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 CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GARY M. LAWKOWSKI
Counsel of Record
Supreme Court Bar No. 315998
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Telephone: 703-574-1654
GLawkowski@DhillonLaw.com

MICHAEL BOOS
DANIEL H. JORJANI
Citizens United
Citizens United Foundation
The Presidential Coalition
1006 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Telephone: 202-547-5420
MichaelBoos@CitizensUnited.org
DanielJorjani@CitizensUnited.org

Counsel for amici curiae Citizens United, Citizens United Foundation, and The Presidential Coalition

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and amici in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United, Citizens United Foundation, and the Presidential Coalition as *Amici Curiae* in Support of Petitioner, *Percoco v. United States*, No. 21-1158 (U.S. Sept. 7, 2022); Brief of Citizens United, Citizens United Foundation, and the Presidential Coalition as *Amici Curiae* in Support of Petitioners, *Moore, et al. v. Harper, et al.*, No. 21-1271 (U.S. Sept. 6, 2022); Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

---

[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Consistent with Rule 37.3, neither consent of the parties nor a motion for leave to file an *amicus curiae* brief is necessary.

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") § 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC § 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization founded to educate the American public on the value of having principled leadership at all levels of government.

INTRODUCTION

Early in his Presidency, George Washington wrote "Government being, among other purposes, instituted to protect the Persons and Consciences of men from oppression, it certainly is the duty of Rulers, not only to abstain from it themselves, but according to their Stations, prevent it in others." LETTER FROM GEORGE WASHINGTON TO THE SOCIETY OF THE QUAKERS (Oct. 13, 1789), https://founders.archives.gov/documents/Washington/05-04-02-0188.

Deeply held religious views are not mere preferences, akin to liking Pepsi over Coke or being a night owl who desires a late start to his or her

workday. They concern the transcendental duties and obligations owed to one's Creator, however conceived, that implicate what John Locke referred to as "the highest obligation that lies upon mankind." John Locke, A LETTER CONCERNING TOLERATION 31 (1689), https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/locke/toleration.pdf. These views are, and are recognized to be, of such paramount importance to the individual that they can excuse citizens of some of the most fundamental civic duties, including taking up of arms in the nation's defense when called upon to do so. *See* 50 U.S.C. § 3806(j); *see also United States v. Seeger*, 380 U.S. 163 (1965).

The necessity and advisability of protecting the ability of an individual to fulfill his or her obligations to their Creator as he or she understands them has long been recognized as a core component of American liberty. To wit, it formed the basis of the Free Exercise and Establishment Clauses of the First Amendment. It was reflected in Congressional debates and recognized in draft acts going back to the early 19th century. *See generally United States v. McIntosh*, 283 U.S 605, 633 (1931) (Hughes, C.J., dissenting). It has been repeatedly reiterated by Congress through the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*., and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq*. And it is recognized in Title VII of the Civil Rights Act.

The Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), disregarded this fundamental element of American liberty and

demeaned the significance of sincerely held religious beliefs to eviscerate the substantive meaning of Title VII by adopting a "more-than-de-minimis" test for religious accommodations. This interpretation was egregiously wrong when it was adopted and should be reversed today.

Moreover, the lower courts have further undercut the substantive protections afforded to people of faith by effectively granting co-workers a heckler's veto over their sincerely held religious practices.

The text and history of Title VII are clear: employers have an obligation to accommodate sincerely held religious practices unless doing so would impose an *undue burden* on the *employer's business* – not a mere inconvenience, not indistinct grumbling among other employees. Accordingly, the judgment of the Court of Appeals should be reversed.

SUMMARY OF THE ARGUMENT

Hardison was egregiously wrong when it adopted a more-than-de-minimis test for evaluating claims of religious discrimination under Title VII.

First, the test set forth in *Hardison* is irreconcilable with the text of Title VII of the Civil Rights Act. The text of Title VII refers to "undue hardship" on an employers' business. The words "undue hardship" mean a burden that is significant or substantial. A significant or substantial burden is a materially higher bar than a mere more-than-de-minimis burden.

