American system is the presence of a written Constitution. Because the American Constitution is written, there is even less of a need for *stare decisis* than in Blackstone's day. *Gamble*, 139 S. Ct. at 1981-82 (Thomas, J., concurring). If the presumption during the Founding era was that precedent should be disregarded under the circumstances described above, then in the American system, precedent should be disregarded if it is plainly contrary to the law—which *Hardison* is. The fact that we are dealing with a statute instead of a Constitution in this case should make no difference. *Gamble*, 139 S. Ct. at 1985 (Thomas, J. concurring). *Amici* are unaware of anything in Blackstone's *Commentaries* or the historical record to suggest that *stare decisis* carried more weight in statutory interpretation than in constitutional interpretation.

For the reasons articulated in Part II.D, *infra*, *Hardison* does not comport with Title VII's plain text, and therefore it should be overruled. However, if the Court disagrees that the matter is this simple, then *Amici* will proceed to discuss the *stare decisis* factors below.

II. In the Alternative, This Court's *Stare Decisis* Factors Favor Overruling *Hardison*

Over the past four years, this Court has articulated several factors to determine whether *stare decisis* requires keeping a precedent, even if it was decided incorrectly. Those factors include (1) the quality of the precedent's reasoning, (2) the workability of the rule, (3) whether subsequent developments have left the precedent as an outlier, and (4) reliance interests. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018). *Janus* held that if the first three factors are met, then they usually outweigh reliance interests to the contrary. *See id.* at 2486. This Court has also sometimes asked not only whether the precedent is wrong but also whether it is egregiously wrong. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

A. *Hardison* Was Poorly Reasoned

The Court's analysis in *Hardison* is not only poorly reasoned–it is largely non-existent. "An important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus*, 138 S. Ct. at 2479 (citing *Citizens United v. FEC*, 558 U.S. 310, 363–364 (2010)). When precedent is egregiously wrong "on its face," stare decisis is no longer the "wise policy," and it is no longer more important that an "applicable rule of law be settled than that it be settled right." *Planned Parenthood v. Casey*, 505 U.S. 833,

983 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

In *Hardison*, Trans World Airlines (hereafter "TWA") hired Larry Hardison as a clerk in the Stores Department at its Kansas City base. *TWA v. Hardison*, 432 U.S. 63, 66 (1977). Hardison participated in a seniority system "contained in a collective bargaining agreement," yet he was second from the bottom of the seniority list in the building he worked at. *Id*. at 68. When he realized that he would be forced to work on Saturdays, he sought relief by proposing to the company that he would only work four days a week. *Id*. When TWA refused his proposal because his job was "essential," Hardison refused to come to work and was discharged for "insubordination." *Id*. Hardison sought administrative and injunctive relief in the Western District of Missouri against TWA and three labor unions, claiming that "his discharge by TWA constituted religious discrimination in violation of Title VII. *Id*. at 69. The Western District of Missouri held in favor of TWA and the unions. *See Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974). The Eighth Circuit, however, held that TWA failed to make reasonable accommodations for Hardison's religious needs. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 44 (8th Cir. 1975).

This Court in *Hardison* began by noting that Title VII defined the term "religion" as any aspect of "religious observance and practice . . . 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*." *Hardison*, 432 U.S. at 74 (emphasis added) (citing 42 U.S.C. § 2000e(j)). The Court acknowledged that neither Congress nor the EEOC defined the term "reasonable accommodation," yet the Court nevertheless considered whether the TWA "met its obligation under Title VII to accommodate the religious observances of its employees." *Id.* at 75–76. The Court briefly reviewed the Eighth Circuit's conclusion and noted that the TWA made all reasonable efforts to accommodate Hardison's religious beliefs within the context of the seniority framework. *Id.* at 78. Because circumventing the seniority system would deny a senior employee his contractual rights under the collective-bargaining agreement, the Court concluded that Title VII does not require an employer to deprive other employees of their shift and job preference. *Id.* at 79–83.

The Court next addressed the Eighth Circuit's suggestions that "the TWA could have permitted Hardison to work a four-day week if necessary to avoid working on the Sabbath" and that the TWA "could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages." *Id.* at 84. After noting that "both of

these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages," the Court articulated the following words:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to 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.

Id. (emphasis added). The Court abruptly concluded by maintaining that it would not construe Title VII to discriminate against other employees "in order to enable others to observe their Sabbath." *Id.* at 85.

