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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, LOUISIANA, AND 15 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*[*]

The *amici* States of West Virginia, Louisiana, Alabama, Arkansas, Florida, Kansas, Kentucky, Mississippi, Montana, Nebraska, New Hampshire, 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). "Conscience," James Madison said, constitutes a "most sacred" thing, often growing from "religious opinions" and "the profession and practice" they dictate. James Madison, *Property* (Mar. 29, 1792), *in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (P. Kurland & R. Lerner eds., 1987). And over our history, "many hundreds of thousands of real people have regarded their religious beliefs as so important that they sacrificed" (among other things) "opportunities for career advancement … to worship in accordance with their convictions." Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 791 (2013).

When Congress passed Title VII of the Civil Rights Act of 1964, it aimed to take career sacrifices for the sake of religious practice off the board. Title VII expressly prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). The statute also compels employers to "reasonably accommodate" "all aspects" of an "employee's religious

[*] Under Supreme Court Rule 37.2(a), *amici* notified counsel of record of their intent to file this brief.

observance or practice" so long as the accommodation does not impose "undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). The hard tradeoffs made by the "hundreds of thousands" before should thus have become far less common.

But just a short time after Congress enacted Title VII's promise of religious liberty, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), stripped the heft of its reasonable-accommodation provision. In *Hardison*, the Court declared that an employer suffers an "undue hardship"—obviating the need to offer accommodation—whenever the accommodation would impose "more than a de minimis cost." *Id.* at 84. And that de minimis cost can be mighty small. The requested accommodation in *Hardison* would have cost the company just "$150 for three months, at which time [the employee] would have been eligible to transfer" out of the conflicting circumstances. *Id.* at 92 n.6 (Marshall, J., dissenting).

Amici States believe this unjust standard demands a remedy. And while Petitioner has shown the issues that *Hardison* created in lower federal courts, the problem extends even farther, seeping deep into the state judiciary as well. The *Hardison* test brought to state courts the same disregard for believers seeking workplace accommodations that the federal courts have seen too often. This dismissive approach cuts against the States' longstanding interests in safeguarding the country's tradition of religious liberty. The States have fought to ensure that this tradition stays alive at home and in the office. Congress did its part, too, in passing Title VII's protections. This Court should now do its part in upholding them.

Religious liberty should not fall away whenever its respect costs employers a few dollars and cents. The

Court should therefore take this case and dispense with *Hardison*'s more-than-de-minimis-cost standard.

SUMMARY OF ARGUMENT

Petitioner is right: This case "presents an ideal opportunity" to do away with the more-than-de-minimis-cost test that *Hardison* set loose 45 years ago. Pet.4. The Court should grant the petition and bury that standard for at least three reasons:

I. *Hardison*'s reach extends beyond federal courts. Yes, it is not hard to find problematic rulings in many federal forums. But state courts often follow federal courts' lead when interpreting their own workplace anti-discrimination statutes. As a result, the *Hardison* standard has found its way into state-court decisions, bringing the same confusion and disregard for religious liberty that the federal courts struggled with first. This case is the right vehicle to consider that standard afresh, stop the damage it inflicts, and help ensure that no court—federal or state—applies it to an American employee again.

II. *Hardison* also chafes with some of our country's most fundamental values. Before the Founding and after, the colonies and then the States spoke with a single voice about the importance of religious freedom. Workplace freedom-of-conscience protections—including Title VII's—stem from this history. Similarly, the States that have continued in this vein despite *Hardison*'s setback show that robust religious freedom at the office is workable and economically viable.

III. The more-than-de-minimis-cost test conflicts with Title VII itself. The statute requires religious accommodations unless an employer can prove undue

hardship. But one tick above de minimis is not even a hardship—much less an undue one. Honoring the States' tradition of religious liberty honors Title VII's text and context as well.