Second, the test set forth in *Hardison* improperly conflates religious beliefs with mere personal preferences and, in doing so, misses the point of Title VII. Religious beliefs relate to the duties and obligations individuals owe to their Creator, however conceived. In many faith traditions, these duties and obligations take on supreme importance directly related to the fate of the individual in the hereafter. Accordingly, they are immutable obligations imposed from without that are not analogous to mere personal preferences, such as a desire to wear a head covering as a matter of sartorial expression.

This view is reinforced by the intertextual context of Title VII. In Title VII, religion is grouped alongside race, national origin, and sex. At the time Title VII was adopted, race, national origin, and sex were all considered immutable characteristics determined at birth. Put differently, they were all viewed as things that an individual cannot change. Applying the canon of *noscitur a sociis*, it may be reasonably inferred that "religion," as used in Title VII, refers to a perceived Truth that exists outside of the individual that cannot be changed by the individual.

It is also reinforced by the protection of religious liberty in other statutes, particularly the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. Together, these Congressional actions express unambiguous concern that purportedly neutral laws and policies can burden religious expression. In response, these statutes provide additional protection for religious practices

from encroachment by State governments and the federal government. Title VII fills in a missing piece – providing protection for the free exercise of religion from discrimination by private employers.

Third, *Hardison* is – at least implicitly – premised on the incorrect belief that Congress needed to be entirely neutral or indifferent to religion. This view appears to be influenced by views of the Establishment Clause expressed in the now-discredited *Lemon* test. A review of historical practices and understandings, particularly those of the First Congress, show that strict neutrality and/or indifference to religion is not compelled by the First Amendment.

Finally, the Court of Appeals in this case erred by looking to the burden on an employee's coworkers, rather than the burden on an employer's business itself. Examining the impact on an employee's coworkers, without reference to the magnitude of that impact on the employer's business, is contrary to the text of Title VII. Moreover, doing so effectively subverts the purpose of Title VII by giving coworkers a heckler's veto over religious accommodations.

In light of the text, history, and purpose of Title VII, the Court should firmly and conclusively disapprove of *Hardison's* more-than-de-minimis test, clarify that the proper analysis of undue hardship focuses on the impact to an employer's business, not an employee's coworkers, and reverse the decision of the Court of Appeals.

ARGUMENT

I. *Hardison* Is and Was Egregiously Wrong

Title VII of the Civil Rights Act provides in part that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The statute further defines "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).

As Justice Gorsuch noted, the Court in *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). Specifically, *Hardison* concluded that requiring a company "to bear more than a de minimis cost in order to give Hardison

Sundays off is an undue hardship," *Hardison*, 432 U.S. at 84, effectively replacing the undue hardship standard with a more-than-de-minimus test.

Hardison's more-than-de-minimus test is contrary to the plain text of the Title VII, improperly conflates religious needs with mere personal preferences, and appears to be premised on an outdated view of the Establishment Clause. Accordingly, *Hardison* is and was egregiously wrong and should be clearly and conclusively disapproved.

a. The Plain Meaning of the Civil Rights Act Requires a Showing of a Significant or Substantial Difficulty or Costs

By its plain terms, Title VII broadly protects religious affiliation and religious practices. Under the Civil Rights Act, employers must accommodate religious practices unless doing so would result in "undue hardship." As Judge Thapar observed, "[d]ictionaries from the period define a 'hardship' as 'adversity,' 'suffering' or 'a thing that is hard to bear,'" which indicates that "[o]n its own terms . . . the word 'hardship' would imply some pretty substantial costs." *Small v. Memphis Light, Gas and Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J. concurring), cert. denied 141 S. Ct. 1227 (2021) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 601 (1969); BLACK'S LAW DICTIONARY 646 (5th ed. 1979); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 826 (2d ed. 1975)). Moreover, the word "undue" refers to that which "'exceed[s] what is appropriate or normal" or is "excessive." *Id.*

(quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1398; BLACK'S LAW DICTIONARY 1370; WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 826)).

