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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RELIGIOUS LIBERTY SCHOLARS AND EMPLOYMENT LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

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SUMMARY OF ARGUMENT

This case is an ideal vehicle for correcting an error that has undermined protection for religious workers across the country, in defiance of clear statutory text and underlying principles of religious liberty.

I. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion. 42 U.S.C. § 2000e-2(a). The statute requires employers to "reasonably accommodate" their employees' religious practices if they can do so without "undue hardship." 42 U.S.C. § 2000e(j).

A. Title VII does not define "undue hardship." But in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court declared that any accommodation that requires the employer to "bear more than a *de minimis* cost" imposes undue hardship. *Id.* at 84. This reading "cannot be reconciled with the plain words of Title VII." *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari). Nor does it "represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari). "Undue hardship" means serious harm or difficulty; "de minimis" means a trifle not worth considering.

B. *Hardison*'s error robbed employees of the protection that Congress tried to provide. The Equal Employment Opportunity Commission receives hundreds of religious-accommodation complaints each year. Most of them are dead on arrival, because of *Hardison*. The impact falls most heavily on minority religious practices.

II. Subsequent decisions of this Court have rendered *Hardison* exactly the kind of "doctrinal dinosaur" that justifies overruling obsolete precedents. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

A. *Hardison* suggested that interpreting Title VII as written would be "anomalous," because it would result in "unequal treatment" of other employees. 432 U.S. at 81. But as the Court has since clarified, that concern rested on a fundamental misunderstanding. Title VII gives religious practices "favored treatment." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). "By definition any special 'accommodation' requires the employer to treat an employee . . . differently, *i.e.,* preferentially." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

Making allowances for the unusual needs of specific workers does not discriminate against majorities without those needs. Current law provides such allowances for disability, pregnancy, and family medical issues, in addition to religion. *Hardison*'s equation of accommodations with discrimination was erroneous from the start, and it has been further undermined by frequent provision for similar allowances in federal law today.

B. Nor can *Hardison*'s substitution of its *de minimis* standard for Title VII's clear text be justified by any concern about the Establishment Clause.

1. When *Hardison* worried that accommodation of religious practices would result in unequal treatment, it focused on religiously neutral *categories*—on treating religious and nonreligious employees the same, regardless of whether they had similar needs or

were similarly situated. An equally coherent and more liberty-protecting understanding of neutrality focuses on religiously neutral *incentives*. The right to practice or reject religion is most free when governments and employers neither encourage nor discourage religion.

Work rules that force employees to choose between their faith and their job powerfully discourage religious exercise. But accommodating employees with special religious needs does little to encourage other employees to join these usually demanding religions. It is far more neutral to accommodate employees' religious practices than to fire them for practicing their faith.

2. The original public meaning of the Establishment Clause casts no doubt on religious accommodations. Religious exemptions were no part of the historic religious establishment. They emerged in the wake of free exercise and *dis*establishment, to protect religious minorities. Religious exemptions were widespread in the colonial period, and seriously debated. But with only one readily distinguishable exception, there is no record of anyone arguing that religious exemptions would raise an establishment issue.

3. Since *Hardison*, this Court has repeatedly and unanimously confirmed that "there is ample room for accommodation of religion under the Establishment Clause." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). A law may raise Establishment Clause concerns if it guarantees an absolute and unqualified right to accommodation, but Title VII creates no such right. The undue-hardship exception enables courts to fully consider the legitimate

interests of both employers and employees. It should not be a veto on nearly all requests for reasonable accommodation.

ARGUMENT

I. *Hardison* Is Inconsistent with Title VII's Text and Deprives Religious Employees of Meaningful Protection.

Title VII requires an employer to "reasonably accommodate" an employee's religious practices, unless doing so would impose an "undue hardship" on the employer. 42 U.S.C. § 2000e(j). *Hardison* insisted that an employer suffers "undue hardship" whenever an otherwise reasonable accommodation would generate "more than a *de minimis* cost." 432 U.S. at 84.

That conclusion cannot be reconciled with Title VII's text. Both the words "hardship" and "undue" indicate that the statute's exception applies only to costs that far exceed *de minimis* levels. Moreover, *Hardison*'s error was profoundly significant. As this case illustrates, equating undue hardship with any cost more than *de minimis* deprives religious employees of protection in all but the most limited circumstances. This is an important and recurring issue that this Court should address.