REASONS FOR GRANTING THE PETITION

I. The Damage *Hardison* Inflicts Has Spread To State Courts.

Over the past decades, the "de minimis" test has evolved into an escape hatch for employers that has very nearly muted a whole provision of Title VII. And the test has weaseled its way into similar state laws, too, showing that the issue is not just a federal court problem. With state courts following *Hardison*'s lead, the test's pervasiveness at every level is another reason to grant review.

It did not take long for *Hardison* to shape lower federal court decisions. Federal courts have "almost unanimously" found that "any economic costs" produce an 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, 139-40 (2015). This standard injures religious adherents of all stripes—each of them weighing the same impossible choice Mr. Hardison faced years earlier. So, like him, many devout practitioners have left the courthouse with their consciences intact but their accommodation requests denied.

Those rejections stacked up fast, from a Muslim teacher wishing to wear religious attire, *United States* v. *Bd. Of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990); to an Orthodox Jew seeking to observe Shabbat,

Brener v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982); to Muslim employees asking to move a meal break during Ramadan to coincide with sunset, *EEOC* v. *JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018). And on and on. Employees' "[f]ree religious exercise" thus became increasingly "restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC* v. *Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008).

It would be bad enough if *Hardison*'s damage were limited to these federal courts. But it is not.

Several States have modeled their own religious discrimination statutes after the language of Title VII. See, *e.g.*, ALASKA STAT. § 18.80.210, *et seq.*; IOWA CODE § 216.6; ME. STAT. tit. 5 § 4572; MASS. GEN. LAWS ch. 151B § 4; 43 PA. CONS. STAT. § 955. And "[m]any States look 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). This mimicry does not always reflect careful deliberation and agreement with the federal courts' analyses. Instead, many state courts seem driven by an instinct to keep federal and state statutes on the same track. See, *e.g.*, Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 721 (2016) ("[S]tate courts typically conform to federal court interpretations of federal [anti-discrimination] statutes with relatively paltry analysis of countervailing considerations.").

What issued on the state side in *Hardison*'s wake, then, should have surprised no one. State courts nationwide have repeatedly relied on the decision in interpreting their own state anti-discrimination laws:

- Courts in four States applied *Hardison* to requests from Seventh-Day Adventists to observe the Sabbath. See *Olin Corp.* v. *Fair Emp. Pracs. Comm'n*, 367 N.E.2d 1267, 1268, 1270-71 (Ill. 1977); *Mass. Bay Transp. Auth.* v. *Mass. Comm'n Against Discrimination*, 879 N.E.2d 36, 40, 45 (Mass. App. Ct. 2008); *Franks* v. *Nat'l Lime & Stone Co.*, 740 N.E.2d 694, 696, 699-700 (Ohio Ct. App. 2000); *Pa. State Univ.* v. *Com., Pa. Hum. Rels. Comm'n*, 505 A.2d 1053, 1054, 1056 (Pa. Commw. Ct. 1986). Two other States applied *Hardison* to Seventh-Day Adventists' religious conflicts involving labor unions. See *Wondzell* v. *Alaska Wood Prods., Inc.*, 583 P.2d 860, 861, 864 (Alaska 1978); *Me. Human Rts. Comm'n v. Local 1361, United Paperworks Int'l Union AFL-CIO*, 383 A.2d 369, 372, 381 (Me. 1978). The Massachusetts decision, in particular, shows how *Hardison* has even warped state statutes that do not mirror Title VII. There, the state high court deployed the de minimis test even though "the Massachusetts undue hardship standard … is noticeably different and allows for slightly broader protection." *Mass. Bay Transp. Auth.*, 879 N.E.2d at 337 (cleaned up).

- Jewish employees in California and Iowa trying to observe religious holidays faced the standard, too. See *Soldinger* v. *Nw. Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 752-53, 762 (Cal. Ct. App. 1996); *King* v. *Iowa Civ. Rts. Comm'n*, 334 N.W.2d 598, 600-02 (Iowa 1983). Here again, the California court applied *Hardison* even though California's statute called for a higher standard: "significant burden or expense." Jason Despain, *A Peculiar Clause of Political Compromise for California's Religious Minorities*, 21 RUTGERS J. L. & RELIGION 390, 419 (2021).

