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 *AMICI CURIAE* STATES OF WEST VIRGINIA, LOUISIANA, AND 20 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from discriminating against an individual "because of such individual's * * * religion." 42 U.S.C. §§ 2000e-2(a)(1), (2). The statute defines "religion" to include "all aspects of religious 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." *Id.* § 2000e(j). In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court stated that an employer suffers an "undue hardship" in accommodating an employee's religious exercise whenever doing so would require the employer "to bear more than a de minimis cost." *Id.* at 84.

The questions presented are:

1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Few would quibble with the idea that Title VII of the Civil Rights Act of 1964 is a landmark law—one of the most significant pieces of legislation of our time. And in it, Congress barred workplace discrimination based on, among other things, "religion." 42 U.S.C. § 2000e-2. Congress thus insisted that employees don't need to shed their religious identity when they go to work. They shouldn't be punished for bringing that identity to life through religious practice, either. *See id.* § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief").

Unfortunately, five decades ago this Court effectively nullified Title VII's broad protection for religious exercise by making it far too easy for employers to avoid their statutory obligations. Title VII excuses employers from "reasonably accommodat[ing]" an employee's religious observance or practice only when the accommodation would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). But in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), the Court recast "undue hardship," construing the term in dicta to make the exception apply whenever accommodation would require the employer "to bear more than a de minimis cost."

Shortly after *Hardison*, one circuit found it "difficult to imagine" a "standard less difficult to satisfy" than this new de minimis test. *Yott* v. *N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979). That court was right. Most religious-accommodation claims since *Hardison* have proven dead on arrival, save the few times when the "employer had made no attempt to accommodate." Karen

Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 373 (1997). Now, "virtually any type of cost constitutes undue hardship." 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, 138 (2015).

The Court's early choice to rewrite the standard has inflicted real harms. Religious minorities—"people who seek to worship their own God, in their own way, and on their own time"—are often the ones most adversely affected. *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring); see also *Hardison*, 432 U.S. at 96-97 (Marshall, J., dissenting). This unequal impact is predictable. Employers are more likely to accommodate religious beliefs that are more familiar because they are widely held—say, a Sunday Sabbath or Christmas Day already built into the calendar—and less likely to accommodate beliefs not as well known in some communities—like a Seventh-day Adventist whose Sabbath starts sundown Friday or a Muslim employee who celebrates Eid. See Amicus Br. for Christian Legal Society, et al. at 23-24, *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349), 2018 WL 5098484 (finding that 62 percent of cases that turned on "undue hardship" since 2000 involved members of non-Christian faiths or Christians who observe Saturday Sabbaths); see also Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, WASH. POST (June 21, 2016, 4:39 p.m.), http://bit.ly/3lX0RVL (writing that Muslim Americans account for approximately a quarter of religious accommodation cases despite comprising 1.1% of the national population).

So scores of failed religious-accommodation claims have come to fill the case reporters. And for every public example, many others lurk in the background. Many employees won't file claims or will "accept any offered accommodation—even when it does not adequately accommodate their religious observance—because courts are unwilling to require more." Matthew P. Mooney, *Between a Stone and a Hard Place: How the Hajj Can Restore the Spirit of Reasonable Accommodation to Title VII*, 62 DUKE L.J. 1029, 1050 (2013). This situation is a long way from the "favored treatment" that Title VII intended for religious practices. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). And it is altogether unjustifiable given that *Hardison* is "[b]ereft of any textual support and incompatible with this Nation's founding promises." Pet.Br.4.

This Court can now correct course and restore Title VII's plain meaning.

Amici States—West Virginia, Louisiana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia—are deeply concerned with protecting their residents' right to earn a living while "avoiding unnecessary clashes with the dictates of conscience." *Gillette* v. *United States*, 401 U.S. 437, 453 (1970). They also aren't just bystanders, unaffected by any doctrinal change. *Amici* are themselves large employers who will be held to the more protective standard if the Court reinstates Title VII's religious-accommodation provisions. Even so, *Amici* believe that accommodating religious observance and practice is well worth it. Religious accommodation makes for a better workforce for both employees *and* employers.