The words "de minimis" were not included in the Court's opinion leading up to its conclusion that giving Hardison Saturdays off would be an undue hardship. Indeed, the *de minimis* standard was not included in the Eighth Circuit's opinion, the District Court's opinion, the definition of "religion" in Title VII, or the EEOC guideline which precedes Title VII's undue hardship standard. *See, e.g.*, 42 U.S.C. § 2000e(j); *Hardison*, 527 F.2d at 33 (8th Cir. 1975); *Hardison*, 375 F. Supp. at 877 (W.D. Mo. 1974); 29 CFR § 1605.1(b) (1968). The standard, like the "undue burden" standard in *Casey*, was "plucked from nowhere." *See Planned Parenthood v. Casey*, 505 U.S.

833, 965 (1992) (Stevens, J., concurring in part and dissenting in part).

Not even the parties in *Hardison* advocated for the *de minimis* standard. *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari). The Court in *Hardison* did not cite to any authority justifying the creation of the *de minimis* standard, nor did it proffer any principled reason why the phrase "undue hardship" should be equated with the words "de minimis." The *Hardison* Court spent most of its' opinion explaining why the TWA made reasonable efforts to accommodate Hardison's religious beliefs but addressed undue hardship in a single sentence. *Hardison*, 432 U.S. at 84. The *Hardison* Court made its decision in accordance with *ipse dixit*, not reason.

B. The *De Minimis* Standard Is Not Workable

The *de minimis* standard provides no clear or manageable guidelines for lower courts to apply. "Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2238 (2022). The rule is workable in part when it promotes the "evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The plain text of the standard itself is vague. The Court in *Hardison* stated that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Hardison*, 432 U.S. at 84. What does "de minimis" mean? These words have been defined as "of a trifling consequence and a matter that is so small that the court does not wish to even consider it." *De Minimis*, *Black's Law Dictionary* (2nd ed. 1910). Yet these words, as applied to the employer-employee relationship, provide little guidance on what matters would be of "trifling consequence." What matters are "small" and inconsequential? Economic cost? Non-economic cost? Employee morale? The *Hardison* Court provided no factors or explanations to qualify its use of an entirely new standard.

Indeed, the word "undue" has been used by this Court and lower courts to denote the existence of a balancing test. *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (using the words "undue burden" in conjunction with the *Pike* balancing test in *Pike v. Bruch Church* to address a dormant commerce clause issue); *see Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) (using *Casey's* "undue burden" test to balance the "benefits and burdens" of Pennsylvania's recordkeeping requirement). But under the *de minimis* standard, there is little, if any, "hardship" for which employers must make reasonable accommodations. Indeed, the words "undue burden"

have now been associated with *Hardison*. *Weber v. Roadway Express*, Inc., 199 F.3d 270, 275 (5th Cir. 2000). If accommodating the religious beliefs of an employee would place any "hardship" or "burden" on the employer, accommodation is not required unless the hardship would be of "trifling consequence."

The word "undue" in the statute implies at least that there is some degree of hardship that would be acceptable, even if bearing the burden of that hardship would not be *de minimis*. Before *Hardison*, at least one court interpreted Title VII in this manner. *See Cummins v. Parker Seal Co.*, 516 F.2d 544, 551 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65, 97 (1976) ("[undue] hardship is something greater than hardship"). Yet by creating the *de minimis* standard, the Court in *Hardison* completely neutered the statutory language and "effectively nullifie[d] the statute's promise." *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting) ("*Small II*") (citing *Hardison*, 432 U. S., at 88, 89, 93, n. 6 (Marshall, J., dissenting)). As acknowledged by one court, "a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine." *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979). Another court noted that Title VII now only imposes a "slight burden" on employers to accommodate the religious beliefs of an employee. *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021).

Even if the Court did not intend to create a new standard redefining the phrase "undue hardship," the words "undue hardship" are now equated with "de minimis cost." *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) ("An accommodation causes 'undue hardship' whenever that accommodation results in 'more than a de minimis cost'"). The *de minimis* standard dramatically changes what accommodations are "reasonable" under the statute. Under Title VII, the employer must demonstrate 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). If accommodating an employee's religious practice would lead to an undue hardship, then accommodating would not be reasonable. However, under *Hardison*, if accommodating an employee's religious practice would lead to more than a *de minimis* cost to the employer, then accommodating would not be reasonable. Thus, many accommodations are unreasonable just because the employer would incur more than a "trifling" cost.