- For Jehovah's Witnesses, state courts in Kentucky and North Carolina said that *Hardison* applied when employees refused to say "Merry Christmas" when answering the phone or when they asked to attend a weekly religious meeting. See *Ky. Comm'n on Hum. Rts.* v. *Lesco Mfg. & Design Co., Inc.*, 736 S.W.2d 361, 362, 364 (Ky. Ct. App. 1987); *New Hanover Hum. Rels. Comm'n* v. *Pilot Freight Carriers. Inc.*, 351 S.E.2d 560, 561, 564 (N.C. 1987).
- And when a Pentecostal interpreter in Missouri refused to sign words or statements against her religion, the court said that *Hardison* applied. *Sedalia No. 200 Sch. Dist.* v. *Mo. Comm'n on Hum. Rts.*, 843 S.W.2d 928, 929-30 (Mo. Ct. App. 1992).

These *Hardison*-driven state cases run the gamut, from remands for further factual development or remands to consider the new legal standard, to affirmances or reversals of an accommodation decision. The varied outcomes show that not only have state courts taken on *Hardison*'s water, but they are just as confused applying the standard as the "bewilder[ed] … litigants" in front of them. See Major Christopher D. Jones, *Redefining "Religious Beliefs" Under Title VII: The Conscience As the Gateway to Protection*, 72 A.F. L. REV. 1, 36-37 (2015) (discussing "the confusion among judges" and litigants over how to apply *Hardison*). The more-than-de-minimis-cost test provides courts with "no practical guidance" in assessing burdens—and "at times even allow[s] clairvoyance to carry the day." Anton Sorkin, *A "Cruel Choice" Made Law: Freewheelin' Accommodation Claims and Harms of Conviction Endemic to Adverse Action*, 52 U. MEM. L. REV. 703, 715-16 (2022).

For reasons like these, courts—again, federal *and* state—have shown an increasing disdain for *Hardison*'s

effects. The test eats away at the tradition of religious diversity and pluralism baked into our Constitution and "[t]he American story." *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring), *cert. denied*, 141 S. Ct. 1227 (2021). Members of this Court, too, have added their voices to the growing consensus against *Hardison*. See *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch J., dissenting from denial of certiorari) (*Hardison* "dramatically revised—really, undid—Title VII's undue hardship test"); *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 687 (2020) (Alito, J., concurring in denial of certiorari) ("[W]e should reconsider the proposition … that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden.").

State judges are also (rightly) concerned about the chaos *Hardison* unleashed and the damage it can inflict on employees' rights. After all, depriving religiously observant employees of their jobs without making a "suitable effort" to accommodate them is a "drastic result." *Wondzell*, 583 P.2d at 867 (Boochever, C.J., dissenting) ("I also am mindful of the considerations eloquently expressed by Justice Marshall in his dissent in [*Hardison*].")

In short, *Hardison*'s spillover effects extend beyond the federal courts. True, some state courts have correctly chosen to go their own way. Cf. *Nakashima* v. *Or. Bd. of Educ.*, 131 P.3d 749, 759-62 (Or. Ct. App. 2006) (reasoning that the state law uses "the term 'undue hardship' in a fashion clearly at odds with the *de minimis* standard" and interpreting it to mean "a significant or substantial burden taking into account all relevant circumstances"), *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). But too many have not. *Hardison* left religious employees "to make the cruel choice of surrendering their religion or their job," a dilemma that "seriously erode[s]" our tradition of "hospitality to religious diversity." *Hardison*, 432 U.S. at 87, 97 (Marshall, J., dissenting). That the erosion has extended to the States' courts makes the problem more urgent. It is time for this Court to step in.

