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 *AMICUS CURIAE* LIBERTY COUNSEL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Liberty Counsel is a nonprofit legal organization that defends the right of Americans to live and work according to their sincerely held religious beliefs. Through its decades of religious-liberty litigation, including representing plaintiffs bringing claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, *Amicus* has developed a substantial body of expertise relating to the questions presented in this case.

Amicus respectfully submits that this Brief will help the Court understand (a) the devastating consequences the de minimis standard set forth in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), has had on religious employees; (b) how lower courts have usurped Title VII's favored protections of religious employees based on speculative "hardships" for businesses and coworkers; and (c) the need to overrule *Hardison* and restore Title VII of the Civil Rights of Act of 1964 as the preeminent civil rights statute that Congress intended.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amicus Curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should overrule the interpretation in *Trans World Airlines, Inc. v. Hardison* that Title VII does not require an employer to accommodate an employee's religious beliefs if doing so would impose more than a de minimis burden on the employer. 432 U.S. 63, 84 (1977). *Hardison's* de minimis standard—found nowhere in the Title VII's text or legislative history—has led to absurd results, allowing employers to discriminate against religious employees with impunity, thereby forcing workers to choose between their religious beliefs and their jobs.

This Brief provides an in-depth example of how one lower court has rendered Title VII's religious workplace protections to near futility—all because of two passing paragraphs at the end of the *Hardison* opinion. If Title VII's religious protections mean anything, then "it is past time for the Court to correct [*Hardison*]," *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari), and the Court should do so here.

Hardison's test is not supported by the text of Title VII and is directly contrary to Congressional intent behind Title VII. Additionally, *Hardison*'s de minimis test imposes unique – and unlawful – burdens on religious discrimination claimants alone, making them the "odd man out." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). *Hardison* was wrong the day it was decided, and it is wrong today. This Court should reverse.

ARGUMENT

I. COURTS AND EMPLOYERS INTERPRET *HARDISON*'S DE MINIMIS STANDARD NARROWLY, LEADING TO ABSURD RESULTS.

Ashley Leigh, Erik Berg, and James Griffith are exceptionally talented musicians at the height of their craft. For 82 combined years, they served the South Florida arts community as tenured players in the prestigious Naples Philharmonic Orchestra. Doc. 1 at 7.[2] But that all changed in 2021 when their employer, Artis-Naples, instituted a COVID-19 vaccination mandate. Doc. 1 at 15. In keeping with their sincerely held religious beliefs, they could not receive any of the available vaccines because each was developed using the cells of aborted fetuses. Forced to choose between their careers and their faith, the musicians turned to Title VII, and sought reasonable accommodations for their sincerely held beliefs—including frequent testing, the use of personal protective equipment, and other measures that their employer was already providing for patrons, and that other employers were providing for their employees. But *Hardison* stood in their way. Now the musicians are unemployed and their careers destroyed because of "a single sentence with little explanation or supporting analysis." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari).

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[2] The record cites in this Brief indicate the docket number and ECF page number of documents filed in *Leigh, et al. v. Artis-Naples, Inc.*, No. 2:22-cv-606-JLB (M.D. Fla.).

A. *Hardison* Effectively Stifles Title VII's Protections For Employees With Religious Objections To Their Employer's Vaccination Mandate.

In March 2020, in response to the worldwide spread of the novel coronavirus SARS-CoV-2, Artis-Naples suspended all Naples Philharmonic events for the rest of the 2019-2020 performance season. Artis-Naples restarted its performance offerings in September 2020 after adopting and implementing various COVID-19 protocols, including weekly testing and masking for musicians, socially distanced performances, and placing filtrating fans on stage. With these policies in place, the Naples Philharmonic, comprised of both vaccinated and unvaccinated musicians, successfully delivered a full slate of concerts during the 2020-2021 season. Doc. 1 at 14–15.

In July 2021, Artis-Naples announced a COVID-19 vaccination requirement for all employees, including all Naples Philharmonic tenured and per-service musicians. Doc. 1 at 15. Leigh, Berg, and Griffith (collectively, the "Musicians") had sincere religious objections to Artis-Naples's COVID-19 vaccination mandate. As Bible-believing Christians, the Musicians believed that receiving each available vaccine was morally compromising because each was developed with cell lines from aborted fetuses. Doc. 1 at 10–11.