A. "Undue Hardship" Does Not Mean "Anything More Than a *De Minimis* Cost."

When interpreting Title VII or any other statute, this Court looks to "the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). The relevant terms of Title VII are clear. "Title VII requires proof

not of minor inconveniences but of hardship, and 'undue' hardship at that." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013). But *Hardison* ignored this clear text, choosing to "rewrite the statute that Congress has enacted." *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 130 (2016) (quotation omitted).

Hardison declared that anything "more than a *de minimis* cost" is an "undue hardship." 432 U.S. at 84. But "simple English usage" does not permit that reading. *Id.* at 92 n.6 (Marshall, J., dissenting).

Then as now, *de minimis* meant "very small or trifling," *De Minimis*, *Black's Law Dictionary* (5th ed. 1979); *id.* (11th ed. 2019) ("trifling, negligible"). A *de minimis* cost or wrong is one the law will not notice or correct: *de minimis non curat lex*. This familiar maxim is usually translated, somewhat loosely, as "The law does not concern itself with trifles." *De Minimis Non Curat Lex*, *Black's Law Dictionary* (11th ed. 2019). Thus, under *Hardison*'s reading, an "undue hardship" occurs whenever a religious accommodation generates any cost for an employer that is more than a trifle. A trifle plus a dollar cannot be reconciled with the words "undue hardship."

As the petition notes, sources contemporaneous with the provision's enactment define hardship as "a condition that is difficult to endure," "suffering," or "something hard to bear." Pet. 14 (quoting dictionaries). A "hardship" far exceeds a trifle. If there were any question about that, the modifier "undue" further emphasizes Congress's meaning. *See Black's Law Dictionary* (5th ed. 1979) ("undue" means "more than necessary; not proper; illegal"); *id.* (11th ed. 2019) ("excessive or unwarranted"). Not just any

hardship will suffice, but only one that is "undue"—more than necessary, disproportionate to the religious-liberty problems to be solved.

The ordinary meaning of "undue hardship" in Title VII at the time of enactment resembles the subsequent definition of that phrase under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. In provisions directly analogous to Title VII's religious-accommodation provision, the ADA requires an employer to make "reasonable accommodations" for an employee's disability unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). Under the ADA, undue hardship means "an action requiring significant difficulty or expense," and factors to be considered include the accommodation's cost, the employer's financial resources, and the accommodation's impact on the business. 42 U.S.C. § 12111(10). Congress and the courts have offered similar interpretations of the phrase in other contexts as well. *See Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting from denial of certiorari).

By ignoring the clear text of Title VII, the Court in *Hardison* substituted its own preference for the statute Congress enacted and "dramatically revised—really, undid—Title VII's undue hardship test." *Id.*

B. *Hardison*'s Misreading of the Statute Has Greatly Harmed Religious Minorities.

Hardison's flagrant misinterpretation of Title VII's "undue hardship" exception has allowed employers to escape liability whenever a religious accommodation generates anything more than the most trivial inconvenience.

The EEOC receives thousands of religious discrimination complaints each year, some of which include requests for accommodation. EEOC, *Religion-Based Charges (Charges filed with EEOC) FY 1997–FY 2021*, https://bit.ly/3QuQMZX (last visited Sept. 25, 2022). Under *Hardison*'s permissive standard, all but a handful of these requests are dead on arrival. It is no exaggeration to say that *Hardison* "effectively nullif[ies]" and "makes a mockery" of Title VII's protection, and that it "seriously eroded" this country's "hospitality to religious diversity." *Hardison*, 432 U.S. at 88-89, 97 (Marshall, J., dissenting). This situation—and its impact on religious minorities—raises an important question of federal law that merits this Court's review.

This case illustrates the problem. Gerald Groff sincerely believes that he cannot work on Sundays, his Sabbath. Pet. 5. Although Groff's Christian faith may seem to represent a "majority" religious view in the United States, his strict Sabbath observance decidedly does not. One poll recently reported that only 18% of Christians consider resting on the Sabbath "essential" to their faith—including only 28% of those who considered themselves "highly religious." *See* Pew Research Ctr., *Essentials of Christian Identity Vary by Level of Religiosity* (Apr. 12, 2016), https://pewrsr.ch/3DyM0aS.