Yes, returning to the plain meaning of "undue hardship" might lead to more accommodation requests and claims, which could in turn lead to more costs. But a tsunami of new litigation and expense is unlikely: "[R]eligious accommodation requests are equivalent to only six percent of the disability claims that allege the lack of a reasonable ADA accommodation." See Christopher M. Fournier, *Faith in the Workplace: Striking A Balance Between Market Productivity and Modern Religiosity*, 15 SEATTLE J. FOR SOC. JUST. 229, 251 (2016) (predicting no great increase in religious-accommodation claims under a more permissive standard). So in reality, returning to a genuine undue-hardship standard should cause little more than a ripple. And that's in large part because other state and federal civil-rights laws already hold employers to a more robust interpretation of "undue hardship." See *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari). Many employers must comply with various state laws that define "undue hardship" to mean "significant difficulty or expense," for instance. So concern that employers cannot accommodate a stricter standard is unfounded.

And ultimately, when considering the costs of recalibrating the undue-hardship standard the Court should also weigh the costs of trudging on with the feeble more-than-de-minimis-cost test. That test has led to inconsistent and unfair treatment of employees. See Dallan F. Flake, *Bearing Burdens: Religious Accommodations That Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 215 (2015) (describing circuit split over whether employers must accommodate requests not to work weekends because it might affect morale). It has also forced thousands of people to suppress their religious beliefs at work or decline job

opportunities to preserve their faith and practices. See Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 791 (2013). So increased compliance costs under a new standard would flow from the fact that *Hardison* has unjustifiably depressed religious accommodations for several decades. Restoring Title VII's promise would thus return employer costs—and offsetting benefits, such as improved employee morale—to where they should have always been.

Religious respect shouldn't disappear over concerns of a few dollars and cents. *Amici* urge this Court to so hold.

SUMMARY OF ARGUMENT

The Court should reject *Hardison*'s more-than-de-minimis-cost test for refusing reasonable religious accommodations under Title VII. Lurking beneath the test's outward flaws are several myths that the Court should dispel.

I. One misconception is the fear that employers of all sizes and sorts will be hamstrung by a surge of religious accommodation requests without *Hardison*'s Title VII gloss. As a legal matter, Congress already weighed the tradeoffs and decided that the burdens of accommodation are worth the benefits—*Hardison* was wrong to revisit that calculation. As a factual matter, this fear rests on no empirical data or other actual evidence. It grew instead from untested hypotheticals and assumptions. The Court has heard and rejected this brand of speculation before. It should do so again. In short, the sky will not fall if the Court overrules *Hardison*. What will happen instead is a restoration of the full respect for religious practice that Title VII was meant to secure all along.

II. Another worry is that employers won't know how to handle an enlivened "undue hardship" standard. But every day, employers comply with "undue hardship" standards in other federal laws that give the term more meaning than *Hardison*'s more-than-de-minimis approach does. From providing accommodations for employees with disabilities to preserving veteran employment to carving out work breaks for nursing mothers, employers make "undue hardship" tests work in many contexts that require a "significant difficulty or expense" (or similar) showing. States, too, have passed accommodation laws that define "undue hardship" as involving significant difficulty or costs. This pervasive use of a higher standard makes *Hardison* all the more anomalous—and can give the Court confidence that interpreting undue hardship according to its plain text will not strike employers with unmanageable pain.

III. A last myth is the notion that all employers favor *Hardsion*. The *amici* States' voice is unique and authoritative on the matter: States often employ more people than anyone else within their borders, and state and local employees are often the ones seeking the sort of religious accommodations that the Court is evaluating here. And yet, the *amici* States are ready to see *Hardison* go. The States believe that the benefits are worth any added burdens. Our people deserve to access and remain in the workforce knowing that their rights to religious observance are durable. A religiously diverse workforce helps everyone. And strong respect for religious liberty in general benefits the States and our residents alike.