II. The States' Religious-Freedom Traditions And Laws Show A Workable Alternative To *Hardison*.

Our country's abiding respect for religious liberty is a deep part of who we are. *Hardison* offends that identity. But since before they were States, the States have played a central role holding our tradition together. Though *Hardison*'s error has spread to many of our States' courts, those States that have resisted it and chosen more robust protections for religious employees can point the way to its cure. Renewed freedom of conscience is workable for Title VII, too.

1. America's commitment to freedom of religion and religious pluralism runs deep. See *City of Boerne* v. *Flores*, 521 U.S. 507, 551-52 (1997) (O'Connor, J., dissenting) (discussing the history of free exercise of religion in the colonies). The colonies had long insisted "that freedom to pursue one's chosen religious beliefs was an essential liberty." *Id.* at 552. When "religious beliefs conflicted with civil law," "religion prevailed unless important state interests militated otherwise." *Id.*; see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV.

L. REV. 1409, 1422-25 (1990) (discussing the colonies' diverse religious traditions).

This fondness for religious freedom took even greater hold as we transformed from colonies to country. The Founders recognized early that the Republic's long-term success depended on greater religious diversity, not less. Madison told us, for instance, that "security" "for religious rights" must match that for "civil rights"—meaning that we need a "multiplicity of sects" the same as a "multiplicity of interests." THE FEDERALIST NO. 51, at 321 (Madison) (Clinton Rossiter ed., 1961). Hamilton stressed that "a perfect equality of religious privileges" would prompt workers to "flock … from Europe" in droves to "pursue their own trades or professions." Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *in* 5 THE FOUNDERS' CONSTITUTION, *supra*, at 95.

In fact, the "religious aspect of the country" was the "first thing that struck" Alexis de Tocqueville during his visit in the early nineteenth century. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 308 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Vintage Books 1990). He was taken aback—"astonish[ed]," actually—by the "phenomenon" of "intimate[] unit[y]" between the "spirit[s] of religion … [and] freedom" that "reigned in common over the same country" instead of "marching in opposite directions." *Id.*; accord *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J, concurring in the judgment) (quoting de Tocqueville's description of religion and freedom "reigning together but in separate spheres on the same soil" (cleaned up)). America was home to "innumerable" religious sects with different objects of worship, but all "agree[d] in respect to the duties which

are due from man to man." DEMOCRACY IN AMERICA, *supra*, at 303.

The States, specifically, have pressed for religious liberty for as long as the country is old. As the eighteenth century ended, every state constitution but one included robust safeguards for religious freedom. See John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016) ("[T]he founding generation … defend[ed] religious freedom for all peaceable faiths, and wove multiple principles of religious freedom into the new state and federal constitutions of 1776 to 1791"). Putting to paper the "colonial experience" as "the fundamental law of the land," WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 339 (1965), the U.S. Constitution and the state constitutions alike thus secured religious freedom as "an unalienable right." McConnell, *Origins*, *supra*, at 1455-56.

Since then, the States have carried their commitment to religious freedom with pride. Many state constitutions "provide greater protection to the free exercise of religion … than is now provided under the United States Constitution." *Swanner* v. *Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 280 (Alaska 1994). Perhaps for that reason, several of the principles this Court has embraced in its First Amendment cases are traceable to earlier state-court decisions.

Take *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), for example. Its declaration of liberty has become an axiom: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in … religion, or matter of opinion or force citizens to confess by word or

act their faith therein." *Id.* at 642. Lesser known is an earlier ruling issued from the Hancock County courthouse in the northern panhandle of West Virginia—the "same State that would produce *Barnette*." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 164 (2018). Five Jehovah's Witnesses were indicted after their children refused to salute the American flag. *Id.* But citing the *state* constitution's religious liberty guarantees, Judge J. Harold Brennan invalidated the indictments and the state law under which they issued. "[F]reedom of religion," he explained, means "unpopular minorities may hold views unreasonable in the opinion of the majorities"; forcing children to violate their and their parents' consciences "ha[d] not been done in America hitherto" and he would not "begin it here." *Id.* (quoting Mem. Op. at 6, *State* v. *Mercante* (W. Va. Cir. Ct. June 1, 1942) (cleaned up)).

