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 *AMICUS CURIAE* OF AMERICAN CONSTITUTIONAL RIGHTS UNION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from discriminating against an individual "because of such individual's . . . religion." 42 U.S.C. §§ 2000e-2(a)(1), (2). The statute defines "religion" to include "all aspects of religious practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id*. § 2000e(j). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court stated that an employer suffers an "undue hardship" in accommodating an employer's religious exercise whenever doing so would require the employer "to bear more than a de minimis cost." *Id*. at 84.

The questions presented are:

1. Whether this Court should disapprove the more-than-de-minimis test for refusing Title VII 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 coworkers rather than the business itself.

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STATEMENT OF *AMICUS CURIAE*[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the First Amendment's protection of the free exercise of religion. Its mission is grounded in the understanding that the first Amendment's Free Exercise clause protects religious expression for people of all faiths. The ACRU defended the religious expression inherent in the Bladensburg Cross in *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019). In addition, it wrote in support of the Petitioner Joseph Kennedy in

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored 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. Sup. Ct. R. 37.6.

Kennedy v. Bremerton School District, 597 U.S. ___, 142 S. Ct. 2407 (June 27, 2022). This case is consistent with ACRU's mission of protecting the First Amendment right to the Free Exercise of religion.

SUMMARY OF ARGUMENT

This case offers the Court an opportunity to revisit the Court's equation of "undue" with *de minimis* in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977). That equation is at odds with the plain meaning of "undue." In addition, it has encouraged the lower courts to pit the interests of the statutorily-protected religious adherents against the interests of co-workers, substituting the co-workers for the employer. Finally, *Hardison* cannot be reconciled with the Court's subsequent decision in *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015).There, the Court held that Title VII requires the courts to give "favored treatment" to religious practices and observances. By reining in *Hardison*, the Court can do precisely that.

ARGUMENT

A. Introduction

In pertinent part, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of, among other causes, religion. 42 U.S.C. § 2000e-2(a)(1). Title VII defines religion to include "all aspects of religious observance and practice, as well as

belief." 42 U.S.C. § 2000e(j). It then mandates that employers accommodate their employees' religious practices and beliefs "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id*.

The Court, though, breezily declared that "undue" means *de minimis* in *Trans World Airlines, Inc*. at 83. It did so without any supporting authority, suggesting only that "a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." *Id*. at 83, n.15. Congress, however, said "undue," not *de minimis*.

As Petitioner notes, "undue hardship" means, among other things, "unwarranted," or "excessive" "suffering" or "a condition that is difficult to bear." Brief of Petitioner at 18. In addition, the *Hardison* Court's equation of "undue hardship" with *de minimis* is dicta. *Id*. at 15; see also *Patterson v. Walgreen Company*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari) ("[T]he parties' briefs in *Hardison* did not focus on the meaning of that term [i.e., undue hardship]; no party in that case advanced the *de minimis* position; and the Court did not explain the basis for this interpretation."). Put simply, the *Hardison* Court "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

B. The conflation of "undue hardship" with a *de minimis* effect has encouraged lower courts to put the interests of co-employees ahead of those of religious adherents.

In pertinent part, 42 U.S.C. § 2000e(j) measures the reasonableness of an accommodation on "the conduct of the employer's business." *Id*. Lower courts have, at best, stretched the meaning of the "employer's business," by looking at the effect of an accommodation on co-employees. As the Seventh Circuit recently said, "Title VII does not place the burden of accommodation on fellow workers." *EEOC v. Walmart Stores E.L.P*., 992 F.3d 656, 660 (7th Cir. 2021).

In *Walmart Stores*, the company was asked to provide an accommodation for a Seventh-day Adventist who was offered a managerial position but could not work between sundown Friday and sundown Saturday. The company concluded that an accommodation "would leave the store short-handed at some times, or require it to hire a ninth manager, or would compel the other seven managers to cover extra weekend shifts despite their preference to have weekends off." *Id*. at 658. The Court rhetorically asked, "What would Walmart do if other workers balked?" *Id*. at 659.

The court said, "We repeat that the burden of accommodation is supposed to fall on the employer, not on other workers." *Id*. at 660 (citing *Porter v*. *Chicago*, 700 F.3d 944 (7th Cir. 2012); *Paz v. Walters*, 782 F.2d 701 (7th Cir. 1986)). In the same way, the Fifth Circuit declared, "It would be anomalous to conclude that by

'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 146 (5th Cir. 1982). In *Brener*, an Orthodox Jew, who could not work on the Sabbath, lost his job as a staff pharmacist because he could not work on either the Sabbath or Jewish holidays.