ARGUMENT

I. The Sky Will Not Fall.

Hardison gave "new life" to fears of "unforeseen complications and speculative hardships" that might arise if courts understood Title VII to demand more than a lax "undue hardship" test. Anton Sorkin, *A "Cruel Choice" Made Law: Freewheelin' Accommodation Claims and Harms of Conviction Endemic to Adverse Action*, 52 U. MEM. L. REV. 703, 716 & n.32 (2022) (collecting cases citing the "floodgate/steamroller effect … in various settings"). The gist of the concern is that "grant[ing] even the most minor special privilege to religious observers to enable them to follow their faith," *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting), would "likel[y]" spur a swarm of accommodation requests from "employees whose religious observances … prohibit them from working" in the way their employers want, *id.* at 85 n.15 (majority op.). Even though expressed as a footnote, this worry about a "spectral march" of future claimants seems to have played an outsized part in the *Hardison* majority's decision. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

The "floodgates" concern is often heard in litigation—but it does not hold up here. Yes, the Court should respect the appropriate "undue hardship" limit that Congress set to keep from propping open the religious-accommodation door too wide and for too long. See, *e.g.*, *United States* v. *Lee*, 455 U.S. 252, 258 (1982) (rejecting exemption, under the Free Exercise Clause, from paying social security tax because "mandatory participation is indispensable to the fiscal vitality of the social security system"). "[A]n organized society," after all, both "guarantees religious

freedom to a great variety of faiths" *and* "requires that some religious practices yield to the common good." *Id.* at 259. But the speculative harms that animate *Hardison*'s defenders are different. They are not the sort that could (much less should) justify reading right out of the statute "all efforts under Title VII to accommodate work requirements to religious practices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

A troubling assumption from at least some of the "floodgates" crowd is that many employees would opportunistically lie their way into special treatment by claiming a religious need. Yet next to no evidence supports that idea. See *Burns* v. *S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (rejecting for lack of evidence the argument that allowing accommodations "would open the gate to excusing vast numbers of persons"). And perhaps worse, this assumption conflicts with the general practice courts employ when they encounter religious-observance claims. Typically, courts presume that religious objections are sincere and rooted in religious faith (though that presumption can be overcome). See, *e.g.*, *Lee*, 455 U.S. at 257. So upholding *Hardison* based on this worry might enshrine a hostility to religion unseen in modern religious-freedom doctrine—one that assumes that, in a nontrivial number of cases, requests for accommodations are *in*sincere.

But most often, the speculation at the heart of *Hardison*'s floodgates rationale is another version of "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). Courts have shot down this kneejerk reaction many times, often twice over—once when an issue first

arises as an improper consideration, and again later on for lacking the vindication of time and application. The reason for that is simple: "It can't be the case that the speculative possibility that one exception conceivably might lead to others is *always* reason enough to reject a request for the first exception." *Yellowbear* v. *Lampert*, 741 F.3d 48, 62 (10th Cir. 2014) (Gorsuch, J.) (emphasis in original). Even more so when Congress has already chosen to require the exception in the mine-run of cases.

This case is not the first time the Court has had a chance to expose and debunk this flawed line of reasoning. In 2015, for example, the Court took up the case of a Muslim prison inmate who was denied "permission to grow a [half-inch] beard" as his faith required. *Holt* v. *Hobbs*, 574 U.S. 352, 359 (2015). The state corrections department resisted the accommodation in part because it thought that granting it might lead many other prisoners to "request beards for religious reasons." *Id.* at 368. But citing *O Centro*, the Court rejected the argument just as it had in "similar … analogous contexts" before. *Id.* (explaining similarly rejected speculation "that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might … dilute the unemployment compensation fund" and hurt employers' ability to schedule "necessary Saturday work"). As far as the *amici* States can tell, *Holt* did not trigger "a flood of other inmates [to] declare themselves believers" in a new religion just to "enjoy [the] benefit[]" of a half-inch beard. *Pasaye* v. *Dzurenda*, 375 F. Supp. 3d 1159, 1170 (D. Nev. 2019).