When Groff joined the Postal Service, he anticipated no need to deliver packages on Sundays. Even once the organization started Sunday deliveries, Groff's exercise was accommodated by his local Postmaster who simply arranged for Groff to cover additional shifts throughout the week instead. Pet. 6-7. Later, Groff received Sunday shifts, but he was

temporarily accommodated through a system that automatically scheduled another worker to cover for him. Pet. 7. Eventually, the Postal Service ended those accommodations and Groff was given an ultimatum: either work on Sundays or suffer progressive discipline. Pet. 7. Fearing termination, Groff resigned and brought this suit. Pet. 8.

The effect of Groff's adherence to his beliefs was simply that other employees had to work more Sunday shifts. Yet the courts below cited *Hardison*'s *de minimis* standard and held that continuing to accommodate Groff would impose an undue hardship—notwithstanding the lack of evidence showing that the Postal Service would face any significant difficulty by continuing to do so. *See* Pet. 33.

Unfortunately, this case is not unusual. As another group recently demonstrated, adherents of religions with minority practices make up a hugely disproportionate share of undue-hardship cases. *See* Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioner, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020), at 23-24 (62% of cases since 2000 focusing on undue-hardship at summary judgment involved non-Christian faiths or small Christian sects that observe a Saturday Sabbath). The results in individual cases confirm *Hardison*'s destructive impact on these claimants and others. Under *Hardison*, employers can often reject their requests out of hand, even if the cost of accommodation would be modest.

Just two years ago, James Small, a Jehovah's Witness, came to this Court after facing the same ultimatum as Groff: accept a new work schedule that

conflicts with your weekly religious obligations or find a new job. Citing *Hardison*, the Sixth Circuit held that even temporarily accommodating Small's request to work the rest of the week, at reduced pay, while he searched for a new job would impose an undue hardship. *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 826 (6th Cir. 2020). This was despite the company's "history of offering this same accommodation to other employees, including those removed from their positions for unsatisfactory job performance." *Small*, 141 S. Ct. at 1227 (Gorsuch, J., dissenting from denial of certiorari).

Other examples abound. One court dismissed claims by a Muslim seeking to attend Friday prayer services. The court said that requiring an employer to pay *any* overtime—even two hours—would be undue hardship as a matter of law. *El-Amin v. First Transit, Inc.*, 2005 WL 1118175, at *8 (S.D. Ohio May 11, 2005). Another court held that a Seventh-day Adventist was not entitled to a scheduling accommodation to observe his Sabbath because the administrative change would have cost his employer—the Chrysler Corporation—roughly "$1,500 per year." *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992). Still another court recently observed that "payment of premium wages goes beyond an employer's obligation to provide a reasonable accommodation," and that the employer is not required "even to assist the plaintiff in finding someone to swap shifts." *Logan v. Organic Harvest, LLC*, 2020 WL 1547985, at *5 (N.D. Ala. Apr. 1, 2020).

Religious claimants also suffer under *Hardison*'s callous standard in cases about grooming policies and dress codes. One court reluctantly held that

exempting a Rastafarian from a grooming policy at the auto-repair shop where he worked would pose an "undue hardship," because doing so might "adversely affect the employer's public image." *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 15 (D. Mass. 2006) (quotation omitted). Another concluded, for the same reason, that accommodating a Muslim employee's request to wear a hijab would result in undue hardship. *Camara v. Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1330-32 (N.D. Ga. 2017).

All of this is disturbing. But it is not surprising. As Congress realized, neutral employer policies inevitably favor the majority's preferences regarding schedules, appearance, and similar matters. And Congress knew that practices like Groff's were in particular danger. Indeed, Senator Jennings Randolph—the sponsor of the 1972 amendment that added the religious-accommodation provision to Title VII—complained that this Court had "divided evenly" in a case involving an employee who was fired for refusing to work on the Sabbath. 118 Cong. Rec. 705-06 (1972) (referring to *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971)). Randolph remarked that his amendment would "resolve by legislation . . . that which the courts apparently have not." *Id.*

But *Hardison* demonstrated a breathtaking indifference towards Congress's goal of protecting the rights of religious workers—an indifference that threatens "our hospitality to religious diversity" and leaves "[a]ll Americans . . . a little poorer" as a result. *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting). Now, workers whose religious practices fall outside the mainstream suffer disproportionate harm under

the typical employer's rules and under *Hardison*'s flimsy standard.

