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 FOR THE AMERICAN HINDU COALITION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

The American Hindu Coalition (AHC) is a nonpartisan advocacy organization based in Washington, D.C., with significant membership in several states. Representing Hindus, Buddhists, Jains, Sikhs, and related members of minority religions, many of whom are federal and state government employees, AHC files this brief because its members' religious practices may be unfamiliar to mainstream America, leading to instances of workplace discrimination. Religious freedom, including the right to live, speak, and act according to one's religious beliefs, peacefully and publicly, is an essential component of AHC's platform, and AHC supports petitioner in ensuring that employees' free exercise of religion remains protected in the workplace.

SUMMARY OF ARGUMENT

In 1972, Congress amended Title VII to provide protections for members of minority religions. Those protections ensured that religious minorities, such as Hindus, Sikhs, Buddhists, and Jains, who could not rely on prevailing cultural norms to carve out space for their religious practices, would be free to worship without having to sacrifice their livelihoods. In passing the amendment, Congress recognized that religious practice is a fundamental good. It balanced that good against economic interests, believing that affirmative accommodation of religious practice would lead to greater human flourishing without unnecessarily burdening employers.

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its counsel, made any monetary contribution to the preparation or submission of this brief.

Specifically, Title VII, as amended, requires that employers accommodate an employee's religious practice unless doing so would impose an "undue hardship" on the employer's business. *See* 42 U.S.C. § 2000e(j). Dictum in this Court's decision in *Hardison*, if it became a holding with regard to Title VII, would quash protections hard-won by religions through enactment of that provision. *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 86 (1977) (Marshall, J., dissenting). In particular, equating the phrase "undue hardship" with anything more than a "de minimis cost" to an employer is contrary to the statutory text and inconsistent with any plausible understanding of the law's purpose.

Even though *Hardison* dealt solely with tension between religious accommodations and a collective bargaining agreement, the lower courts have applied its "de minimis cost" dictum as a bright-line rule. *See, e.g.*, *EEOC* v. *Walmart Stores E., LP*, 992 F.3d 656 (7th Cir. 2021). This result has been uniquely problematic for religious minorities. Many minority religions do not mirror Christian entities in their doctrine, organization, or practices, so employers are less likely to understand or identify accommodations that are vital to ensuring that these employees can continue to work without sacrificing their faith. Members of minority faiths routinely face discrimination in the workplace. Indeed, in issues related to religious attire or appearance, employers have at times proposed accommodations that further burden minorities' religious practices or amount to de facto segregation. A "de minimis cost" test renders Title VII's hard-fought protections toothless, enabling employers to disregard the traditions and practices of these devout people.

Lower courts' adoption of a "de minimis cost" test has been particularly troublesome in part because this

Court has previously urged religious minorities to seek their protections from Congress. In holding that the Constitution does not exempt religious persons from neutral, generally applicable laws that may otherwise conflict with their religious beliefs, this Court stressed that minority groups whose "religious practices … are not widely engaged in" nevertheless had recourse to the political process to obtain accommodations. *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 890 (1990). Consistent with this endorsement, members of minority faiths were instrumental in the passage of the Title VII amendment at issue in this case, requiring "religious accommodation, even though unequal treatment would result." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). When Congress has taken affirmative steps to carve out space for minorities to practice their religion in harmony with the Constitution's guarantee of religious liberty, courts should take Congress's words at face value.

This Court should faithfully apply the "undue hardship" standard as enacted by Congress so that it is consistent with the same or similar language in other statutes, recognizes that religious practice is a societal good, and requires employers to take affirmative steps to accommodate their employees' needs.

ARGUMENT

I. *HARDISON*'S UNDUE HARDSHIP STANDARD SHOULD BE DISAPPROVED

While *Hardison*'s holding is entitled to *stare decisis* effect, its construction of "undue hardship" is not a holding with regard to the meaning of § 2000e(j). *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404 (1965) ("Concepts of *stare decisis* in statutory

interpretation apply to the *holdings* with which the case-by-case method of decision surrounds a statute."). That is because *Hardison* construed a defunct EEOC guideline, not Title VII as amended, when it equated undue hardship with "more than a de minimis cost." There is thus no need for this Court to evaluate the various "factors that should be taken into account in deciding whether to overrule a past decision" and no decision has to be overruled for this Court to endorse a more protective reading of "undue hardship" under Title VII as amended. *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2478 (2018).