Before *Hardison* was decided, at least one circuit lamented that the phrase "undue hardship" as used in 42 U.S.C. § 2000e(j) is a "relative term[] and cannot be given any hard and fast meaning." *United States v. Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 489 (10th Cir. 1976). After *Hardison*, the waters were muddied even further. In the absence of a concise

interpretation of "de minimis," lower courts have been forced to decide that *de minimis* costs are determined on a case-by-case basis. *Tabura v. Kellogg USA*, 880 F.3d 544, 558 (10th Cir. 2018) ("Whether an employer will incur an undue hardship is a fact question . . . that turns on the particular factual context of each case") (internal citation omitted); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994) ("the Supreme Court has provided some guidance by generally defining 'undue hardship' as any act that would require an employer to bear greater than a 'de minimis cost.'"); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986).

As a result, lower courts are split on whether *Hardison* permits employers to refuse to accommodate hypothetical hardships. Such hardships include projected or anticipated risks associated with accommodation and hardships which "an employer thinks might be caused by an accommodation that has never been put into practice." *Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979). While many courts have held that there must be an actual, demonstrated hardship for the employer to enjoy the benefit of the *de minimis* standard, *see Opuku-Boateng v. California*, 95 F.3d 1461, 1474 n.25 (9th Cir. 1996), *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989), at least one circuit examined *Hardison* and suggested that

> The [*Hardison*] Court may have determined that whether a proposed accommodation would create costs that are more than de minim[i]s is a matter to be determined *on the basis of the projected number of instances* of accommodation that a company *may* have to undertake, rather than on the impact of the single case of the plaintiff before the Court.

Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579, 583 n.22 (3rd Cir. 1977) (emphasis added). The ambiguity of the *de minimis* standard gives lower courts wide latitude to interpret *Hardison* as they see fit.

This is demonstrated further when accommodating the religious beliefs of the employee would force the employer to bear any economic cost, however small. Many courts have held that the employer bears an undue hardship just because an additional monetary expenditure is required. *See Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994); *Baz v. Walters*, 782 F.2d 701, 706–707 (7th Cir. 1986); *DePriest v. Dep't of Human Servs.*, No. 86-5920, 1987 WL 44454, at 3 (6th Cir. Oct. 1, 1987) (unpublished table decision); *Gibson v. Missouri P. Railroad*, 620 F. Supp. 85, 86–89 (E.D. Ark. 1985), *dismissed without op.*, 786 F.2d 1171 (8th Cir. 1988); *Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1192 (M.D. Ala. 1982). Some courts concluded that accommodation would require the employer to sustain

"significant" additional costs but did not discuss or seek to identify the line between "significant" costs and *de minimis* costs. *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1023–24 (10th Cir. 1994); *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992). Because the *de minimis* standard interprets the "undue hardship" language in Title VII, courts have broad latitude to conclude that any monetary expense or loss of efficiency is automatically an "undue hardship." At least one court has cited the EEOC guidelines which set forth several factors to determine whether an "undue hardship" exists, including one which gives "due regard" to the "identifiable cost in relation to the size and operating cost of the employer." *EEOC v. IBP, Inc.*, 824 F. Supp. 147 (C.D. Ill. 1993) (citing 29 C.F.R. § 1605.2(e)(1) (1980)). Yet the EEOC interpreted the *de minimis* standard to mean that "costs similar to the premium wages of substitutes . . . would constitute undue hardship" and presumed that "administrative costs" would be *de minimis* under *Hardison*. 29 C.F.R. § 1605.2(e)(1) (1980). In the absence of any clear guidance from this Court, lower courts and the EEOC have been left to speculate as to the scope of the *de minimis* standard.

Finally, lower courts are split on which negative impacts on other employees constitute undue hardships. Although Title VII specifically states that "undue hardship" applies to the "conduct of the employer's business," *see* 42 U.S.C. § 2000e(j), many circuits have concluded that under *Hardison*, an employer suffers undue hardship when required to

bear a greater than *de minimis* cost or imposition upon co-workers. *Weber,* 199 F.3d at 274 ("The mere possibility of an adverse impact on co-workers as a result of 'skipping over' is sufficient to constitute an undue hardship"); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981). Other courts have held to the contrary, citing Title VII as proof that an undue hardship on other employees is not a *per se* hardship on the employer. *Crider v. Univ. of Tenn.*, 492 Fed. Appx. 609, 614 (6th Cir. 2012); *E.E.O.C. v. Townley Engineering & Manufacturing Co.*, 859 F.2d 615 (9th Cir. 1988). One court has noted that *Hardison* provides no "significant" or "authoritative" guidance on the issue. *Haring v. Blumenthal*, 471 F. Supp. 1172, 1181 (D.D.C. 1979).