Nor did these rulings result from misinterpretation of *Hardison*. Rather, in *Hardison* this Court found its *de minimis* standard satisfied when "one of the largest air carriers in the Nation" denied a religious accommodation that would have cost merely "$150 for three months." 432 U.S. at 91, 92 n.6 (Marshall, J., dissenting). As Judge Hardiman observed in dissent below, these courts may be correct that nearly "*anything* . . . may be considered 'more than a de minimis cost' . . . under *Hardison*'s capacious standard. But such a [standard] seems rather far afield from the text of Title VII." Pet. App. 27 n.1. These cases demonstrate that "[t]he only 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 (Gorsuch, J., dissenting from denial of certiorari).

Justice Gorsuch is correct. This Court should not hesitate to remedy such an obvious error of its own creation, especially one so destructive of the civil rights of those whom Title VII was designed to protect. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978) (declining to "place on the shoulders of Congress the burden of the Court's own error").

II. *Hardison*'s Reasons for Misinterpreting Title VII Were Erroneous.

Hardison's misinterpretation of Title VII's text, and the harm it has visited on religious claimants, are reasons enough for this Court to grant the petition. But there is more.

Hardison misapplied background legal principles at the time, and the law's subsequent development has made those errors ever more apparent. Employment law, the law of the Establishment Clause, and the law of statutory interpretation have all evolved in important ways since 1977.

Little needs be said about statutory interpretation. Everyone understands that the Court pays far closer attention to statutory text today than it did in 1977. *E.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (noting the "fundamental canon of statutory construction" that statutory language is interpreted according to its ordinary meaning). It is almost unimaginable that today's Court would distort the key statutory term "undue hardship" to mean something so radically different as anything more than *de minimis* cost.

Developments in employment law and religious-liberty law deserve further exploration. *Hardison*'s briefly stated reasons in defense of its departure from statutory text are deeply inconsistent with the subsequent "growth of judicial doctrine" and with "further action taken by Congress." *Kimble*, 576 U.S. at 458 (quotation omitted). *Hardison* has become a "doctrinal dinosaur or legal last man standing." *Id.* The Court should not continue to allow a ruling so far out of step with current law to frustrate Title VII's protections.

A. The Court's Fear of Religious Favoritism Was Unfounded in 1977 and Is Even Less Plausible Today.

Hardison suggested that enforcing Title VII as written would be "anomalous," because it would

result in "unequal treatment" of religious and non-religious employees. 432 U.S. at 81. "[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id.* at 84. But that suggestion badly misunderstood religious accommodation, and it has become even more implausible under more recent employment law.

By its terms, Title VII treats religion differently from other categories protected under the statute. It defines "religion" to encompass not just status, but also activity—"all aspects of religious observance and practice"—and requires employers to reasonably accommodate this activity unless doing so is an undue hardship. 42 U.S.C. § 2000e(j). As this Court recently observed, "Title VII does not demand mere neutrality with regard to religious practices . . . . Rather, it gives them favored treatment." *Abercrombie*, 575 U.S. at 775. This is true in an important sense: Congress required that employees in need of religious accommodations be treated differently. But in another, equally important sense, the accommodation requirement is entirely neutral. *See infra* section II.B.1.

Hardison treated this aspect of Title VII as "anomalous," even suggesting that it required "discrimination . . . against majorities." 432 U.S. at 81. But that assertion badly misunderstood the problem that Title VII's religious-accommodation provision addresses. An employer's neutral scheduling policies, dress codes, and similar rules rarely impose disproportionate burdens on employees because of categories like race or sex. But such

policies routinely codify majority practices, and as a result, they regularly "compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Id.* at 87 (Marshall, J., dissenting).