Consistent with Title VII, the Musicians brought their bona fide religious objections to Artis-Naples's

attention, and in good faith they requested a reasonable accommodation to the vaccine mandate. Doc. 1 at 11. A reasonable accommodation would have been periodic testing and masking in lieu of vaccination. After all, the Naples Philharmonic successfully carried out a full performance season during the height of the pandemic adopting these same mitigation measures.

But Artis-Naples refused to even consider accommodating the Musicians' religious beliefs. Despite peddling an accommodation process ostensibly to feign compliance with Title VII, Artis-Naples had already resolved to have a vaccinated-only workplace, with no religious exemptions for musicians. Doc. 1 at 17. So, in October 2021, Artis-Naples suspended the Musicians with partial pay for the remainder of the 2021-2022 season, and a number of other per-services musicians who objected to the mandate on religious grounds lost their jobs. Doc. 1 at 18, 23.

The month after Artis-Naples suspended the Musicians, Governor Ron DeSantis signed into law Florida Statute § 381.00317, which prohibits private employers from imposing a COVID-19 vaccination mandate on employees without providing individual exemptions, including exemptions for religious beliefs and periodic testing. Doc. 1 at 25–26. The Musicians again requested exemptions from the mandate, this time using the process set forth by the Florida Department of Health. Doc. 1 at 28–29. Under Section 381.00317, Artis-Naples was

required to grant the Musicians an exemption and allow them to return to work.

Emboldened by *Hardison*, Artis-Naples again refused to follow Title VII, and further refused to comply with Fla. Stat. § 381.00317. Instead, in June 2022, Artis-Naples fired the Musicians from their tenured positions. Doc. 1 at 29–30. It then posted nationwide auditions to replace them. Doc. 6 at 11. In response, the Musicians filed suit in September 2022 in the Middle District of Florida, asserting Title VII claims for failure to accommodate, wrongful termination, and retaliation. *Leigh, et al. v. Artis-Naples, Inc.*, No. 2:22-cv-606-JLB (M.D. Fla.). The Musicians also moved for a preliminary injunction that would prohibit the Naples Philharmonic from replacing their tenured positions or alternatively order the Musicians' reinstatement pending the litigation. Doc. 6.

In their moving papers, the Musicians established a prima facie case of religious discrimination because Artis-Naples wholly failed to consider their accommodation requests, as Title VII requires. Doc. 6 at 16–17. They also demonstrated extensively that Artis-Naples could not assert an "undue hardship" defense. Doc. 6 at 17–23. For instance, the Musicians pointed out that their proposed accommodations—namely, regular testing and masking—were already successfully carried out by the Naples Philharmonic for the entire 2020-2021 performance season and thus would pose no health or safety risk. The Musicians further showed that, because Florida law and public policy *required*

private employers to exempt requesting workers from their vaccination mandates, Artis-Naples could not plausibly argue that complying with state law would be an undue hardship. Doc. 6 at 18–19.

The district court held an evidentiary hearing in November 2022 and issued its ruling the following month. *Leigh v. Artis-Naples, Inc.*, 2022 WL 18027780 (M.D. Fla. Dec. 30, 2022). In short, the district court found that the musicians established a prima facie case of religious discrimination under Title VII because Artis-Naples failed to accommodate the musicians' religious beliefs. 2022 WL 18027780, at *7.

But, like so many federal courts bound by *Hardison*, the district court observed that "the undue hardship test is 'not a difficult threshold to pass.'" *Id.*, at *8 (quoting *Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009)). Consequently, the district court found that Artis-Naples "met its minimal burden" of establishing that accommodating the musicians would cause a more than "de minimis" hardship on its business. *Id.*, at *7.

Notably, the district court did not address a single argument that the Musicians made as to why Artis-Naples could not meet its "undue hardship" defense. Doc. 6 at 17–23. Instead, it drew from a variety of rulings from various circuits that all stemmed from *Hardison*'s twisted dicta. *Id.*, at *7–8. Thus, relying on *Hardison* and its progeny, the district court rejected the Musicians' Title VII claims

and accordingly denied their request for injunctive relief.

B. Relying On *Hardison*, District Courts Reduce Title VII's Religious Protections To Near Futility.

The legal history and contemporary criticism of *Hardison* is well presented in the briefs of Petitioner and other *amici*, and thus *Amicus* will not repeat them here. Relevant, however, is that the Equal Employment Opportunity Commission interprets *Hardison*'s "de minimis cost" language simply to mean "costs similar to the regular payment of premium wages of substitutes," whereas administrative costs such as "rearranging schedules and recording substitutions for payroll purposes" do not amount an undue hardship. 29 C.F.R. § 1605.2(e)(1). Further, the Seventh Circuit rightly observed that "*Hardison* is most instructive when the particular situation involves a seniority system or collective bargaining agreement, as in *Hardison* itself." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013).