West Virginia's constitutional promise that no person may be "enforced, restrained, molested or burthened" because of his or her "religious opinions or belief," W. VA. CONST. art. 3, § 15, is not unique. The Arkansas Constitution is just one other example—it proclaims that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" and "[n]o human authority" can "control or interfere with the right of conscience." ARK. CONST. art. 2, § 24; see also, *e.g.*, GA. CONST. art. 1, § I, ¶ III (similar). So it is not that surprising that—*Hardison*'s effect on state courts aside—federal law has often chased behind state law when it comes to religious liberty and conscience. In fact, the pattern is particularly bright "when it comes to conscience protection in the workplace"; there, "the states have been the chief trailblazers." See James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 267 (2007).

This legacy all means that Title VII's "reasonable accommodation" guarantee did not spring to life from nothing. It is "deeply rooted" in the State-based commitments to religious pluralism that informed the First Amendment itself. Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 CATH. LAW. 289, 292 (1991); see also Dalian F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1700 (2020) (recounting accommodation amendment sponsor's statements that the law "flow[ed] from the original Constitution of the United States"). In other words, including religious discrimination in Title VII "reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right that lies at the heart of a free society." Harry T. Edwards & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 602 (1971).

Hardison, then, stands as an aberration among the otherwise robust commitments that the States and the federal government have always made to religious adherents—at home, at worship, and at work.

2. And just as the States' tradition of religious pluralism helped inform the decision to include religious freedom among Title VII's protections in the first place, their varied experience applying workplace religious freedom laws show that more-than-de-minimis-cost is *not* the only workable way.

Some States have demonstrated their commitment to religious freedom through laws subjecting employers to a stricter "undue hardship" standard than the one in *Hardison*:

Laws in New York, New Jersey, and Oregon, for example, bar employers from imposing conditions that would violate certain religious observance. Employers in those States cannot keep an employee at work during the Sabbath or other holy religious days unless the alternate schedule would cause the employer a "significant" "expense" or "difficulty," N.J. STAT. § 10:5-12, *et seq.*; OR. REV. STAT. § 659A.003, *et seq.*, or a "significant expense or difficulty," 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 (1981) (holding that employer failed to accommodate employee's observance of the Sabbath by requiring the employee to find co-workers to cover her shift).

Colorado's Anti-Discrimination Act bars employers from refusing to hire or from firing an employee based on religion. COLO. REV. STAT. § 24-34-402, *et seq.* The employer must talk with the employee to find an appropriate religious accommodation and then show that it would suffer an undue hardship from *each* available accommodation before denying them. 3 COLO. CODE. REGS. § 708-1-50.1, *et seq.* Kansas's law is similar. KAN. STAT. § 44-1009, *et seq.* Its related regulations require employers to make reasonable accommodations for employees to observe the Sabbath or other holy days in the absence of specifically delineated types of "undue hardship"—like where the work "cannot be performed by another employee of substantially similar qualifications during the period of absence." KAN. ADMIN. REGS. § 21-33-1(b). Meanwhile, North Dakota employers must 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 § 14-02.4-03(2). And Arizona uses similar factors to determine what counts as an "undue hardship" that presents "significant difficulty or expense." ARIZ. REV. STAT. § 41-1461(15).

Other States have tailored their laws even more specifically to the kind of accommodation Petitioner sought here. Georgia's Common Day of Rest Act of 1974, for example, states that "[a]ny business or industry which operates on … Saturday or Sunday" with employees "whose habitual day of worship has been chosen by the employer as a day of work shall 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. And 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.