A. *Hardison*'s De Minimis Standard Is Dictum

As originally enacted in 1964, Title VII made no express reference to the reasonable accommodation of religion or undue hardship. It was not until 1972 that Congress amended Title VII to enact these accommodations. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (1972). Congress did so by defining "religion" to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

The underlying dispute in *Hardison* arose in 1971, prior to Title VII's amendment, so the Court's construction of "undue hardship" was premised on a 1967 EEOC interpretive guideline to Title VII's religious discrimination provision "in effect at the time the relevant events occurred." 432 U.S. at 76 & n.11 (specifying that the Court accepted the 1967 EEOC guidelines "as a defensible construction of the pre-1972 statute" and that the

Court "need not consider whether [§] 701(j)"—the amended definition of "religion"—"must be applied retroactively"). The EEOC guideline stated that Title VII required employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." *Id.* at 72 (quoting 29 C.F.R. § 1605.1 (1968)). Applying this guideline, the Court held that its "undue hardship" standard was satisfied by the (meager) costs required to accommodate Hardison's Sabbath since an employer's business suffers an "undue hardship" whenever accommodating an employee's religious exercise would require the employer "to bear more than a de minimis cost." *Id.* at 72, 84. *Hardison*'s "de minimis" test is thus only a judicially binding construction of the 1967 EEOC guideline, not the 1972 amendment.

This distinction controls the *stare decisis* analysis here. *Hardison*'s "de minimis" gloss is not binding authority as to the meaning of the 1972 amendment and the definition of "undue hardship" because the Court did not apply that amendment or otherwise construe it in issuing its decision. Three Justices have recognized this fact. *See EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part), and *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 n.* (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari)). As "this Court is not bound by dicta," the question before the Court now is not whether to adhere to *Hardison* as precedent, but whether to apply its reasoning to the separate question of the meaning of "undue hardship" under Title VII. *Kerry* v. *Din*, 576 U.S. 86, 94 (2015).

B. The De Minimis Test Clashes With Title VII's Text, Structure, And History

The Court should not follow *Hardison* in construing the 1972 amendment to Title VII. *Hardison*'s reasoning is a poor fit for Title VII's text, as "undue hardship" cannot "be interpreted to mean 'more than *de minimis* cost'" as a matter of "simple English usage." *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). "[T]he ordinary public meaning of Title VII's command" thus requires departing from *Hardison*'s reading of "undue hardship." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

Nor does *Hardison*'s reasoning faithfully implement the structure of § 2000e(j). The 1972 Amendments expanded the definition of "religion" under Title VII to include "religious observance and practice" as well as "belief," and it imposed a requirement of reasonable accommodation in the absence of undue hardship. To hold that this provision, like the guideline interpreted in *Hardison*, is satisfied whenever an exception to a neutral work rule carries more than a de minimis cost would "effectively nullify[]" the statute. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting).

Hardison's de minimis standard also does not reflect the congressional intent underlying § 2000e(j). In interpreting the guideline, the Court in *Hardison* placed significant weight on the notion that the EEOC had not departed from a position it had taken in its 1966 guidelines, suggesting that "work schedules generally applicable to all employees may not be unreasonable[.]" 432 U.S. at 72 n.7. This assertion was contested at the time, *id.* at 86 n.1 (Marshall, J., dissenting), and in any event is of no value in interpreting the legislated text of § 2000e(j). Rather, as noted in Justice Marshall's dissent, the

"instructive" legislative history shows that the "primary purpose of the [1972] amendment" was "to make clear that Title VII requires religious accommodation, even though unequal treatment would result," and "to protect Saturday Sabbatarians"—"'whose religious practices rigidly require them to abstain from work … on particular days.'" *Id.* at 89 (quoting 118 Cong. Rec. 705 (1972) (statement of Sen. Jennings Randolph)).

These "traditional principles of statutory interpretation" thus counsel against extending *Hardison*'s rule to this case. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

C. The Government And Lower Courts Have Urged This Court To Reject The Test

For the above reasons, *Hardison*'s test has been roundly criticized by the United States and a number of judges on the Courts of Appeals. In opposing certiorari in this case, the United States did not repudiate its prior position that *Hardison* was "incorrect"; rather, it only argued that "this case would be a poor vehicle[.]" U.S. Amicus Br. 19, *Patterson* v. *Walgreen Co.*, No. 18-349 (U.S.); BIO 8. In recommending certiorari in *Patterson*, the United States noted that the de minimis test was announced without "the benefit of full briefing" and that the rule has been undermined by this Court's decision in *Abercrombie*. *Patterson* U.S. Amicus Br. 21-22.