Perhaps recognizing *Hardison*'s inherent limitations, the district court in *Leigh* tried to frame the issue as involving a collective bargaining agreement: "In demonstrating that the COVID Policy was collectively bargained for by the musicians [through their representatives], Artis-Naples has shown that accommodating Plaintiffs' desires to not be vaccinated would implicate the entire Philharmonic who chose to be bound by the COVID-19 vaccine requirement." 2022 WL

18027780, at *9. Thus, the district court reasoned, "[t]he potential impact that a vaccination exemption might have on the entire cohort of musicians who, through its representatives, adopted a uniformly applied COVID Policy weighs in favor of the significance of the burden that such an exemption might place on the conduct of Artis-Naples's business." *Id.*, at *9 (citing *Hardison*, 432 U.S. at 81).

Aside from the fact that the Musicians' accommodation requests implicated no collectively bargained right, the problem with the district court's reasoning is that Artis-Naples's vaccination policy specifically outlined a process by which musicians may apply for a religious or medical accommodation. So even if the "entire cohort of musicians" "chose to be bound by the COVID-19 vaccine requirement," 2022 WL 18027780, at *9, *the policy nonetheless provided a process for religious and medical accommodations*, which Artis-Naples's leadership subsequently refused to honor. Accommodating the Musicians could not be an undue hardship merely because the players' association had approved the vaccination policy; the policy expressly provided for religious accommodations. And yet, *Hardison*'s de minimis standard provided refuge for Artis-Naples' "undue hardship" pretext where none should have existed.

Hardison's flimsy de minimis threshold also enables courts—like the district court did in *Leigh*—to contravene this Court's conclusion that "Title VII does not demand mere neutrality with regard to

religious practices—that they be treated no worse than other practices," but instead gives religious employees "favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual ... because of such individual's' 'religious observance and practice.'" *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). Contravening that holding, Artis-Naples wholly refused to even consider the Musicians' accommodation requests, having already decided to implement a vaccinated-only workforce despite its own policy's accommodation requirements. Because the Musicians required an accommodation as an "aspec[t] of religious . . . practice," the district court erred in upholding their subsequent discharge on account of "an otherwise-neutral policy" that was approved by the employees' informal representatives. *Id*.

This Court is clear: "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id*. *Hardison* has enabled lower courts to depart from this standard and should therefore be overruled.

C. The Suffocating Effect Of *Hardison* Is So Strong That It Even Usurps State Laws Requiring A Religious Exemption From Certain Employment Practices.

As a matter of law (not to mention common sense), it should never be an "undue hardship" for an employer merely to comply with the laws and public policy of its own state. And yet, *Hardison*'s permissive "undue hardship" framework allows

employers to escape the dictates of Title VII even when the accommodations sought by their employees are already required by state law.

In *Leigh*, Florida law expressly prohibits private employers from "impos[ing] a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of … religious reasons." Fla. Stat. § 381.00317(1). In short, under Section 381.00317, an employer *must allow* the religiously objecting employee to opt out of its vaccine mandate. Yet Artis-Naples did the precise opposite; it doggedly and recklessly imposed a universal vaccine mandate without providing for a religious-based opt out, contending that it would be a "undue hardship" under *Hardison* for it to provide *even what the state law already required it to provide.*

Remarkably, the district court wholly failed to address the Musicians' argument that complying with state law cannot be an undue hardship. But if it is true that an employer need not provide an accommodation that would result in a violation of state law, *see United States v. Bd. of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990) (concluding that it "would be an undue hardship to require a school board to violate an apparently valid criminal statute"),[3] then

[3] *See also, e.g.*, *Lowman v. NVI LLC*, 821 F. App'x 29, 32 (2d Cir. 2020) ("Because NVI's SSN disclosure policy is mandated by federal law, NVI cannot depart from the policy to accommodate Lowman without suffering an undue hardship."); *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000)

the converse must also be true: An employer cannot invoke the "undue hardship" defense under Title VII for an accommodation that state law already requires it to provide. That is even more obvious when the law itself proposes reasonable alternatives to compulsory vaccination. *See* Fla. Stat. § 381.00317(1) (listing "periodic testing" and "the use of employer-provided personal protective equipment").