Holt followed closely another case in which the Court rejected a slippery-slope argument that challenges to the Affordable Care Act under the Religious Freedom Restoration Act would trigger a "flood of religious

objections" demanding "almost every conceivable kind" of "constitutionally required religious exemptions from civic obligations." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 732, 735 (2014) (quoting *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 888-89 (1990)). Those considerations were flawed from the start (and the Court said so). They were also discredited later when "no such flood occurred at all." Mark L. Rienzi, *Religious Liberty and Judicial Deference*, 98 NOTRE DAME L. REV. 337, 395 (2022). Empirical research has shown that "religious liberty claims and victories remain scarce," "government win rates have [not] undergone a dramatic change since *Hobby Lobby*," and RFRA is "primarily used to protect less privileged minority religions." *Id.*; see also J. Haberkorn, *Two Years Later, Few Hobby Lobby Copycats Emerge*, POLITICO (Oct. 11, 2016, 5:19 p.m.), https://politi.co/3K79mrB (describing how fears of an exemption rush "haven't been borne out" in the "anticlimactic response" to *Hobby Lobby*).

In short, "predictions that *Hobby Lobby* would open the floodgates" fell flat. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 356 (2018). And even if faux revivals leading to mass litigation were to start breaking out, judges have the tools to resolve them: "Courts have had no problem weeding out weak or insincere RFRA claims" after *Hobby Lobby* and similar rulings, like *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020). *Id.*

So refusing to accommodate reasonable requests from faith-driven employees betrays a lack of faith on the part of employers. *Hardison*'s demise will not trigger sudden and irreparable work stoppages or crushing financial loss,

especially as the statute allows flexibility in cases of *genuine* employer hardship. See *Est. of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) ("Title VII calls for reasonable rather than absolute accommodation."). Instead, "enforc[ing] [Title VII] as written" will honor the "sensible balanc[ing]" test that Congress chose. *Hobby Lobby*, 573 U.S. at 736. The Court should scatter the speculative concerns that have propped up *Hardison* until now.

II. *Hardison* Stands Alone.

Fears that employers won't be able to manage a different "undue hardship" standard are also unfounded because employers *already do* under a host of other laws. *Hardison*'s weak spin on the Title VII religious accommodation standard is the outlier.

For one thing, federal law is comfortable with a higher standard. As members of the Court have already noted, Congress rejected *Hardison*'s interpretation in favor of a "significant difficulty or expense" standard in the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Rights Act, and the Affordable Care Act. See *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting from denial of certiorari). "Undue hardship" is applied similarly for jury service and under the Fair Labor Standards Act. *Small*, 952 F.3d at 827 (Thapar, J., concurring) (citing 28 U.S.C. § 1869(j) (jury service); 29 U.S.C. § 207(r)(3) (FLSA)). And even where Congress doesn't define "undue hardship," courts have most often given the term its plain meaning—a meaning more stringent than "de minimis." *Id.* (quoting *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005) ("[T]he adjective 'undue' indicates that Congress viewed garden-variety hardship as an insufficient excuse." (cleaned up))).

So *Hardison*'s interpretation of "undue hardship" stands out from the rest of the U.S. Code.

The same is true looking to state law.