The general rule of the Courts of Appeals is not to "ignore pertinent statements by the Supreme Court," *United States* v. *Anchor Mortg. Corp.*, 711 F.3d 745, 750 (7th Cir. 2013), and, as a result, every circuit court to address the question has applied *Hardison*'s de minimis

test in interpreting Title VII.[2] While doing so, however, a number of judges of the Courts of Appeals have noted *Hardison*'s shortcomings. Judge Frank Easterbrook has noted that "more than a de minimis cost" is equivalent to a "slight burden," contravening the statutory language of "undue hardship." *Walmart Stores E.*, 992 F.3d at 658, 660. Judge Amul Thapar has recognized that the statutory text, analogous provisions in the "corpus juris," the desuetude of *Hardison*'s constitutional-avoidance rationale, and the "harm [to] religious minorities" all support abandoning the de minimis test. *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 826-829 (6th Cir. 2020) (Thapar, J., concurring). And Judge Thomas Hardiman, dissenting below, noted that "*Hardison*'s capacious standard" "depart[s] from Title VII's text" and "can effectively nullify Title VII's promise of religious accommodation." Pet. App. 27a n.1 (cleaned up).

* * *

In sum, although the de minimis test is dictum that does not rest on a reading of Title VII's language, the Courts of Appeals do not consider themselves free to rectify its well-known shortcomings themselves. Accordingly, consistent with the text, structure, and history of the statute, this Court should interpret Title VII

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[2] *See, e.g.*, *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004); *Baker* v. *Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006); *EEOC* v. *GEO Grp., Inc.*, 616 F.3d 265, 273 (3d Cir. 2010); *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Davis* v. *Fort Bend Cnty.*, 765 F.3d 480, 488-489 (5th Cir. 2014); *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *EEOC* v. *Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997); *Harrell* v. *Donahue*, 638 F.3d 975, 980 (8th Cir. 2011); *Balint* v. *Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999); *Tabura* v. *Kellogg USA*, 880 F.3d 544, 557 (10th Cir. 2018); *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995).

to impose a more protective standard for employees' religious rights in the workplace.

II. THE *HARDISON* TEST HARMS RELIGIOUS MINORITIES

The centrality of religious practice and the principle of religious pluralism lie at the heart of the American tradition. "Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue … to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state." *McGowan* v. *Maryland*, 366 U.S. 420, 461 (1961) (op. of Frankfurter, J.). The Founders "fashioned a charter of government which envisaged the widest possible toleration of conflicting [religious] views." *United States* v. *Ballard*, 322 U.S. 78, 87 (1944).

The 1972 Title VII Amendment continued this tradition of government solicitude for the diverse religious practices of the people. But the *Hardison* Court's dictum, were it to stand, would gut Congress's protection of religious minorities.

A. The 1972 Title VII Amendment Was A Critical Use Of Political Power To Protect Religious Minorities

To be sure, the First Amendment's free exercise protections do not give religious people free rein to do whatever they please. In *Smith*, this Court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and

neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879 (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Nevertheless, the Court stressed that even where "a nondiscriminatory religious-practice exemption" is not "constitutionally required," religious minorities have recourse to the political process to obtain the state's protection. *Id.* at 890. "Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

The Title VII Amendment was just such a law. As Justice Marshall explained in his *Hardison* dissent, there was a general concern for "the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed," including "Sundays, Christmas, and Easter, but who need time off for their own days of religious observance." 432 U.S. at 85 (Marshall, J., dissenting). Although the EEOC had taken steps to alleviate that concern by adopting the "undue hardship" standard in its regulations in the 1960s, *id.* at 85-86, courts failed to recognize the need for employers to take positive steps to accommodate religious practices and instead focused on whether work rules were facially neutral and generally applicable to both religious and secular employees. For example, in 1970, the Sixth Circuit opined in *Dewey* v. *Reynolds Metals Co.* that, so long as an employer provides "a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of

them"—that is, without taking religious practice into account—than the employer acts in accordance with Title VII.[3] 429 F.2d 324, 329 (6th Cir. 1970). This Court affirmed without opinion by an evenly divided vote. *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971).