The district court's giving credence to Artis-Naples' "undue hardship" mantra, despite the clear state law factually negating that defense, underscores how much *Hardison* has tied the hands of lower courts to properly interpret and apply Title VII in religious-discrimination cases.

D. *Hardison* Seemingly and Erroneously Waives The Burden On The Employer To Prove That A Religious Accommodation Would Pose A Direct Threat To Health And Safety.

The district court in *Leigh* also upheld the Musicians' discriminatory discharge on the grounds

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("Requiring defendants to violate the Internal Revenue Code and subject themselves to potential penalties by not providing Seaworth's SSN on information returns results in undue hardship."); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830–31 (9th Cir. 1999) (holding that the employer was not liable for refusing to hire person who declined for religious reasons to provide his social security number because accommodating applicant's religious beliefs would cause employer to violate federal law, which constituted "undue hardship").

that allowing unvaccinated musicians to perform on stage "created an undue hardship for Artis-Naples because it 'posed an increased risk to the health and safety of other employees.'" 2022 WL 18027780, at *9 (citing Doc. 20-1 at ¶ 36). Indeed, "[c]ourts have … essentially adopted a per se rule that employers do not need to accommodate religious employees in a manner that would result in health or safety hazards." Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 139 (2015); see *id.* (collecting cases). Notwithstanding that "[t]he concern with health and safety is most likely to be an issue with employers in the business of public safety such as police departments," *id.*, *Hardison* has emboldened employers to fasten a "for health and safety" button on any discriminatory employment policy, confident that a trial court will hesitate to dig deeper.

Such is the case with the Naples Philharmonic musicians. For the district court, the starting point should have been Title VII, which affirmatively obligates an employer to reasonably accommodate an employee's religious practice short of incurring undue hardship. 42 U.S.C. § 2000e(j). At a minimum, because "reasonable accommodation" and "undue hardship" are not defined under Title VII, "[e]ach case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably." *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (quoting *United States*

v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977)).

But for *Hardison*, the district court should have found that accommodating the Musicians would *not* have posed a "direct threat to the health and safety of others." 2022 WL 18027780, at *7 (quoting Doc. 46-1 at 2). As a threshold matter, Title VII does not define "direct threat." In the disability context, however, "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2. According to federal regulations, determining whether an individual poses a "direct threat" must "be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job." *Id*. This assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Id*. The regulations then set forth several factors to consider in determining whether an individual poses a "direct threat": "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." *Id*.

In sweeping fashion, the district court accepted Artis-Naples's "health and safety" excuse without engaging in any meaningful analysis of its validity. Indeed, the district court found that Artis-Naples "presented credible evidence that providing

accommodations might compel other employees to accept less favorable working conditions by forcing them to rehearse and perform for extended periods of time in close proximity to individuals who were at a higher risk of transmitting COVID-19." 2022 WL 18027780, at *11. But Artis-Naples presented no evidence of the sort. In fact, it presented *no* evidence—much less any scientific or evidence—that the Musicians "were at a higher risk of transmitting COVID-19" than their vaccinated coworkers. *Id*.

By contrast, the Musicians in their moving papers cited numerous medical studies showing that Artis-Naples's position that unvaccinated employees are vectors of disease, while vaccinated employees are not, contravenes scientific evidence. For example, an October 2021 study published in the prestigious peer-reviewed medical journal *The Lancet* shows that the impact of vaccination on community transmission of circulating variants of SARS-CoV-2 is not significantly different from the impact among unvaccinated people. Doc. 1 at 32. Another study found no major differences between vaccinated and unvaccinated individuals of SARS-CoV-2 viral loads, even in those with proven asymptomatic infections. Doc. 1 at 32. And in January 2022, an infectious disease expert explained that "the current evidence suggests that current mandatory vaccination policies might need to be reconsidered, and that vaccination status should not replace mitigation practices such as mask wearing, physical distancing, and contact-tracing

investigations, even within highly vaccinated populations." Doc. 1 at 33.

Even more recently, the Centers for Disease Control and Prevention relaxed its COVID-19 guidelines in August 2022, announcing that people no longer need to maintain six feet of social distancing and dropped the recommendation of testing asymptomatic people in most community settings. Doc. 1 at 34. According to CDC officials, the changes "are driven by a recognition that an estimated 95% of Americans 16 and older have acquired some level of immunity, either from being vaccinated or infected." Doc. 1 at 35.

In short, Artis-Naples's argument that allowing unvaccinated employees to work would be "an undue hardship" is unsupported by scientific evidence and is at odds with the CDC guidelines. Yet thanks to *Hardison*'s exceedingly low threshold, the district court accepted Artis-Naples's excuse without questioning.