First, many state legislatures have rebuffed *Hardison*'s approach in favor of a "significant difficulty or expense" standard in the religious-discrimination context. See, *e.g.*, ARIZ. REV. STAT. § 41-1461(15). These statutes often list additional factors employers (and reviewing courts) must consider when determining whether a hardship is truly undue—like California's focus on the nature and cost of accommodation, the overall resources of the affected facilities and business as a whole, the type of operations at stake, and the geographic spread between facilities. See CAL. GOV. CODE § 12926(u). Frameworks like these help ensure that employees' rights are protected while safeguarding employers from financial distress. They also provide courts flexibility to apply the laws "in a practical way" to "case-specific" circumstances. *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401-02 (2002); accord *Dykzeul* v. *Charter Commc'ns Inc.*, No. 18-05826, 2019 WL 8198218, at *6-7 (C.D. Cal. Nov. 18, 2019).

Still other States have adopted other kinds of stricter standards for religious accommodations. In New Jersey, for instance, "employers cannot impose any condition upon employees that 'would require a person to violate ... sincerely held religious practice or religious observance.'" *Tisby* v. *Camden Cnty. Corr. Facility*, 152 A.3d 975, 979-80 (N.J. Super. Ct. App. Div. 2017) (quoting N.J. STAT. § 10:5-12(q)(1)). The dictate is not absolute, but employers can claim an exemption only where they would "incur an undue hardship," defined as "unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a

bona fide collective bargaining agreement." N.J. STAT. §§ 10:5-12(q)(1)-(3).

The list goes on. Other States, like New York, use much the same approach. See N.Y. EXEC. LAW § 296, *et seq.*; accord *N. Shore Univ. Hosp.* v. *State Hum. Rts. Appeal Bd.*, 82 A.D.2d 799, 799-800 (N.Y. App. Div. 1981) (holding that employer failed to accommodate employee's Sabbath observance by requiring the employee to find co-workers to cover her shift). North Dakota uses similar factors, as well. It requires employers to grant a reasonable accommodation so long as it does not "disrupt or interfere with the employer's normal business operations; threaten an individual's health or safety; contradict a business necessity of the employer; or impose an undue hardship on the employer" based on factors like cost and the business's size. N.D. CENT. CODE § 14-02.4 to -03(2). And Colorado's Anti-Discrimination Act, which forbids refusing to hire or firing an employee based on religion, COLO. REV. STAT. § 24-34-402, *et seq.*, lets employers decline to grant an accommodation only after working with the employee in good faith and only if "an undue hardship would result from each available alternative method of accommodation," 3 COLO. CODE REGS. § 708-1-50.1(A)-(B).

Still other States have tailored their laws to specific kinds of recurring accommodations requests. For example, Georgia requires businesses with employees "whose habitual day of worship has been chosen by the employer as a day of work [to] make all reasonable accommodations to the religious, social, and physical needs of such employees so that those employees may enjoy the same benefits as employees in other occupations." OFFICIAL GA. CODE ANN. § 10-1-573. In Minnesota, public employees who "observe[] a religious

holiday on days which do not fall on a Sunday or a legal holiday" can take those days off. MINN. STAT. § 15A.22. Likewise, Kansas requires its employers to make reasonable accommodations for employees to observe their Sabbath or other holy days if the accommodation doesn't cause undue hardship. KAN. ADMIN. REGS. § 21-33-1(b) (listing example of an undue hardship where "the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence").

Finally, some state courts have specifically rejected the more-than-de-minimis-cost test when construing "undue hardship" under state laws. Quite recently, for instance, the Washington Court of Appeals rejected the *Hardison* formulation and instead held that an undue hardship results only when an accommodation would cause an employer "significant difficulty or expense." *Suarez* v. *State*, 517 P.3d 474, 482-86 (Wash. Ct. App. 2022), *review granted in part, denied in part*, No. 101386-8, 2023 WL 1818610 (Wash. Feb. 8, 2023). An Oregon court also held that the legislative choice to use "the term 'undue hardship'" was "clearly at odds with the de minimis standard," and so construed it instead to mean "a significant or substantial burden taking into account all relevant circumstances." *Nakashima* v. *Or. Bd. of Educ.*, 131 P.3d 749, 759-62 (Or. Ct. App. 2006), *aff'd on other grounds sub nom.*, 185 P.3d 429, 442 (Or. 2008) (holding that lower tribunal erred in applying a "de minimis burden test" to a statute barring religious discrimination in state-funded school activities).