This lamentation is highlighted by the fact that before *Hardison*, the Sixth Circuit was forced to address the same issue with minimal guidance. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520–21 (6th Cir. 1975). After *Hardison*, the same issue persists. *Hardison* has failed to provide "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827. For almost fifty years, the *de minimis* standard has raised questions, created division among lower courts, and generated legal ambiguity. The *de minimis* standard is therefore unworkable.

C. The *De Minimis* Standard Is Grossly Incongruent with Other Areas of the Law and Other Statutory Interpretations of the Words "Undue Hardship."

Title VII was one of the first statutes enacted by Congress to use the words "undue hardship." After *Hardison* was decided, Congress enacted at least three statutes which provide heightened, not *de minimis*, protection for employees who qualify for statutory protection.

For example, Title III of the Americans with Disabilities Act provides that covered entities discriminate against disabled individuals if they fail to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5). Congress then went on to define "undue hardship" as "an action requiring significant difficulty or expense," not "de minimis cost." 42 U.S.C. § 12111(10)(A). In doing so, Congress specifically asserted and emphasized that "the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation." *See* H.R. Rep. No. 101-485, pt. 2 at 68; S. Rep. No. 101-116 at 36; H.R. Rep. No. 101-485, pt. 3 at 40. Under the ADA, covered entities are subject to a higher

burden to prove undue hardship, but employers under *Hardison's* interpretation of Title VII only need to demonstrate that accommodations would result in "de minimis cost." Due to the Court's judicially crafted addon to Title VII, disabled employees in the workplace are now far more protected by Congress than those employees with sincerely held religious beliefs.

The same is true with the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under USERRA, an employer is obligated to make "reasonable efforts" to return United States service members to their former positions as long as the employer would not suffer "undue hardship." 38 U.S.C. § 4303(10), 4313(a). "Undue hardship" is once again interpreted as meaning "actions requiring significant difficulty or expense," with virtually identical language to Title III of the ADA. 38 U.S.C. § 4303(16). Service members also receive more protection than religious employees.

Finally, the *de minimis* standard is incongruent with the Religious Freedom Restoration Act ("RFRA") itself. Under RFRA, the government cannot substantially burden an employee's free exercise of religion without demonstrating that it has a compelling interest, and the challenged law is narrowly tailored to achieving that interest. 42 U.S.C.S. § 2000bb (citing *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Sherbert v. Verner*, 374 U.S. 398 (1963)). Yet generally Congress did not

intend RFRA to apply to Title VII. S. Rep. No. 111, at 13; *but see EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468 (D.C. Cir. 1996). RFRA is only implicated when a public employer relies on federal law (e.g., federal labor laws) to prove that there would be undue hardship in accommodating an employee's religious beliefs. *See United States v. Board of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990). The employer then must prove that the statute or regulation satisfies strict scrutiny. This creates an odd scenario: If an employer does not use federal law to prove that accommodating an employee's religious beliefs would create an undue hardship, the *de minimis* standard applies under *Hardison*. However, if an employer raises a federal statute or regulation to justify its' position that accommodating would be an undue hardship, and the employee proves that failing to accommodate "substantially burdens" their free exercise of religion, then strict scrutiny under RFRA applies. *See* 42 U.S.C. 2000bb. Whether the religious beliefs of an employee receive higher protection now depends on the conduct of the employer, not on the fact that an employee seeks to exercise his or her sincerely held religious beliefs.