E. *Hardison* Allows District Courts To Find Undue Hardship Based On Hypothetical Harms, And Subjects Religious Beliefs To A Heckler's Veto.

The district court also accepted Artis-Naples's proffered claims "as to a number of business interests that would have been negatively impacted if exemption requests were granted." 2022 WL 18027780, at *10. All these "business interests" were wholly speculative and thus should have been rejected. *See generally* Debbie N. Kaminer, *Title*

VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment, 21 Berkeley J. Emp. & Lab. L. 575, 612 (2000) (collecting cases holding that businesses must present actual evidence and not rely on speculative hypothetical harms).

The district court first accepted Artis-Naples's purported concern "that if Artis-Naples did not require all employees to be vaccinated, it would not be able to contract with touring Broadway performances, which required that 'all performers on stage, backstage as well, [ ] be vaccinated.'" 2022 WL 18027780, at *10 (quoting Doc. 48 at 102). Although the district court observed that "there were no Broadway productions, visiting orchestras, or visiting artists during the 2020–2021 season," it still accepted Artis-Naples's speculation that "not enforcing a rigid vaccine mandate would harm 'business relationships with other guest artists, Broadway series, [and] dance series' in the 2021–2022 season." *Id.* (quoting Doc. 48 at 52–53, 103).

The tenuousness of that speculation is further underscored by the fact that Artis-Naples did not even try to reasonably accommodate the Musicians from any third-party requirements. For example, if a touring Broadway production (which is not even orchestra related) required performers to be vaccinated, the Musicians could have stayed home the days that the production was in town. Such a simple accommodation was not even discussed—Artis-Naples chose instead to discriminate. And, more significantly, touring Broadway productions

bring their own musicians, and would not have even required the participation of Artis-Naples' Musicians in any event.

The district court in *Leigh* further accepted that "allowing exemptions to the Philharmonic vaccine policy may have unfairly imposed Plaintiffs' religious beliefs on other musicians who complied with the vaccine policy." 2022 WL 18027780, at *10. Nothing in the record supported that conjecture. Instead, the district court cited an Eighth Circuit decision that upheld a lower court's finding that an employer need not allow a religious employee to wear a graphic button of an aborted fetus that caused a "substantial disruption at work." *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341 (8th Cir. 1995). As the Eight Circuit observed, "Title VII does not require an employer to allow an employee to impose his religious views on others." *Wilson*, 58 F.3d at 1342.

The *Leigh* and *Wilson* courts are not alone in veering from Title VII's requirements—and even providing co-workers with heckler veto power over the sincere religious beliefs of Title VII claimants—under the guise of *Hardison*'s feeble de minimis standard. See *Groff v. DeJoy*, 35 F.4th 162, 176 (3d Cir. 2022) (Hardiman, J., dissenting) ("Title VII requires USPS to show how Groff's accommodation would harm its "*business*," not Groff's coworkers." (emphasis added)). Indeed, since *Hardison*, employers commonly defend their refusal to accommodate an employee's religious beliefs "by pointing to the effects that such accommodation

might have on other employees." Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 406 (1997). Consequently, "any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level." *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979) (citation omitted). "Such an application of *Hardison*," the Eighth Circuit warned, "would provide a per se proscription against any and all forms of differential treatment based on religion." *Id*. After all, and as Judge Hardiman noted in his dissent in the case at bar, Title VII requires the employer to show how the employee's accommodation would harm its "business," *not* coworkers. *Groff*, 35 F.4th at 176 (Hardiman, J., dissenting) (citing 42 U.S.C. § 2000e(j)).

In *Leigh*, the district court's concern that accommodating the Musicians would in effect impose their religious beliefs on their fellow orchestra players, despite being irreconcilable with the text of Title VII, is par for the course under *Hardison*. Indeed, in *Amicus*' experience litigating religious-discrimination employment cases, instead of focusing on whether the employer would suffer significant difficulty or expense by accommodating an employee's religious beliefs, courts routinely focus on perceived "undue hardships" *on coworkers*. (Many of these supposed hardships are trivial or not

supported by actual evidence.) In doing so, *Hardison* has bestowed on coworkers a heckler's veto by which they would rather have their religious coworker fired than accorded "favored treatment" under Title VII. *Abercrombie*, *supra*, 575 U.S. at 775.