Each of these laws shows that employers can effectively manage religious-accommodation requests even when operating under standards worlds apart from *Hardison*'s.

Second, that observation is unsurprising given that States also routinely enforce more stringent accommodation tests in areas beyond religion. At least 35 States echo the federal Rehabilitation Act when addressing disability, requiring covered employers to afford reasonable accommodations that enable the employee to perform the job's essential functions without imposing undue hardship on the employer. See JOHN J. COLEMAN, III, DISABILITY DISCRIMINATION IN EMPLOYMENT § 8:1 (2022 supp.). Some call for even more. In West Virginia, for example, the undue hardship standard means any action "requiring significant difficulty or expense." W. VA. CODE R. § 77-1-4.6. Relevant factors include the employer's size and financial resources, the nature and cost of the accommodation, and the "possibility that the same accommodations may be able to be used by other prospective employees." W. VA. CODE R. §§ 77-1-4.6.1 to .4. Considerations like these "balance the interests of the employee in continued employment and the interests of the employer in avoiding unreasonable burdens or expenses." *Haynes* v. *Rhone-Poulenc, Inc.*, 521 S.E.2d 331, 344 (W. Va. 1999).

And States have found plenty of other ways to provide for better disability accommodation than a milquetoast *Hardison*-like standard. Iowa, for example, uses its own brand of the undue hardship standard, which looks in part at whether rejecting the accommodation was a "business necessity"—that is, "necessary to the safe and efficient operation of the business." *Iowa Beer & Liquor Control Dep't Store 1023* v. *Iowa C.R. Comm'n*, 337 N.W.2d 896, 900 (Iowa Ct. App. 1983) (quoting *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971)). Maine offers a slightly different version of the undue hardship standard, requiring the employer to take reasonable steps to accommodate a potential employee's disability, but not

requiring the employer to eliminate essential functions of the job. *Plourde* v. *Scott Paper Co.*, 552 A.2d 1257, 1262 (Me. 1989).

Nor is disability the only area where employers are already grappling with a meaningful "undue hardship" standard under state law. For example, federal law requires employers to provide nursing mothers break time and a private space to express milk, with an exception for smaller employers that can show an "undue hardship." 29 U.S.C. §207(r)(1)-(3). Some States in turn mirror that obligation in their own law. See, *e.g.*, CAL. LAB. CODE § 1031. But some other States have gone even further than this federal floor. Vermont's "Nursing mothers in the workplace" law uses a "substantially disrupt" standard *and* makes it unlawful to "retaliate or discriminate" against employees for exercising their rights. VT. STAT. ANN. tit. 21, § 305. And "[t]o the extent reasonably possible," Indiana law requires employers to provide a refrigerator for milk storage or allow employees to bring their own. IND. CODE § 22-2-14-2(b). These protections cover millions of nursing mothers each year.

Several States also have laws barring employers from disciplining employees who are victims of spousal abuse or domestic violence, or that require employers to provide time off from work in these situations. *E.g.*, ME. REV. STAT. tit. 26, § 850. Oregon's version requires reasonable safety accommodations unless they would cause an undue hardship. OR. REV. STAT. § 659A.290. And similar to other state regimes, it defines "undue hardship" well above more-than-de-minimis. It requires "significant difficulty and expense" to the employer, including "consideration of the size of the employer's business and the employer's critical need for the eligible employee." *Id.* § 659A.275; see also *Marshall* v. *Pollin Hotels II, LLC*,

170 F. Supp. 3d 1290, 1307 (D. Or. 2016) (finding that company provided reasonable accommodations when it repeatedly attempted to help employee obtain a restraining order and counseling and supervisor offered to send trespass notice to assailant). Despite the disturbing prevalence of domestic violence in America, employers have not been heard to complain about this stronger accommodation requirement.

