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 *AMICUS CURIAE* OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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), and replace it instead with a standard similar to the religious accommodation/undue hardship standard set forth in the Americans with Disabilities Act of 1990.

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INTEREST OF THE *AMICUS*[1]

The Union of Orthodox Jewish Congregations of America (Orthodox Union) is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated as amicus curiae in many cases that, like this one, raise issues of importance to the Orthodox Jewish community, including *Carson ex rel. O.C.* v. *Makin*, 142 S. Ct. 1987 (2022); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021); *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Locke* v. *Davey*, 540 U.S. 712 (2004); and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

In coalition with others, the Orthodox Union has long advocated for legally-mandated workplace religious accommodations for religious workers. That advocacy includes efforts since 1994 to enact the Workplace Religious Freedom Act, bipartisan legislation that was meant to combat the ill effects on Orthodox Jews and other religious Americans that resulted from this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). See, *e.g.*, Orthodox Union, *Examples of Cases WRFA Would Solve*, June 16, 2004, https://perma.cc/3QJ8-H2Q8.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The Orthodox Union submits this brief both to explain the harms that *Hardison* has inflicted on Orthodox Jewish practice and to propose an alternative interpretation of the Title VII reasonable accommodation/undue hardship standard that draws on the existing reasonable accommodation/undue hardship standard under the Americans with Disabilities Act of 1990.

INTRODUCTION AND SUMMARY OF ARGUMENT

At first glance, accommodating the religious practices of Orthodox Jews might seem like a "hard case" for applying the Title VII workplace religious accommodation standard. Jewish law, which is rooted in the Torah, Talmud, and mryiad rabbinic writings, demands much of its adherents. Many everyday activities are regulated in great detail, and work and workplaces are no exception. Moreover, Jewish law and practice does not yield easily to the strictures of the surrounding culture that Orthodox Jews may find themselves in. That means that conflicts—or seeming conflicts—between Jewish religious observance and the 2023 American workplace will be more numerous and more complicated than they might be for the religious practices of larger religious groups, or for religions with fewer obligations.

But if hard cases typically make bad law, this is a chance for a hard case to make good law. That is because thinking about workplace religious accommodation through the lens of Orthodox Jewish practice and experience will help the Court understand the outer bounds of how a well-functioning reasonable accommodation/undue hardship standard might work in practice. By looking at known areas where Jewish requests for workplace religious

accommodations typically arise, the Court can craft a well-functioning post-*Hardison* standard that strikes the right balance not just for Orthodox Jews, but for a wide spectrum of different religious minorities present in this country.

And as we explain below, there is desperate need for a well-functioning post-*Hardison* Title VII reasonable accommodation/undue hardship standard. First, using four different areas of Jewish religious observance—Shabbat and holidays, personal appearance, dietary observance, and daily religious observances—we describe some of the demands of Jewish law and how that law typically intersects with the workplace. We then recount how the need for Jewish religious accommodations has evolved over time. From the very beginning of our Nation, Orthodox Jews have sought religious accommodations in the workplace. At first the narrative of Jewish religious practice at work was a narrative of flat denial and to some degree workplace ghettoization. Then, there was hope that, with the 1972 amendments to Title VII, no Orthodox Jew in the United States would be denied opportunity in the workplace because of his or her religious commitments.

Hardison dashed that hope. By moving to a *de minimis* standard, the Court wrongly took away the promise of the 1972 amendments and many Orthodox Jews have been forced to alter their career ambitions or been denied opportunities for advancement.

With this case, the Court has a chance to remedy that error and make space for all Orthodox Jews in the workplace. *Amicus* has long advocated for a Title VII reasonable accommodation/undue hardship standard similar to the longstanding and well-developed

reasonable accommodation/undue hardship standard under the Americans with Disabilities Act of 1990. *Amicus* believes the time is ripe for the Court to adopt that standard. And although 46 years of non-accommodation is 46 years too many, in the Jewish view, there is never a wrong time to start doing what is right.

ARGUMENT

I. The experience of Orthodox Jews throughout history demonstrates the need for robust accommodations of religious observance and practice in the workplace.

At the core of Orthodox Judaism is living every day in accordance with Jewish law. But throughout millennia of history, Orthodox Jews have faced oppression from people and governments for following that law faithfully. Antisemitism and ignorance have threatened Orthodox Jews' religious freedom, and history likewise demonstrates that many employers will not accommodate Orthodox Jews if not required to do so. Before the 1972 amendments to Title VII, employers frequently refused to accommodate Orthodox Jews, and *Hardison* ensured the 1972 amendments did not improve employers' treatment of Orthodox Jews.