The phrase "undue hardship" is not unique to the Civil Rights Act. Rather, it is defined for purposes of the Americans with Disabilities Act, Fair Labor Standards Act, and for purposes of veterans' employment by reference to "significant difficulty or expense." *See* 42 U.S.C. § 12111(10)(A); 29 U.S.C. § 207(r)(3); 38 U.S.C. § 4303(16).

Thus, the plain meaning of the statutory text indicates that "undue hardship" requires a significant, substantial, excessive imposition of cost that is difficult, if not impossible, for an employer to bear.

b. Sincere Religious Beliefs are Not Mere Preferences

In defiance of the plain text of Title VII, *Hardison* demeans the import of sincere religious beliefs by analogizing them to mere preferences. For sincere believers, religious needs reflect the duties and obligations that one owes to one's Creator. Many believe that faithful adherence to these duties and obligations is directly related to their own eternal salvation. Thus, religious beliefs are not preferences akin to wanting an earlier or later shift on the job site; they are paramount demands. *See generally Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (drawing a distinction between religious beliefs and mere personal preferences, noting "we see that the record in this case abundantly supports the claim that the

traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction.")

In *Hardison*, the Court stated "[i]t 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 needs of others." *Hardison*, 432 U.S. at 81. In doing so, the Court failed to account for why Congress sought to protect "religious needs" in the first place, and what distinguishes "religious needs" from mere "shift and job preference[s]."

In a different case concerning Sabbatarian beliefs, Justice Douglas noted that "[t]he harm is the interference with the individual's scruples or conscience." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). As the Court has previously stated, "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342 (1890). The "essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation." *Seeger*, 380 U.S. at 175 (quoting *McIntosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting)). Even "putting aside dogmas with their particular conceptions of deity, freedom of conscience implies respect for an innate conviction of paramount duty." *Id.* at 176

(quoting *McIntosh*, 283 U.S. at 634 (Hughes, C.J., dissenting)).

Given the "paramount" nature of these duties, "in the forum of conscience, duty to a moral power higher than the state has always been maintained." *Id.* at 170 (quoting *McIntosh*, 283 U.S. at 633 (Hughes, C.J., dissenting)). Accordingly, then-future Chief Justice Harlan Fiske Stone wrote "[a]ll our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *Id.* (quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919)).

For many people of faith, attending to their "religious needs" is a weightier matter than even life and death. Their duties and obligations owed to their Creator are directly tied to the salvation of their immortal souls. As an example of this line of thinking familiar to the Framers, John Locke wrote "[e]very man has an immortal soul, capable of eternal happiness or misery; whose happiness depending upon his believing and doing those things in this life which are necessary to the obtaining of God's favour, and are prescribed to God for that end. It follows from

thence, first, that the observance of these things is the highest obligation that lies upon mankind and that our utmost care, application, and diligence ought to be exercised in the search and performance of them; because there is nothing in this world that is of any consideration in comparison with eternity." John Locke, A LETTER CONCERNING TOLERATION 31 (1689), https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/locke/toleration.pdf.

The "paramount" importance of religious duties is central to understanding what Congress sought to protect in Title VII of the Civil Rights Act. Congress was not creating a jump ball. As the Court has recognized, "Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment." *Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). It does so in recognition that asking individuals to violate their sense of religious obligation is a big, potentially very consequential deal, and based on a policy determination that in a pluralistic society individuals should not be forced to violate their consciences unless it is absolutely necessary.

Thus, "[a]t the risk of belaboring the obvious, Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013) (emphasis in the original). By disregarding this aim and the purpose behind it, *Hardison* misinterprets Title VII.

i. The Textual Context of the Civil Rights Act Confirms that Religion is Not a Mere Preference

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167-69 (2012) (describing the "whole-text canon" of statutory construction). Moreover, consistent with the canon of *noscitur a sociis*, "[a]ssociated words bear on one another's meaning." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012).