All these laws show that employers already accommodate their workers under standards stricter than more-than-de-minimis-cost. They will no doubt adjust quickly to a heftier federal standard for religious practices, too. What's more, these laws reveal *Hardison*'s test as the odd man out. *Hardison* deviates from the *ordinary* standards for workplace accommodations in diverse contexts. So any consideration of increased accommodation costs should account for how *Hardison* has let employers effectively shirk their responsibilities under Title VII by using an unusually weak standard for the past fifty years. The right question is thus not how much it will cost employers to accommodate their employees' religious beliefs going forward. Rather, it is whether we can afford to continue derogating employees' rights in this important area.

III. States' Interests Are Critical.

Lastly, the States stand to bear the lion's share of the burdens that might flow from tossing *Hardison*—but also have much to gain. States are "[g]overnment employers" who "account for a disproportionate share" of Sabbath observance and other religious accommodation cases. Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 838 (1999). Yet the *amici* States are still eager to assume the task of

offering meaningful accommodation under Title VII. After all, States have long been committed to supporting our religious citizens' right to join and remain in the workforce. Cf. Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331, 384 (2020) (describing broader societal benefits from religious accommodation generally). Durable religious-accommodation protections increase freedom of conscience *and* lead to better workplaces. And a reinvigorated Title VII standard will let state and federal law speak with the same voice.

States want to see robust accommodations for their religious workers in part because a fulfilled workforce is a key marker of both a stable society and a healthy economy. Americans know this better than anyone; work is part of our national identity. "In America no one is degraded because he works." 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 152 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Vintage Books 1990). Rather, "[t]he notion of labor" is "held in honor" as "the necessary, natural, and honest condition of human existence." *Id.* at 152. And when an unaccommodated religious observance or other workplace obstacle gets in the way, the result is often a "decline in civic engagement." SOCIAL CAP. PROJECT, U.S. CONG. JOINT ECON. COMM. — REPUBLICANS, SCP REP. NO. 8-19, THE SPACE BETWEEN: RENEWING THE AMERICAN TRADITION OF CIVIL SOCIETY (Dec. 18, 2019), https://bit.ly/3SpabOw.

If employees are driven from a job because they find it incompatible with their religious mandates, that attrition can also cause worker shortage for States and other employers. Religious observers are a huge portion of the American population, so losing even a small part of them could squeeze employers. See Jeffrey M. Jones, *How Religious Are Americans?*, GALLUP (Dec. 23, 2021),

http://bit.ly/3EpPwnC (49% of Americans surveyed said religion was "very important" to them); *Religious Landscape Study*, PEW RSCH. CTR. (2014), https://bit.ly/3KpOpZ3 (last visited Feb. 24, 2023) (reporting that 53% of Americans believe religion is "very important" in their lives). The States have always been aware of the challenge of finding and keeping strong employees—and have only become more acutely aware of it as of late. See Elise Gurney, *Colorado Shifts to Skills-Based Hiring to Fill State Government Workforce Needs and Hire More Individuals with Disabilities*, COUNCIL OF STATE GOV'TS (Jan. 10, 2023), https://bit.ly/3xrBQVi ("State governments ... fac[e] unprecedented workplace shortages."); Liz Farmer, *The Great Resignation's Impact on Local Government*, ROCKEFELLER INST. OF GOV'T (Jan. 20, 2022), https://bit.ly/3IOHjfp ("2021 marked the highest number and rate of state and local government job openings in the past 20 years, suggesting that governments are understaffed and unequipped to deal with additional losses"). So States want it to be clear that religious adherents are welcome in government jobs.