In the same vein, *Hardison* encourages discriminatory treatment against religious employees. *Hardison* emboldens workplace discrimination because it makes it too easy for employers and coworkers to justify their discriminatory attitudes under the guise of "co-worker impact" or "promoting health and safety." In short, the Court should restore the focus of the "undue hardship" standard on the employer's business as required by Title VII, not on the feelings of coworkers.

II. *HARDISON*'S DE MINIMIS RULE MAKES A MOCKERY OF TITLE VII AND DISCRIMINATES AGAINST RELIGION, RELEGATING RELIGIOUS RIGHTS TO ODD MAN OUT STATUS.

The foregoing example of lower courts' application of *Hardison*'s de minimis rule demonstrates the truth recognized by Justice Gorsuch in *Small*, that *Hardison* "dramatically revised—really, undid—Title VII's undue hardship test." *Small v. Memphis Light, Gas, & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari). *Hardison*'s de minimis standard was adopted with no party arguing for it as the appropriate application of Title VII, *Patterson v.*

Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., concurring), with no textual support in the statute, *Small*, 141 S. Ct. at 1228, and "is intolerable" "as a matter of law" because it "adopt[ed] the very position that Congress expressly rejected in 1972." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting). "What could justify so radical a departure from [Title VII's] terms and long-settled rules about [statutory] interpretation?" *Roman Catholic Diocese of Brooklyn. v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J.). *Hardison* offered merely "a single sentence with little explanation or supporting analysis." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). "[T]ime has [not] been kind" to that single sentence with no interpretative justification. *Id.* The time has long since passed to relegate *Hardison*'s de minimis rule to the dustbin of history.

Hardison was wrong when it was decided, and it is wrong today. As Justice Marshall forecasted, *Hardison*'s de minimis test "needlessly deprive[s]" religious adherents of their livelihoods "simply because [they] chose to follow the dictates of [their conscience," and is a "tragedy exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God." *Hardison*, 432 U.S. at 96 (Marshall, J., dissenting). The Naples Musicians' example, *supra* Section I, demonstrates the prescience of that forecast. And, "despite Congress' best efforts, one of this Nation's pillars of strength our hospitality to religious diversity has been seriously eroded" by *Hardison*. *Id.*

"All Americans will be a little poorer until today's decision is erased." *Id.* Only a reversal of *Hardison* can restore America's pillar of religious tolerance, and "it is past time for the Court to correct it." *Small*, 141 S. Ct. at 1229 (Gorsuch, J., dissenting).

A. *Hardison*'s De Minimis Rule Is Directly Contrary To The Plain Text Of Title VII.

Title VII's protection for sincerely held religious beliefs requires an employer to "demonstrate that he is unable to reasonable accommodate [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). No doubt Congress imposed the duty on employers to accommodate sincerely held religious beliefs "somewhat awkwardly," *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986), by placing it "in Title VII's statutory definition of 'religion.'" *Small v. Memphis Light, Gas, & Water*, 952 F.3d 821, 826 (6th Cir. 2020) (Thapar, J., concurring). That puzzling statutory scheme notwithstanding, Title VII required an "undue hardship," and nowhere even hinted at a de minimis threshold. As Judge Thapar recognized, "you might be wondering where the de minimis test even came from? *Certainly not the text of Title VII*." *Id.* at 828 (emphasis added).

And, though Congress did not define "undue burden," Congress "didn't leave matters there." *Small*, 952 F.3d at 827 (Thapar, J., concurring). "Instead, it specified that the 'hardship' must be

'undue.'" *Id.* Indeed, "[w]hat the statute says, in plain words, is that [religious accommodations] are required unless 'undue hardship' would result." *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting).

"On its own terms, then, the word 'hardship' would imply some pretty substantial costs." *Small*, 952 F.3d at 827 (Thapar, J., concurring). *See also Adeyeye v. Hartland Sweetners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013) ("Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship of that."); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something greater than hardship."); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) ("an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine").

As Judge Thapar noted, "undue hardship" is appropriately understood as "exceeding what is appropriate or normal"; in short, it must be 'excessive.'" *Small*, 952 F.3d at 827 (Thapar, J., concurring) (cleaned up). Thus, "the phrase 'undue hardship' tells us that the accommodation must impose significant costs on the company." *Id.* Yet, *Hardison* interpreted "undue burden" to mean something trivial — a de minimis burden. "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring). The problem with *Hardison* is that it represented a death knell to statutory protection for

religious adherents in the workplace. As Justice Marshall stated, *Hardison*'s test "deals 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).

> The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

Id. at 86-87.