The significance and transcendental nature of religious needs is further confirmed by the textual context of Title VII. "Religion" appears in Title VII in a list, alongside "race, color, . . . sex, or national origin." 42 U.S.C. §§ 2000e-2(a)(1), (2). When the Civil Rights Act was adopted (and until fairly recently),

race, color, sex, and national origin all referred to innate and immutable characteristics. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). By virtue of its appearance alongside these other immutable characteristics, religion is best understood as referring to something more substantial than mere personal preference. It is something that exists outside of the individual and references an understanding of Truth for sincere believers that can no more be changed than a person's race or birthplace.

With this understanding, *Hardison*'s dismissal of "religious need" as analogous to a shift preference is contrary to the text and demeaning to sincere religious belief.

ii. The Importance of Religious Liberty is Also Reflected in Other Statutes

Title VII's protection of religion and religious practices is best understood in the context of a long-standing effort by Congress to protect the free exercise rights of Americans from undue coercion. Congress has long debated and protected the rights of conscientious objectors from compulsory combat service. Congress has also acted expeditiously to protect religious practices from encroachment by both State and federal authorities. In this context, Title VII's protection of religious practices is best understood as one piece of a comprehensive effort to protect religious expression.

To wit, in response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Congress adopted the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb, *et seq*., Pub. L. 103-141 (Nov. 16, 1993) ("RFRA"). In RFRA, Congress declared "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Congress went on to restore the compelling interest test derived from *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. §§ 2000bb(b)(1); 2000bb-1.

When the Court held that portions of RFRA exceeded Congress' authority under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress again reacted to restore protections for religious practices imperiled by facially neutral law and policies by adopting the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq*., Pub. L. 106-274 (Sept. 22, 2000) ("RLUIPA"); *see generally Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022) (noting "Congress enacted RLUIPA, and its sister statute the Religious Freedom Restoration Act of 1993 . . . in the aftermath of our decisions in *Employment Division, Department of Human Resources of Oregon v. Smith* . . . and *City of Boerne v. Flores*." (citations omitted)).

RLUIPA provided "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the

religious exercise of a person . . . unless the government demonstrates that the imposition of the burden" is in furtherance of a compelling state interest and the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc(a)(1). RLUIPA also provided similar protections for incarcerated persons, stating "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden" is in furtherance of a compelling state interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-1(a).

As the Court recognized, Congress enacted both RFRA and RLUIPA "to ensure 'greater protection for religious exercise than is available under the First Amendment.'" *Ramirez*, 142 S. Ct. at 1277 (quoting *Holt v. Hobbs*, 574 U.S. 352, 357 (2015)). To wit, "[s]everal provisions of RLUIPA underscore its expansive protection for religious liberty," including its clarification that the term "religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," Congress's "mandate[] that this concept 'shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution," and Congress's direction that RLUIPA "'may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'" *Holt*, 574 U.S. at 358 (citations omitted).

Congress has repeatedly emphasized the importance of protecting the free exercise of religion and adopted broad statutes to ensure the free exercise of religious practices is protected.

The limited legislative history for the 1972 amendments to Title VII make clear that it was intended to be part of this same tradition. For example, the amendment's sponsor, Senator Randolph, stated in support of the amendment "freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States." Senator Jennings Randolph, 118 Cong. Rec. 705 (1972). He further stated "I think it is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole are [*sic*] of employment, of course are matters that were not always understood by those who led our Nation in the earlier days." *Id.* at 706. Title VII is thus best understood as extending the protections of the equities guarded by the Free Exercise clause to the private sector.

While statutes like RFRA, RLUIPA, and Title VII are separate and have their own nuances, they should be understood together as part of a comprehensive approach to protecting the free exercise of religion from undue intrusion from the federal government, state governments, and private employers, respectively. Consistent with the nature of the equities involved, the standard for protecting

free exercise from government is more stringent that the standard for protecting free exercise from private conduct. Nevertheless, Congress' approach to protecting the free exercise of religion from government intrusion highlights that religious beliefs are not mere preferences, to be dispensed with whenever mildly inconvenient.