All the more because Congress passed Title VII for exactly this reason—to "*open* employment opportunities," not close them. *Loc. 28 of Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 448 (1986) (emphasis added). Indeed, when Congress amended Title VII to provide for religious accommodation, it did so mainly to make sure that "Sabbatarians" would remain part of the workforce. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (quoting 118 CONG. REC. 705 (1972)). It makes sense, then, that the statute would reject "practices that would deprive or tend to deprive" a worker of "employment opportunities." *Connecticut* v. *Teal*, 457 U.S. 440, 453-54 (1982). States stand to benefit greatly from the expanded pool of skilled labor that comes with these protections.

Once state employees are in the workplace, religious accommodations produce better performance from them, too. Religiously observant employees who are offered accommodation are more likely to feel respected. See Fournier, *supra*, at 244 ("When employees witness their employers going above and beyond to provide religious accommodations, those employees will feel more valued."). This respect grows into better morale across the entire workforce. One study, for instance, found that "workers at companies that do not provide flexible hours for religious observance are twice as likely as workers at companies that do provide this flexibility to say they do not look forward to coming to work." TANENBAUM, WHAT AMERICAN WORKERS REALLY THINK ABOUT RELIGION: TANENBAUM'S 2013 SURVEY OF AMERICAN WORKERS AND RELIGION 19 (2013). And improved morale in turn fosters improved performance; "overwhelming research" shows that morale "impacts performance at both the individual level and for the organization as a whole." Flake, *supra*, at 174-77; see also Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1722 (2020) ("[M]ore employee-friendly accommodations would likely boost employee morale, leading to greater productivity, creativity, loyalty, and profitability.").

A state workforce that allows reasonable and meaningful leeway for religious practice also gives the broader public more confidence that their government is representing their interests. If voters believe that anyone with sincerely held religious practices will be cast out of a government job, then they may come to expect that the government will disrespect religious faith in other ways, too. On the other hand, a religiously plural state government workforce might be expected to protect *all* religions in *all* important ways within the State.

Of course, States have pursued some of these benefits by implementing employee-favorable tests for religious accommodation under their own laws—as explained above. See also Christopher N. Elliott, *Federalism and Religious Liberty: Were Church and State Meant to Be Separate?*, 2 RUTGERS J.L. & RELIGION 5 (2000) ("[S]tates, instead of Congress, have … prescribe[d] the legal, political, and social course for religious liberties."); Hon. Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 370 (2004) ("[S]tate constitutions currently afford a friendlier venue for litigants in religious liberty cases."). But especially in a time of increased cross-state mobility and remote work, it would be all the better to see a uniform, national standard from a Title VII that fulfills its original promise.

And dispensing with *Hardison* would also erase the stain that the case has left on some States' own laws. The States have been carrying much of the load Title VII dropped post-*Hardison* when it comes to robust workplace religious freedom laws. But these protections are far from uniform, and *Hardison* is a key reason why. It remains true that many States "find the weight of the federal jurisprudence to be persuasive." *State ex rel. Surnaik Holdings of WV, LLC* v. *Bedell*, 852 S.E.2d 748, 761 (W. Va. 2020); see *Par. Nat. Bank* v. *Lane*, 397 So.2d 1282, 1285 (La. 1981) (similar). That's especially so for States that have "look[ed] to Title VII law as a matter of course in defining the scope of their own laws." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). As a result, some state courts have reflexively applied *Hardison*'s reasoning—such as it is—in construing their *own* States' laws. See W. Va. & La. Pet. Amici Br.4-9 (describing the problems from "[s]tate courts nationwide" using *Hardison* "in interpreting their own state anti-

discrimination laws"). Relegating *Hardison*'s dicta to the dustbin would signal to those courts that they should rethink things, too.

In sum, if the Court gives "undue hardship" the weight it deserves, then States—as well as employees and other employers—stand to benefit in many important ways. The Court should therefore hold that "an employer must incur significant difficulty or expense before it is excused from offering an accommodation." Pet.Br.3.

CONCLUSION

The Court should dispense with the *Hardison* standard and return "undue hardship" to its ordinary, plain meaning.

Respectfully submitted.

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