Simply put, *Hardison*'s interpretation of the statute "effectively nullif[ied] it" because the de minimis test arising from it "makes a mockery of the statute." *Id.* at 88-89. "*Hardison*'s atextual

interpretation of undue hardship has been greatly maligned since the day the case was decided." *E.E.O.C. v. Kroger Ltd. P'ship*, No. 4:20-cv-1099-LPR, 2022 WL 2276835, *16 n.147 (E.D. Ark. June 23, 2022). It is time to decisively correct it.

B. *Hardison*'s De Minimis Rule Is Contrary To The Legislative History Of Title VII, Plain English, And Statutory Canons.

Justice Marshall aptly noted that *Hardison*'s standard "seems oblivious of the legislative history of the 1972 amendments to Title VII." *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting). Due to several court decisions problematically adopting a construction similar to *Hardison*, Congress unanimously adopted an amendment to Title VII "to make clear that Title VII requires religious accommodation, even if unequal treatment would result." *Id.* at 89. Indeed, "[w]hen Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed Congress of these decisions which, he said, had 'clouded' the meaning of religious discrimination." *Id.* As such, Senator Randolph introduced an amendment to bring clarity to Title VII's protection for religious adherents, which mirrored the EEOC's own regulations, to make it unlawful to "refuse to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.* His amendment was adopted unanimously in the Senate, accepted by the Conference Committee, and approved by both Houses of Congress. *Id.*

Nevertheless, despite this history, this Court's *Hardison* decision was "in direct contravention of Congressional intent." *Id.*

What's worse? *Hardison*'s interpretation cannot even be reconciled to plain English. *Small*, 141 S. Ct. at 1228 ("the *de minimis* cost test . . . defies simple English usage") (Gorsuch, J., dissenting). As Justice Marshall noted, "I seriously question whether simple English permits 'undue hardship' to be interpreted to mean 'more than de minimis costs." *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting); *Small*, 952 F.3d at 828 (Thapar, J., concurring) (same).

Finally, as Judge Thapar noted, the de minimis cost test also defies explanation under traditional canons of statutory construction. "De minimis means a 'very small or trifling matter.'" *Id.* (quoting *Black's Law Dictionary* 388).) And, such a construction of undue hardship seems to adopt "the opposite of an undue hardship" as the standard. *Id.* But, such a standard is "in conflict with the background legal maxim *de minimis non curat lex* ('the law does not care for trifling matters')." *Id.* (quoting *Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992)). How can the appropriate construction for a duly enacted statute be to focus on trifles when "venerable maxims" precluding such construction are "part of the established background of legal principles against which all enactments are adopted and which all enactments (absent contrary indication) are deemed to accept?" *Wisconsin Dep't of Rev.*, 505 U.S. at 231.

Hardison, then, essentially means that "[t]he law usually does not care for trifling matters but apparently Title VII does." *Small*, 952 F.3d at 828 (Thapar, J., concurring). But, "[i]f the statute in question requires courts to select among trifles, *de minimis non curat lex* is not Latin for *close enough for government work*." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 234 (2014).

C. *Hardison*'s De Minimis Rule Impermissibly, and Unconstitutionally, Makes Religion The "Odd Man Out" For Employment Discrimination.

Finally, no other provision of Title VII (or any other federal law deploying the "undue hardship" language) has been interpreted to mean merely de minimis costs. As Justice Gorsuch noted, "Title VII's right to religious exercise has become the odd man out." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). In numerous statutes, Congress has articulated an undue hardship standard, and in none of those statutes has that undue burden been deemed satisfied by mere de minimis costs.

1. Other anti-discrimination statutes do not relegate religious beliefs to "odd man out" status.

A similar employment discrimination analogue, the Americans with Disabilities Act, "requires companies to provide reasonable accommodations unless doing so would impose an undue hardship on their business." *Small*, 952 F.3d at 827 (Thapar, J.,

concurring) (quoting 42 U.S.C. § 12112(b)(5)(A)).) Unlike Title VII, Congress provided a definition for "undue hardship," and defined it as "an action requiring *significant difficulty or expense*." 42 U.S.C. § 12111(10) (emphasis added).

In the Fair Labor Standards Act context, Congress defined "undue hardship" to mean "causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. § 207(r)(3).

Under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4303(10), 4313(a)(1)(B), (a)(2)(B), an employer must "restore a returning United States service member to his prior role unless doing so would cause an undue hardship." *Id.*; *see also Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting). That statute defines "undue hardship" as "requiring significant difficulty or expense" to the employer." 38 U.S.C. § 4303(16).