To note just one example, an employer policy forbidding hats at work does not systematically exclude women or racial minorities or otherwise harm the average worker. But it effectively bars any Jew or Muslim whose religion requires wearing a kippah or hijab. *See Abercrombie*, 575 U.S. at 775. *Hardison* ignored this reality in favor of an implausible concern about anti-majoritarian discrimination, distorting Title VII's undue-hardship exception as a result.

The Court worried that accommodating a religious employee's request to refrain from Saturday work might be achieved "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Hardison*, 432 U.S. at 81. But that kind of zero-sum accommodation will rarely if ever be required under Title VII.

Title VII explicitly declares that "[n]otwithstanding any other provision of this subchapter" (thus notwithstanding its religious-accommodation provision), it is lawful to apply a "bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h). The statute thus guarantees that employees operating under collective-bargaining agreements will never be deprived of these important "contractual rights" for the sake of an accommodation. *Hardison*, 432 U.S. at 81. Moreover, as Groff's case illustrates, scheduling accommodations can often be provided far short of "undue hardship." An employer can transfer workers to positions with different

schedules, facilitate a voluntary trade of shifts, or pay a modest premium to induce another employee to change schedules.

In the rare case where such solutions are not available, courts interpreting similar statutes have had little trouble rejecting accommodation claims, all the while employing the straightforward definition of "undue hardship." *E.g.*, *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (proposed accommodation imposed undue hardship under the ADA where employer could not reallocate job duties "among its small staff").

At bottom, *Hardison*'s concern over religious favoritism rested on the idea that requiring an employer to provide a religious accommodation amounted to "unequal treatment of employees on the basis of their religion." 432 U.S. at 84. But that misses the point of employment-related accommodations, which are now commonplace in the U.S. Code.

As this Court has observed with reference to the Americans with Disabilities Act, "[b]y definition, any special 'accommodation' requires the employer to treat an employee . . . differently, *i.e.,* preferentially." *Barnett*, 535 U.S. at 397. But on any reasonable understanding, requiring employers to accommodate workers with disabilities is not discrimination against the non-disabled.

Since *Hardison*, Congress has enacted laws requiring employers to provide allowances for disabled employees, pregnant employees, and employees needing time off to care for sick family members. *See* Americans with Disabilities Act, 104 Stat. 327 (1990), 42 U.S.C. § 12101 *et seq.*; Pregnancy

Discrimination Act, 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k); Family and Medical Leave Act, 107 Stat. 6 (1993), 29 U.S.C. § 2601 *et seq*. But it would be inaccurate and reductive to say that these laws require discrimination against the able bodied, the non-pregnant, or those who have been spared family illness. Like Title VII's religious-accommodation provision, these laws provide protection for important needs that are otherwise under-protected by standard employment practices—not special favors that discriminate against employees without these individual needs.

Hardison's equation of accommodation with discrimination was wrongheaded from the start and has been rendered even more implausible by the additional statutes that now command similar allowances. When the "theoretical underpinnings of [a] decision" have been thus "called into serious question," this Court should set the matter right. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997).

B. Any Establishment Clause Concern That May Have Motivated *Hardison* Is Also Unfounded.

Hardison's concern with preferential treatment misunderstood the law of religious liberty as badly as it misunderstood the role of accommodations in employment law. The Court did not explicitly invoke the Constitution or the constitutional-avoidance canon. But TWA and the union had argued that the accommodation provision violated the Establishment Clause. 432 U.S. at 70; *id.* at 89-90 (Marshall, J., dissenting). That argument cannot justify the Court's departure from statutory text. A deeper understanding of religious neutrality, the original

public meaning of the Establishment Clause, and this Court's decisions since *Hardison* all clarify that religious exemptions from generally applicable rules do not violate the Establishment Clause.

1. Accommodating Employees' Religious Practices Is Neutral, Because It Creates Religiously Neutral Incentives.

It is not discriminatory to take account of the special needs of religious minorities—needs that their more mainstream coworkers do not have. And in Title VII, Congress defined it as discriminatory *not* to account for these special religious needs. Just as it is discriminatory to treat like cases differently, so, Congress judged, it can be discriminatory to treat different cases alike.