Dissatisfied with the result in *Dewey*, Senator Jennings Randolph—himself a Saturday Sabbatarian—sponsored an amendment to Title VII to clarify that the law *required* employers to take affirmative steps to accommodate religious employees. *Hardison*, 432 U.S. at 88-89 (Marshall, J., dissenting) (citing 118 Cong. Rec. 706 (1972)). The Amendment, in other words, was precisely the sort of solicitous legislation that the *Smith* Court endorsed, featuring minority coalitions marshalling political power and using the majority's good will to achieve legal protections that, while not constitutionally required, advance public policies in harmony with republican values enshrined in the Constitution. *See Smith*, 494 U.S. at 890. In that regard, the 1972 Title VII Amendment is consistent with countless other anti-discrimination statutes protecting minorities.

It is therefore unsurprising that the "undue hardship" language the Amendment applies to balance the interests of minority employees against those of their employers appears time and again in Congress's other anti-discrimination laws. *See Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting from denial of certiorari) (comparing Title VII's "undue hardship" language to the same language in the Americans with Disabilities Act, the

[3] The Sixth Circuit considered both a 1966 EEOC regulation that expressly approved of "generally applicable" work schedules that might incidentally burden religious practice and the 1967 version that was silent on the question, concluding that neither outlawed terminating an employee for refusing to work on Sunday under a facially neutral scheduling policy. *Dewey*, 429 F.2d at 329-330.

Uniformed Services Employment and Reemployment Rights Act, and the Affordable Care Act). In each instance, Congress recognized a positive good—religious practice, military service, and work-force participation by disabled individuals and nursing mothers—and took affirmative steps to promote those goods while simultaneously accounting for the interests of businesses and other employers. In *Smith*'s understanding, that is how Congress is *supposed* to work to protect minority rights.

B. Hardison's "De Minimis Cost" Standard Undercuts Religious Minorities' Hard-Won Protections

Congress's ability is limited, however, when courts do not accurately interpret the law. Despite a clear legislative response to *Dewey* that required an employer to show that taking affirmative steps to accommodate employees' religious practices creates an "undue hardship" on the business, the Court's reasoning in *Hardison* was similar to the Sixth Circuit's logic in *Dewey*. In both cases, an employer scheduled its employees for weekend work according to a collectively bargained agreement that purported to distribute shifts equitably across all employees. *See Hardison*, 432 U.S. at 78; *Dewey*, 429 F.2d at 330. To the extent that the 1966 EEOC guideline led courts to believe that neutral, generally applicable policies were sufficient, the *Dewey* court's judgment in favor of the employer was understandable. *See* 429 F.2d at 330-331.

But the 1972 Title VII Amendment established that an employer's lack of discriminatory intent is not enough; it clarified that an employer must "accommodate [] an employee's … religious observance or practice" unless the employer can demonstrate that such an accommodation would impose an "undue hardship on the

conduct of the employer's business." 42 U.S.C. § 2000e(j). If the 1972 Title VII Amendment has any meaning at all, it must be the case that the policy in *Dewey*—making everyone, religious and secular alike, work on the Sabbath—is insufficient to comply with Title VII without particularized proof of a serious burden on the business.

To be sure, the interaction of collective bargaining agreements and Title VII obligations is complex and can be fraught for an employer. But the *Hardison* opinion went beyond the narrow issues of collective bargaining when it said in dictum that any burden that imposes "more than a de minimis cost" on an employer "is an undue hardship" under Title VII. 432 U.S. at 84. As explained above, the law's text cannot support that reading. *See* Pet. Br. 18-22.