"Nor does the meaning of 'undue hardship' change if one ventures further afield in the United States Code." *Small*, 952 F.3d at 827 (Thapar, J., concurring). In terms of being excused from jury duty, a citizen must demonstrate an undue hardship, which means *inter alia* "extreme inconvenience to the juror," "severe economic hardship," or "any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned." 28 U.S.C. § 1869(j).

Or, venture farther afield into the Bankruptcy Code, which permits a debtor to discharge student loan debts if they can show 'undue hardship," 11 U.S.C. § 523(a)(8), and courts have construed undue hardship in that context to mean "intolerable difficulties greater than the ordinary circumstances that might force one to seek bankruptcy relief." *In re Thomas*, 931 F.3d 449, 454 (5th Cir. 2019).

As is abundantly clear, *Hardison*'s de minimis test stands alone in its hostile and discriminatory treatment to religious discrimination claims.

2. Other classes protected from discrimination are not relegated to "odd man out" status.

More troubling for *Hardison*'s de minimis standard for *religious* discrimination is Title VII's treatment of other protected classes of employees. Title VII prohibits discrimination on the basis an employee's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Yet, only in religious discrimination is an undue hardship standard deployed. 42 U.S.C. § 2000e(j). In race, color, sex, or national origin cases, the prohibition on discrimination is unqualified. Employment discrimination plaintiffs in those matters need only make out a prima facie case that they belong to a protected class of employees and that their status was impermissibly taken into account for employment decisions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). If a prima facie case is established, the burden then

shifts to the employer to articulate a nondiscriminatory rationale for its decision. *Id.* If the employer can do that, the burden then shifts to the employee to demonstrate that the employer's proffered justification is pretextual or invalid. *Id.*

That simple framework applies to race and color discrimination claims, *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 626 (1987), as well as sex discrimination claims. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Yet, religious discrimination claims are treated wholly differently and required to survive the extra-textual requirement of de minimis cost.

Or, take the Age Discrimination in Employment Act. That statute, similar to Title VII, prohibits employers from failing or refusing to hire or otherwise discriminating against an individual because of their age. 29 U.S.C. § 623(a). And, that statute's protections were derived *in haec verba* from Title VII. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Age discrimination plaintiffs, in the absence of direct evidence of discrimination, are merely required to satisfy the same *McDonnell Douglas* framework, with no corresponding duty to demonstrate de minimis cost. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Thus, religious discrimination plaintiffs are treated – yet again – less favorably than other employment discrimination plaintiffs. Indeed, "[a]lone among comparable statutorily protected civil rights, an employer may dispense with [religious exercise]

nearly at a whim." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., concurring).

As Judge Thapar eloquently noted, "[t]he irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities—people who seek to worship their own God, in their own way, and on their own time." *Small*, 952 F.3d at 829 (Thapar, J., concurring).

> The American story is one of religious pluralism. The Founders wrote that story into our Constitution in its very first amendment. And almost two-hundred years later, a new generation of leaders sought to continue that legacy in Title VII. But the Supreme Court soon thwarted their best efforts. Even at that time, this ultimate tragedy was clear.

Id.

As the stories of Ashley Leigh, Erik Berg, and James Griffith, the story of Gerald Groff, and the stories of countless healthcare workers across the country[4] demonstrate, the time has come for

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[4] *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (Gorusch, J., dissenting); *Dr. A v. Hochul*, 142 S. Ct. 552 (2021) (Gorsuch, J., dissenting); *Does 1-6 v. Mills*, 16 F.4th 20, 36 (1st Cir. 2021) (holding that Title VII did not require Maine hospitals to extend accommodations to healthcare workers with religious exemptions to compulsory COVID-19 vaccination because it would have caused an undue hardship); *Does 1-2 v. Hochul*, No. 21-CV-5067 (AMD)(TAM), 2022 WL 4637843 (E.D.N.Y Sept.

Hardison's tragic tale of religious discrimination to conclude and its de minimis test to be overruled.

CONCLUSION

Amicus cannot say it better than Justice Gorsuch: *Hardison*'s "mistake here is of the Court's own making—and it is past time for the Court to correct it." *Small*, 141 S. Ct. at 1229. *Hardison*'s de minimis rule was incorrect was it was decided, and it is incorrect today. This Court should overrule *Hardison* and restore Title VII's protection against religious discrimination to its cherished role in the framework on this Nation.

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30, 2022) (same); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (same).