Hardison's comments about preferential treatment reflected a concern with neutral *categories*—with treating religious and nonreligious workers alike regardless of whether their situations were the same or different. When this Court said that Title VII does not demand "mere neutrality," but requires "favored treatment" for religion, *Abercrombie*, 575 U.S. at 775—and when it said that all accommodations require preferential treatment, *Barnett*, 535 U.S. at 397—it was also focused on the neutrality of categories.

An equally coherent and more liberty-protecting conception of neutrality focuses on neutral *incentives*. Government acts neutrally when it seeks "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Douglas

Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990). When government creates religiously neutral incentives, it leaves individuals and voluntary associations free to make their own religious choices and act on their own religious commitments.

This goal of neither encouraging nor discouraging religion is the meaning of neutrality that the Court implicitly applied when it said that religious exemption "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); *see also Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561-65 (1993) (Souter, J., concurring in part and in the judgment) (contrasting different meanings of neutrality).

When an employer fires or penalizes an employee for something he does, the point is to discourage that behavior among its employees. If that behavior is religious for some employees, the penalties discourage religion. Loss of employment is a powerful disincentive to practicing one's faith. It is very far from neutral.

Accommodating such employees does little or nothing to encourage the accommodated religious practice. It is true that other employees might like a reason to demand a day off. But becoming a Seventh-day Adventist or an observant Jew comes with many

obligations that far outweigh not working one day a week—burdens that would often be meaningless apart from the religious faith that gives them meaning. Accommodating these religious practices will not encourage other employees to join their demanding faith.

Rather, accommodating practices like Groff's provides incentives as close to neutral as an employer can come. It is far more neutral than firing Groff for his faith. Congress acted to implement religiously neutral incentives when it required reasonable accommodation of employees' religious practices.

2. The Original Public Meaning of the Establishment Clause Casts No Doubt on Reasonable Accommodation.

Religious exemptions were common in the founding era. They were no part of the surviving colonial establishments; the established churches were closely allied with the state and had no need of exemptions. Rather, exemptions protected religious minorities. They were part of the transition to free exercise and disestablishment. Exemptions from military service, oaths, and taxes assessed for the established churches were universal or nearly so, and some colonies enacted exemptions from marriage laws and from removing hats in court. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1803-08 (2006).

The exemption from military service was controversial and widely debated, and substantial parts of these debates have been preserved. The demand to disestablish the surviving religious

establishments was also widely debated. But hardly any eighteenth-century Americans suggested that religious exemptions raise establishment issues. *See id.* at 1808-30. The only exception that has been found is a single sentence, in a specific context raising issues not present here—issues that the colonies had successfully addressed without eliminating the exemption.[2] The original public meaning of the Establishment Clause casts no doubt on religious accommodation.

3. This Court's Cases Since *Hardison* Confirm That the Establishment Clause Allows Reasonable Accommodation.

Hardison was decided in 1977, at the height of the *Lemon* era. The *Lemon* test called for government

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[2] The exception is Rep. Jackson's statement in the 1790 debate on the Uniform Militia Act, 1 Stat. 271 (1792). He said that an exemption from military service, with no requirement for alternative service or payment of a commutation fee, would create such an incentive to become a Quaker that "it would establish the religion of that denomination more effectually than any positive law could any persuasion whatever." 2 Annals of Cong. 1822 (Dec. 22, 1790) (p.1869 in some printings).

Exemptions that align too closely with secular self interest are indeed a special case. From Rhode Island in 1673 to the end of the modern draft in 1973, the solution for military service has been to require alternative service in non-combatant roles or payment of a commutation fee, a special tax, or a substitute. *See* Laycock, 81 Notre Dame L. Rev. at 1807, 1817-21. *See also* Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 911-15 (2019) (analyzing the Militia Act debate). The special issues posed by exemptions from military service have little relevance to Title VII, where accommodating religious practices creates no remotely comparable incentives. *See supra* section II.B.1.

neutrality—neither advance nor inhibit religion, *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)—and that core part of *Lemon* was sound. But under many *Lemon*-era decisions applying that test, neither categories nor incentives were religiously neutral.