Congress has repeatedly adopted a policy that religious practices should be respected unless they impose a substantial cost. That policy judgment should be respected in the Title VII context.

c. *Hardison* Relies on a False Belief that Congress Had to Be Neutral Toward Religious Beliefs

As Judge Thapar observed, *Hardison* appears to have adopted the more than de minimis test for two reasons: concern that "religious accommodations that involved more than 'de minimis' costs would cause employers to 'discriminate' against their non-religious employees" and an "implicit" concern that a broader reading of Title VII would conflict with the Establishment Clause of the First Amendment. *Small*, 952 F.3d at 828 (Thapar, J., concurring). *See also generally Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (holding that a statute providing an absolute and unqualified right not to work on the Sabbath violates the Establishment Clause); *Estate of Thornton*, 472 U.S. at 711-12 (O'Conner, J, concurring) (distinguishing Title VII from the law at issue in *Caldor*). Both of these justifications are unavailing.

This "implicit" concern is fueled in part by the Court's "ambitious[] attempt[] to find a grand unified theory of the Establishment Clause" in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). Under the *Lemon* test, the Court looked to "whether a challenged government action (1) has a secular purpose; (2) has a 'principal or primary effect' that 'neither advances nor inhibits religion'; and (3) does not foster 'an excessive government entanglement with religion.'" *Id.* at 2078-79 (quoting *Lemon*, 403 U.S. at 612-13). It is difficult to square Title VII's statutory protection of religious practices with *Lemon*, particularly its command that laws have a secular purpose and have a principle or primary effect that neither advances nor inhibits religion. *See id.* at 2092 (Kavanaugh, J., concurring) ("*Lemon*, fairly applied, does not justify" many of the Court's past decisions regarding religious accommodations.); *but see generally Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring) (stating in reference to Title VII "[i]n my view, a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring equal opportunity to all groups in our pluralistic society.").

But as the Court has subsequently recognized, *Lemon* is not the proper framework for understanding the Establishment clause. *See Kennedy v. Bremberton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Town of Greece, New York v. Galloway*, 572 U.S. 565 (2014). Instead, "this Court has instructed that the

Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 576).

Historical practices and understandings support a more robust Title VII. As the Court has noted, "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Humanist Ass'n*, 139 S. Ct. at 2074. When properly read *in pari materia*, the Establishment Clause and the Free Exercise Clause serve similar functions: ensuring that government does not dictate what religious beliefs citizens hold or how they fulfil their duties to their Creator, as each citizen understands them. *See generally Kennedy*, 142 S. Ct. at 2426 ("A natural reading of that sentence [in the First Amendment] would seem to suggest the Clauses have 'complementary' purposes," (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947)).

In this context, the Establishment Clause serves to protect the American people from coercive religious practices, such as the imposition of a single national religion or creed. *See generally Kennedy*, 142 S. Ct. at 2429 ("No doubt, too, coercion along these lines [coercing individuals to attend church or forcing citizens to engage in a formal religious exercise] was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."); *Am. Humanist Ass'n*, 139 S. Ct. at 2096 (Thomas, J., concurring) ("The *sine qua non* of an establishment of religion is

'actual legal coercion'" such as making church attendance mandatory, levying taxes to generate church revenue, barring dissenting ministers from preaching, or limiting political participation to members of an established church. (quoting *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring)).

A proper historical understanding of the Establishment clause does not require a strict neutrality or indifference to religion and religious practices. *See Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) ("The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."); *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (noting that the "central . . . feature" of "our Nation's past and present practices . . . is that there is nothing unconstitutional in a State's favoring of religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments."). Rather, "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." *Van Orden*, 545 U.S. at 686 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

For example, then-Justice Rehnquist referred to James Madison as "undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights."

Wallace, 472 U.S. at 97-98 (Rehnquist, J., dissenting). After a lengthy discussion of the debate leading up to the approval of the First Amendment, he concluded "[i]t seems indisputable from these glimpses of Madison's thinking, as reflected by his actions on the floor of the House in 1789, that he saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prohibit discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion." *Id.* at 98.