Each of these laws shows that fears of a "floodgate" or "steamroller" effect—that is, concerns that with a more permissive standard employers would be overwhelmed by religious accommodation requests—are overblown. See Sorkin, *supra*, at 715-16 (quoting *Hardison*, 432 U.S. at 85 n.15). These state laws are still on the books despite *Hardison*'s effect in so many other States. If the freedom these laws afford employees came at the expense of their States' businesses or economies more generally, one would expect the people living there would have pushed for new laws. Instead, catastrophe averted, laws like these show that Justice Marshall was right when he said "floodgate" worries were both "contrary to the record" and "irrelevant [to] the real question." *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). A diverse set of employees with different religious practices and needs, he

reasoned, would lessen the costs of religious accommodations by making shift "trades … more feasible." *Id.*

The States' experiences confirm the truth in that. And they help set aside any similar concern now that the costs of jettisoning more-than-de-minimis may be too high. State practice shows that religious freedom at work is worth protecting, and *Hardison* is not the only option to do it.

III. *Hardison*'s Religious Accommodation Standard Is Wrong.

So rejecting more-than-de-minimis-cost would do more than follow our States' broad path of religious freedom. It would also close off the *Hardison* detour too many have taken. And it would honor Title VII on its own terms, too.

Beginning with *Hardison* itself, Justice Marshall wrote in dissent that the more-than-de-minimis-cost test "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86 (Marshall, J., dissenting). The test leaves employers free to reject "even the most minor special privilege to religious observers to enable them to follow their faith." *Id.* at 87. This approach is the opposite of our tradition of religious freedom. After all, "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice"—your conscience or your job—that the Court's decision put to Mr. Hardison with so little justification on the employer's side of the scale. *Id.*

These effects are unnecessary, as Title VII's text—and the state laws that mirror it—shows that costs just above

"de minimis" are not enough to excuse employers from accommodating religious practice.

Before refusing to "reasonably accommodate" any "aspect" of an employee's "religious observance or practice," Congress demanded a showing that the requested accommodation will impose "undue hardship." 42 U.S.C. § 2000e(j). In *Hardison*, this Court said "undue hardship" meant scarcely anything. Likewise, the federal Equal Employment Opportunity Commission insists that "undue hardship" means less than "significant difficulty or expense." Sorkin, *supra*, at 715 n.31 (quoting Section 12: Religious Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N § 12-IV (Jan. 15, 2021)). But *Black's Law Dictionary* defines "de minimis" to mean "[t]rifling" or "negligible"—a "fact or thing[] so insignificant that a court may overlook it in deciding an issue or case." *De minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019). Does "trifling" and "negligible" not "seem[] like the *opposite* of an 'undue hardship'?" *Small*, 952 F.3d at 828 (Thapar, J., concurring) (emphasis added). Put another way, de minimis costs "[b]y definition" "are not hardships … and the statutory context provides no reason to think that Congress meant otherwise." Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 936 (2019). These plain-text problems become even more evident read against dictionary definitions from the time Congress enacted the accommodation amendment. One of those dictionaries defined "hardship" as "a condition that is difficult to endure; suffering; deprivation; oppression." RANDOM HOUSE DICTIONARY 646 (1973). And "undue" meant "unwarranted" or "excessive." *Id.* at 1433. Those descriptions hardly sound "trifling," either.

In short, *Hardison* undid Congress's work. It announced the more-than-de-minimis-cost "standard in a single sentence with little explanation or supporting analysis"—and "[n]either party before the Court had even argued for" it. *Small*, 141 S. Ct. at 1228 (Gorsuch J., dissenting from denial of certiorari). That standard "cannot be reconciled with the plain words of Title VII, defies simple English usage, and effectively nullifies the statute's promise." *Id.* (cleaned up) (quoting *Hardison*, 432 U.S. at 88, 89, 92 n.6 (Marshall, J., dissenting)). And "time [has not] been kind to" it. *Id.* Enough is enough. Title VII's protections flowed from an expansive, state-law-grounded view of religious liberty. Its text embodies the same. It is time to bring "Title VII's right to religious exercise" back into the fold. *Id.*

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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