This Court has since clarified that "there is ample room for accommodation of religion under the Establishment Clause," and that religious accommodations need not "come[] packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. Since *Amos*, the Court has unanimously and repeatedly agreed that religious accommodations are generally valid.[3]

Religious accommodations remain valid even when they incidentally generate non-trivial costs for others, and especially so if these costs can be broadly distributed by government or a large employer. As Justice Marshall noted in *Hardison*, this Court has repeatedly permitted or required religious exemptions involving military service, unemployment compensation, and other matters, all of which "placed not inconsiderable burdens on private parties." 432 U.S. at 90, 96 n.13 (Marshall, J., dissenting).

Even concentrated costs are acceptable when the countervailing religious-liberty interest is strong enough—most obviously when the person bearing

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[3] *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 719-26 (2005); *Board of Education v. Grumet (Kiryas Joel)*, 512 U.S. 687, 705 (1994); *id.* at 711-12 (Stevens, J., concurring); *id.* at 716 (O'Connor, J., concurring in part and in the judgment); *id.* at 723-24 (Kennedy, J., concurring in the judgment); *id.* at 744 (Scalia, J., dissenting); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990); *id.* at 893-97 (O'Connor, J., concurring in the judgment).

those costs holds a position inside a religious organization, doing the work of that organization in accordance with its tenets. See *Amos*, where a Title VII exemption let religious employers force employees to choose between "conforming to certain religious tenets or losing a job opportunity." 483 U.S. at 340 (Brennan, J., concurring in the judgment); *see also id.* at 338-39 (opinion of the Court). Likewise, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, this Court unanimously held that both Religion Clauses exempt a religious organization from discrimination lawsuits brought by "those who will personify its beliefs," thus depriving aggrieved employees of the right to seek many forms of relief. 565 U.S. 171, 180, 188 (2012).

Of course, religious accommodations have limits. In *Estate of Thornton v. Caldor, Inc.*, this Court invalidated a Connecticut statute that guaranteed employees an "absolute right not to work on their chosen Sabbath." 472 U.S. 703, 704-05 (1985). Such an "absolute and unqualified" accommodation violated the Establishment Clause by effectively commanding that "Sabbath religious concerns automatically control over all secular interests at the workplace." *Id.* at 709. But Title VII's accommodation provision contains no such defects.

Unlike the statute in *Caldor*, Title VII does not create an "absolute and unqualified right" to religious accommodation. Instead, it explicitly says that employers are obliged to provide only "reasonabl[e]" accommodations that do not impose "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Several Justices acknowledged that difference in *Caldor* itself. *See* 472 U.S. at 711-12

(O'Connor, J., concurring). Moreover, unlike the law in *Caldor*, which singled out one religious practice for absolute protection, Title VII covers "all religious beliefs and practices rather than protecting only the Sabbath observance." *Id.* at 712. Those differences are more than sufficient to alleviate any possible Establishment Clause worries that may have motivated *Hardison*. And this Court's subsequent decisions further confirm that conclusion.

In *Cutter*, this Court unanimously rejected an Establishment Clause challenge to the prison provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a). In so holding, the Court noted that RLUIPA requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and provides a rule that would be "administered neutrally among different faiths." 544 U.S. at 720. And RLUIPA—which requires accommodation unless the government's policy is narrowly tailored to a compelling interest—imposes a standard even more stringent than undue hardship.

Although *Cutter* observed that RLUIPA relieved "government-created burdens," *id.*, this Court has never held that Congress's ability to provide religious accommodations extends only to burdens imposed by the state itself. On the contrary, it has repeatedly said that government may "accommodate religion beyond free exercise requirements." *Id.* at 713; *accord Amos*, 483 U.S. at 334. The employment relationship is heavily regulated, often to protect employees, and Congress can certainly regulate to enable religious minorities to fully participate in the economy. Title VII aims at "assuring employment opportunity to all

groups in our pluralistic society," while balancing this concern against other interests. *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring); *see also Hardison*, 432 U.S. at 90-91 (Marshall, J., dissenting) ("If the State does not establish religion . . . by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.").

To the extent that the Court's holding in *Hardison* may have been motivated by the Establishment Clause, it was exactly backward. Title VII actually furthers Establishment Clause values by ensuring that adherents of underrepresented faiths may "worship . . . in their own way, and on their own time," without putting their job at risk, to the same extent as adherents of more familiar faiths that are less often burdened by employers. *Small*, 952 F.3d at 829 (Thapar, J., concurring).

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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