D. *Hardison* Was Egregiously Wrong

All of the foregoing problems, combined with the departure from the statutory text, led not only to an incorrect rule but an egregiously incorrect rule. At the time that Title VII was amended to include the undue-burden provision, "burden" meant "something that is

carried," or "something oppressive or worrisome." *Webster's Seventh New Collegiate Dictionary* 111 (1972). "Undue" meant "inappropriate, unsuitable," or "exceeding or violating propriety or fitness." *Id.* at 968. While this phrase was hardly a model of clarity and precision, the plain language of the statute presumes that an employer will have to carry a burden in accommodating an employee. Even the word "burden" without the qualifier seems to require employers to carry more than a *de minimis* burden. Without the additional language, the word "burden," by itself, would require the employer to bear a *reasonable* burden before it was excused from accommodation the employee. *See* Antonin Scalia, *A Matter of Interpretation* 23 (new ed. 2018) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."); *see also* Antonin Scalia & Bryan Garner, *Reading Law* 101 (2012) ("general words (like all words, general or not) are to be accorded their full and fair scope").

But Title VII does not stop there: it excuses the employer not for incurring a reasonable burden but an "undue burden." This additional language of "undue" excuses the employer only if the burden "exceeds fitness." As Judge Thapar has argued, this means that the cost to the company must be "significant." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J., concurring) ("*Small I*"). This is the exact opposite of excusing an employer if he incurs only a *de minimis* cost.

Thus, Justice Marshall was correct to conclude that the *de minimis* standard "makes a mockery of the statute." *Hardison*, 432 U.S. at 88. As Justice Gorsuch has noted, the *de minimis* standard "effectively nullif[ies]" what the plain text of Title VII requires. *Small II*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). Interpreting Title VII to require employers to bear only a *reasonable* burden would be wrong, but interpreting it to require them to bear only a *de minimis* burden is egregiously wrong. *Dobbs*, 142 S. Ct. at 2265.

III. *Groff* Provides an "Appropriate Case" for This Court to Overturn *Hardison*

In the past few years, this Court has consistently denied certiorari to Title VII cases which challenge *Hardison*. *Hedican v. Walmart Stores E., L. P*, 142 S. Ct. 331 (2021); *Small II,* 141 S. Ct. at 1227; *Patterson*, 140 S. Ct. at 685. Justices of this Court have noted that although *Hardison* is ripe for review, the case which the Court uses to do so must be a "good vehicle" or "appropriate case" to review *Hardison*. *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring in the denial of certiorari).

Groff v. DeJoy is such a vehicle. In the cases in which this Court has denied certiorari, there were minor variations in the facts which did not make them worthy of review by this Court. For example, in *Small I*, the appellant "did not challenge whether the

accommodations offered would have imposed undue hardship on the company—beyond a passing assertion in his brief." *Small I*, 952 F.3d at 825. In *Patterson*, the Eleventh Circuit concluded that Walgreens reasonably accommodated Patterson's religious beliefs and only addressed the undue hardship question in *dicta*. *Patterson v. Walgreen Co.*, 727 Fed. Appx. 581, 588 (11th Cir. 2018) ("Because Walgreens reasonably accommodated Patterson's religious practice, we need not consider the issue of undue hardship"). In *EEOC v. Walmart Stores, E., L.P.*, the case in which Hedican sought to intervene and was denied certiorari, *see Hedican,* 142 S. Ct. at 331, Hedican deliberately turned down a position within the store which would have eliminated the conflict and insisted that Title VII entitled him to a position as assistant manager at Walmart. *EEOC v. Walmart Stores, E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021). Hedican was hardly a model Title VII plaintiff-appellant.

Groff v. DeJoy suffers from none of these defects. The Third Circuit rested its' decision entirely on the *de minimis* standard. After concluding that USPS failed to make a "reasonable accommodation" to Groff, the court decided that exempting Groff from working on Sundays would be more than a *de minimis* cost to the employer. *Groff v. DeJoy*, 35 F.4th 162, 175 (3rd Cir. 2022). *Groff's* central holding directly relies on *Hardison's* biggest mistake. *Groff* also implicates the split among the circuits as to whether negative impact on other employees constitutes an undue hardship, a

question left unanswered by *Hardison*. *See id*. at 174. Groff even requested a transfer to another position but was denied because all positions required working on Sunday. *Id*. at 166. He is now torn between sacrificing his religious beliefs – e.g., observing the Sabbath on another day of the week – and losing his job. It is hard to imagine a more "appropriate case" to review *Hardison*.

CONCLUSION

In conclusion, *Hardison* has failed to protect religious accommodation in the workplace and has reduced Title VII's protection of religious liberty to a minimum, unworkable threshold based on faulty reasoning. Therefore, this Court should overrule *Hardison* and reverse the judgment of the Third Circuit.

Respectfully submitted,

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