Even though the "de minimis cost" language appeared only in dictum, it has been converted into a holding and propelled as the standard among lower courts evaluating Title VII claims against employers that fail to accommodate their employees' religious practices. Time and again, lower courts have inquired not whether an employee's request for accommodation has seriously impeded business operations, but rather whether the accommodation would require the employer to bear more than a de minimis cost. *See, e.g.*, *Small*, 952 F.3d 821 (6th Cir. 2020); *Virts* v. *Consolidated Freightways Corp. of Del.*, 285 F.3d 508 (6th Cir. 2002); *Weber* v. *Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000); *Lee* v. *ABF Freight Sys., Inc.*, 22 F.3d 1019 (10th Cir. 1994); *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982). Lower courts have gone so far as to describe the *Hardison* standard as relieving employers of their Title VII duty if the accommodation would impose even a "slight burden" or "minimal hardship" on the business—a far

cry from the "undue hardship" language Congress wrote into law. *See Walmart Stores E.*, 992 F.3d at 658-660 ("accommodating [Plaintiff's] religious practices would require [Defendant] to bear more than a slight burden"); *Endres* v. *Indiana State Police*, 349 F.3d 922, 925 (7th Cir. 2003) ("[Section 2000e(j)] does not require an accommodation that would cause more than minimal hardship to the employer or other employees"); *see also id.* at 928 (Ripple, J., dissenting from denial of reh'g) (endorsing "minimal hardship" standard).

C. Religious Minorities Need Robust Anti-Discrimination Protections And Accommodations

Courts' abandonment of Congress's "undue hardship" standard has been particularly troubling for members of minority religions, who cannot rely on prevailing cultural practices and conventions to carve out space for their unique religious practices.[4] Traditionally, businesses closed or reduced their operations on Sundays and for major Christian holy days such as Christmas and Easter, eliminating the need for individualized accommodations. *See Hardison*, 432 U.S. at 85 (Marshall, J., dissenting). Even where, as in this case, the influence of traditional religious practice has waned and employers have been expanded their business hours to include Sundays, Christian employees may rely on familiar cultural norms when they ask for time off on Sunday morning to attend church—a practice supervisors readily recognize.

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[4] While most Title VII religious-accommodation litigation has focused on requirements to work on Saturdays or Sundays for various groups of Christian and Jewish employees, Title VII "applies to all religious observances and practices and is not limited to claims of discrimination based on requirements of Sabbath work." *McDaniel* v. *Essex Int'l, Inc.*, 571 F.2d 338, 342 (6th Cir. 1978); *see also Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

Hindus, Sikhs, Jains, Buddhists, and other religious minorities, however, often cannot rely on either established norms or cultural familiarity. For example, an employer may reasonably anticipate that employees will take vacation around Christmas or Easter—or perhaps even on familiar Jewish holy days such as Yom Kippur—and schedule fewer business activities to take into account personnel absences. Few employers, however, plan for employees to miss work for Diwali. A Hindu employee, for instance, may need to schedule breaks at particular times of prayer during the work day. *Roy* v. *Board of Cmty. Coll. Trs. of Montgomery Cmty. Coll.*, 2015 WL 5553716 (D. Md. Sept. 18, 2015). And as Justice Gorsuch observed in his dissent from denial of certiorari in *Small*, "at least one court has held that it would be an undue hardship to require an employer to shift a meal break for Muslim employees during Ramadan." 141 S. Ct. at 1229 (citing *EEOC* v. *JBS USA, LLC*, 339 F. Supp. 3d 1135, 1181 (D. Colo. 2018)). Similarly, a Buddhist employee was required to participate in an Alcoholics Anonymous program that incorporated Christian content, despite the fact that a similar program based on Buddhist beliefs was available. *See* Compl. 4-5, *EEOC* v. *United Airlines*, No. 20-cv-9110 (D.N.J. filed July 20, 2020); *see also* Christian Legal Society et al. Amicus Br. 15-17, *Small* v. *Memphis Light, Gas, & Water*, No. 19-1388 (U.S.) (compiling religious-accommodation cases and finding that "claims by members of non-Christian faiths (Muslims, idiosyncratic faiths, Jews, Hebrew Israelites, Rastafarians, Sikhs, and African religions) make up 34.5 percent of the accommodation cases (39 of 113), even though non-Christian faiths made up only 5.9 percent of the population in 2014 (and significantly less than that in earlier years)" (citing Pew Research Center,

America's Changing Religious Landscape, at 4 (May 12, 2015).

Beyond time off or shift changes to commemorate less common observances and festivals, religious minorities have other unique needs that may require accommodations from their employers. Religious minorities often have distinctive clothing or grooming styles that may depart from a workplace dress code. Yet time and time again, employers are not only reluctant to recognize these needs, but propose accommodations that segregate minority employees and justify their solutions by citing hypothetical concerns and stereotypes. Lower courts often side with employers based on dubious reasoning that legitimizes the discrimination that people of these minority faiths experience.