"The prevalence of this philosophy at the time of the founding is reflected in other prominent actions taken by the First Congress." *Am. Humanist Ass'n*, 139 S. Ct. at 2087. For example, "only days after approving language for the First Amendment," the "First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Town of Greece*, 572 U.S. at 575, 576. The First Congress requested that President Washington proclaim a National Day of Prayer and beginning its own sessions with a prayer. *See Am. Humanist Ass'n*, 139 S. Ct. at 2087-88. The same Congress also reenacted the Northwest Ordinance, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." An Act to Provide for the Government of the Territory of the North-West of the River Ohio, 1 Stat. 50 (Aug. 7, 1789); *see Am. Humanist Ass'n*, 139 S. Ct. at 2087; *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting).

To paraphrase the Court in *Kennedy*, in the name of protecting religious liberty (at least implicitly), the Court in *Hardison* would effectively suppress it by forcing citizens to choose between their sincere religious beliefs and their livelihoods at the slightest conflict. *See Kennedy*, 142 S. Ct. at 2431. This approach is contrary to the plain text of Title VII and is not supported or compelled by the Establishment Clause. "Title VII does not demand mere neutrality with regard to religious practices . . . . Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observances and practice.'" *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 775. The more-than-de-minimis test in *Hardison* is contrary to the text and purpose of Title VII and should be jettisoned.

II. Hardship for Purposes of Title VII Must Burden an Employer's Business Itself, Not Just Inconvenience an Employee's Coworkers

The district court in this case asserted "[m]any courts have recognized that an accommodation that causes more than a *de minimus* impact on co-workers creates an undue hardship." *Groff v. DeJoy*, Civ. No. 19-1879, 2021 WL 1264030, at *12 (E.D. Pa. Apr. 6, 2021). The Court of Appeals "cite[d] cases echoing the District Court's observation." *Groff v. DeJoy*, 35 F.4th 162, 176 (3d Cir. 2022) (Hardiman, J., dissenting).

This approach is effectively a bait-and-switch that undercuts the Title VII's protections. First, it is contrary to the text of Title VII. As described above, the text of Title VII refers to "undue hardship on *the conduct of the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added). While a negative impact on coworkers may eventually rise to the level of impacting an employer's business, the two categories are not coextensive. *See Groff,* 35 F.4th at 177 (Hardiman, J., dissenting) ("Simply put, a burden on coworkers isn't the same thing as a burden on the employer's business.").

Nearly every accommodation may have some negative impact on an employee's coworkers. As a practical matter, if it never did, Title VII would rarely be necessary: employees could simply make their own adjustments to obviate the need for a legal right to accommodation. To wit, an accommodation allowing an employee not to work on the Sabbath or another religious holiday necessarily means some other employee must fill in or do the work that arises on those days. An accommodation allowing an employee to wear a headscarf for religious reasons may engender resentment from an employee who is not allowed to wear a headscarf as a sartorial statement. By impacting "morale," these accommodations impose some level of burden on an employees' co-workers, but they do not necessarily impose the same burden on the employer's business.

As Judge Hardiman noted, "[b]y affirming the District Court's atextual rule, the Majority renders *any* burden on employees sufficient to establish undue

hardship, effectively subjecting Title VII religious accommodation to a heckler's veto by disgruntled employees." *Id.* As the Court has recognized, "[t]his Court has since made plain, too, that the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Kennedy*, 142 S. Ct. at 2427 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)). Neither does Title VII. Accordingly, the relevant basis for evaluating undue hardship under Title VII is properly the impact on the *business*, not merely on an employee's coworkers.

CONCLUSION

For the foregoing reasons, the Court should disapprove of the test set forth in *Trans World Airlines, Inc. v. Hardison* and reverse the opinion of the Court of Appeals.

Respectfully submitted,

GARY M. LAWKOWSKI
Counsel of Record
Supreme Court Bar No. 315998
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 608
Alexandria, VA 22314
Telephone: 703-574-1654
GLawkowski@DhillonLaw.com

MICHAEL BOOS
DANIEL H. JORJANI
Citizens United
Citizens United Foundation
The Presidential Coalition
1006 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
Telephone: 202-547-5420
MichaelBoos@CitizensUnited.org
DanielJorjani@CitizensUnited.org

Counsel for amici curiae Citizens United, Citizens United Foundation, and the Presidential Coalition

February 28, 2023