Those holdings reflect a view of Title VII that cannot be squared with the Court's decision in *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015). As will be discussed in greater detail below, the Court concluded that Title VII demands that religious practice be given "favored treatment," not just "mere neutrality . . . that they be treated no worse than other practices." *Id*. at 2034. In contrast, the Seventh Circuit said that "the rationale underlying this determination [in *Hardison*] that anything more than a de minimis cost would result in discrimination against other employees, a result the Court concluded Congress did not intend." *Nottleson v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 451 (7th Cir. 1981). Put simply, that puts the interest of co-employees ahead of those of religious adherents, when that statute protects those religious adherents.

In this regard, the Court has "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto." *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). Such a veto would restrict one person's exercise of his or her First

Amendment rights based on what others "might misperceive." *Id*. But, the *de minimis* effect test, as it has been applied, leads the courts to inject a heckler's veto on behalf of co-employees. That injection contributes to the results in cases like *Brener* and *Nottleson*. The Court should put a stop to that practice.

C. This Court's more recent decision in *EEOC v. Abercrombie & Fitch* undercuts the rationale in *Hardison*.

In *EEOC v. Abercrombie & Fitch*, the Court, in a majority opinion written by Justice Scalia, held that the store chain violated Title VII when it enforced its "no cap" policy against a Muslim applicant who, consistently with her religious beliefs, wore a headscarf. It interpreted the pertinent portions of a disparate-treatment claim based on religion in a "straightforward" way: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." 135 S. Ct. at 2033. The Court explained:

> For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violated Title VII.

Id. More to the point, Justice Scalia explained that Title VII demands that religious practice be given "favored treatment", not simply "mere neutrality . . . that they be treated no worse than other practices." *Id*. at 2034. In short, "Title VII requires otherwise neutral policies to give way to the need for accommodation." *Id*.

The Court's reasoning finds little commonality with the decision in *Hardison*. There, the majority held that TWA satisfied its Title VII obligations by making a "reasonable," albeit unsuccessful attempt to accommodate Hardison's religiously grounded need to observe a Saturday Sabbath. The Court was concerned about giving preference to the religious needs of workers: "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate *or prefer* the religious rights of others, and we conclude that Title VII does not require an employer to go that far." 432 U.S. at 81 (emphasis added); see also *id.* at 83 (TWA was not obligated to "carve out a *special exception* to its seniority system in order to help Hardison to meet his religious obligations.") (emphasis added); *id.* at 85 ("the *privilege* of having Saturdays off would be allocated according to religious beliefs.") (emphasis added).

Justice Scalia's example of a Title VII violation arising from the avoidance of a possible accommodation alone casts doubt on the continuing vitality of *Hardison*.

The *Hardison* Court's concern about giving preferential treatment to religious beliefs is consistent with a jurisprudential era that has passed. In 1971, the Court decided *Lemon v. Kurtzman*, 413 U.S. 756 (1971), and *Lemon* then behaved like "some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried" until last term. See *Lamb's Chapel v. Central Moriches Union Free School District*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment); see also *Kennedy v. Bremerton School District*, 142 S. Ct. at 2427 ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

In the meantime, though, its effect can be seen in cases like *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981). There, the Ninth Circuit affirmed a district court judgment that Seventh Day Adventists who had a religious objection to joining or paying a service fee to a union could be accommodated by allowing them to make an equal contribution to charity. The court rejected the union's contention that the accommodation, which was facilitated by a change to the National Labor Relations Act, violated the Establishment Clause of the First Amendment. It explained, "Government can accommodate the beliefs and practice of members of minority religions without contravening the prohibitions of the Establishment Clause." *Id.* at

1244. Then, applying what it called the *Nyquist* test, it concluded that the statutory change had the secular purpose of "promot[ing] Title VII's broader policy of prohibiting discrimination in employment" and conveyed only an ancillary benefit to the objectors. *Id.* at 1245-46 (citing *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1979)). The Court concluded that the union did not show "that the burden of administering this accommodation involves significant amounts of time or money." *Id*. at 1246.

One final difference lies in the respective Court's treatment of the statutory language. The *Hardison* Court read "undue burden" to mean that the employer did not have to "bear more than a de minimis cost." 432 U.S. at 84. As noted above, that reading strains the meaning of "undue." In contrast, the *Abercrombie & Fitch* Court rejected the suggestion that an employer has to have "actual knowledge of a conflict between an applicant's religious practice and a work rule." 135 S. Ct. at 2033. Justice Scalia observed, "The problem with this approach is the one that inheres in most incorrect interpretations of statutes. It asks us to add words to the law to produce what is thought to be a desirable result." *Id*. Put simply, the *Hardison* Court inserted language into the statute, and the *Abercrombie & Fitch* Court declined to do so.

This case offers the Court an opportunity to reinvigorate the language of Title VII. Such a reinvigoration would vindicate the rights of Petitioner.

CONCLUSION

For the reasons stated in the Petitioner's brief and this *amicus* brief, this Court should reverse the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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