In one case, a court sided with a restaurant that refused to employ a Sikh applicant who did not shave his beard. *EEOC* v. *Sambo's of Ga., Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981). In ruling for the restaurant, the court credited the restaurant's "grooming standards," which were "based on management's perception and experience that a significant segment of the consuming public prefer restaurants whose managers and employees are clean-shaven." *Id.* at 89. Such "adverse customer reaction … arises from a simple aversion to, or discomfort in dealing with, bearded people" or "from a concern that a restaurant operated by a bearded manager might be lax in maintaining its standards as to cleanliness and hygiene." *Id.* The court thus elevated customers' perceptions—themselves tainted by discrimination—over the prospective employee's religious beliefs.

Speculative concerns about customers' perceptions continue to plague the decisions of employers and the lower courts. In *Camara* v. *Epps Air Service, Inc.*, the

employer refused to permit a Muslim employee to wear a hijab in a customer-facing position. 292 F. Supp. 3d 1314, 1330-1332 (N.D. Ga. 2017). The employer testified that customers "might have a problem" seeing a customer service representative in a hijab, and "conceded that negative stereotypes and perceptions about Muslims was a factor in his decision." *Id.* at 1322. Drawing on *Hardison*'s de minimis language and relying on the employer's articulated concerns, the court reasoned that plaintiff's request for an exemption from the company's appearance policy was an undue hardship. *Id.* at 1330-1331; *see also Birdi* v. *UAL Corp.*, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002) (dismissing Title VII claim brought by Sikh employee who was prohibited under uniform code from wearing turban in customer-facing role and holding that transfer accommodation to different role was reasonable).

To be sure, employers may have valid reasons for instituting uniforms or imposing dress codes. But what is troubling is that many such policies tend to be unevenly enforced and enforcement efforts are targeted against employees of minority faiths. In 2004, the Department of Justice sued the New York Metropolitan Transportation Authority and New York City Transit Authority for selectively enforcing uniform policies against Sikhs and Muslims who wear turbans or headscarves. Press Release, *Dep't of Justice, Justice Department Sues New York Metropolitan Transportation Authority and New York City Transit Authority Alleging Religious Discrimination* (Sept. 30, 2004), https://www.justice.gov/archive/opa/pr/2004/September/04_crt_665.htm. The Justice Department specifically found that after 2002, Sikhs and Muslims were involuntarily transferred to other jobs where they would not interact with the public, while

other employees were permitted to "routinely w[ear] non-MTA headwear, such as baseball caps." *Id.*

Employers' concerns about consumer perceptions of employees of minority faiths have only increased. The EEOC observed in recent guidance that "[r]ecent tragic events at home and abroad have increased tensions with certain communities, particularly those who are, or are perceived to be, Muslim or Middle Eastern," such as Sikhs. EEOC, *What You Should Know: Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern*, OLC Control No. EEOC-NVTA-0000-24 (Feb. 11, 2016). The Commission "urge[d] employers and employees to be mindful of instances of harassment, intimidation, or discrimination in the workplace and to take actions to prevent or correct this behavior." *Id.*

> In the initial months after the 9/11 attacks, the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims. As a result, EEOC initiated a specific code to track charges that might be considered backlash to the 9/11 attacks…. In the 10 years following the attacks, EEOC received 1,036 charges using the code, out of more than 750,000 charges filed since the attacks. Of the charges filed under the code, discharge (firing) was alleged in 614 charges and harassment in 440 charges…. Since 2001, EEOC has filed or settled a number of lawsuits alleging discrimination on the basis of national origin and religion against the Muslim, Sikh, Arab, Middle Eastern, and South Asian communities.

Id.

That members of these faiths have been harassed and discriminated against is tragic enough. But employers and courts have used such conduct—and nebulous theories of customer perceptions—to legitimize their failure to accommodate employees of minority faiths. In the face of continued, pervasive discrimination, permitting lower courts to continue to apply *Hardison*'s "de minimis cost" standard flies in the face of both the plain text of Title VII and Congress's intent in strengthening protections for religious minorities. This Court should clarify that *Hardison*'s language is non-binding dictum and that "undue hardship" has the same meaning in Title VII that it has in the ADA and other statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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