A. Jewish law frequently requires accommodation in the workplace setting.

Following Jewish law, *halacha*, is of paramount importance in Orthodox Judaism. "All the faith and all the love in the world remain insignificant until they are actualized in a regular routine, in the Halakhah, which transforms faith and love into reality." Norman Lamm, *The Illogic of Logical Conclusions*, in *Derashot*

Shedarashti: Sermons of Rabbi Norman Lamm, Feb. 10, 1973, https://perma.cc/J962-C96B. For centuries, therefore, Jews have made enormous sacrifices rather than violate *halacha*.

And throughout history, Jews have encountered significant obstacles to observance of *halacha*. Among these have been limitations on their abilities to observe the commandments in relation to work. Most obviously, that has included Jews' ability to observe the days when they are commanded *not* to work, including both the weekly Shabbat and the annual *yomim tovim*, or Jewish holidays, such as Pesach, Shavuot, and Sukkot. Indeed, over 2000 years ago Jews in the land of Israel fought against Seleucid Greek rulers who, among other forms of persecution, forbade Jews from observing Shabbat and the *yomim tovim*. It was the success of the uprising against the Seleucids that Jews commemorate annually as the Chanukah holiday.

Today, Jews still face challenges to faithful halachic practice, not least in the workplace. In this brief, we address four common areas of conflict over workplace Jewish religious observance: Sabbath and holiday observance, personal appearance, dietary restrictions, and daily rituals like prayer. Although this is far from an exhaustive list, each of these practices plays an important role in the lives of halachically-observant Jews and each presents recurring conflicts over workplace religious accommodation in this country.

Shabbat and holidays. The Sabbath is a day of spiritual refreshment for the observant Jew. See *Encyclopedia Judaica* 8257 (2d ed. 2007). Since the beginning, God "ceased on the seventh day from doing any work" See *Genesis* 2:2. He commands the Jewish

people to likewise observe the Sabbath. See *Exodus* 31:15-17. Sabbath begins on Fridays at sundown and extends to sundown on Saturdays. During this time, Orthodox Jews may do no *melachah*, or work that involves creative manipulation of the physical world, including driving a vehicle, cooking, or turning on electric appliances. See *Encyclopedia Judaica* 8256-8258 (2d ed. 2007).

Similarly, holidays are a time set apart by Jews, who must refrain from working on certain days during these periods of rejoicing or remembrance. For example, Yom Kippur, the Day of Atonement, is a day for adult Jews to fast and to abstain from work, so they may repent for sins committed in the past year. See *Encyclopedia Judaica* 346, 765-777 (2d ed. 2007). Orthodox Jews often require workplace scheduling accommodations to observe Passover, Shavuot, Sukkot, Rosh Hashanah, and Yom Kippur.[2] During festivals, Orthodox Jews refrain from *melachah* to engage in rejoicing, liturgy, and ceremonies specific to each celebration. *Ibid.* One famous example in American history of this sort of Jewish workplace religious observance happened on October 6, 1965, when Sandy Koufax did not take the mound for the Dodgers in the first game of the World Series. His co-worker Don

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[2] *Amicus* maintains a publicly-available list of Jewish holidays and related work restrictions, along with an 18-year calendar, for the use of both observant Jewish workers and their non-Jewish colleagues. See Orthodox Union, *Work Restrictions and Other Obligations on Jewish Holidays*, https://perma.cc/S4F3-FG67.

Drysdale voluntarily took on the job that day so Koufax could observe Yom Kippur.[3] More recently, when Joseph Lieberman served as a United States Senator, he was known to walk from Capitol Hill to his home in Georgetown, rather than use a car, when a Senate session required his vote on an urgent matter after sundown on Friday.[4]

Personal appearance. *Halacha* also governs observant Jews' personal appearance. Whether it is in the form of *tzitzit*, a beard, or head coverings, clothing and hair appearance are an often-visible part of an observant Jew's religious practice. *Tzitzit*, or fringes on a garment, remind the wearer to observe all the commandments and be holy unto God. See *Numbers* 15:37-41. Male Jews often wear a head covering to show *yirat shamayim*, the fear of God, observing a longstanding tradition by wearing a *kippah* or *yarmulke*, a brimless cap, or another head covering. See *Encyclopedia Judaica* 506-507 (2d ed. 2007). Similarly, some Orthodox women engage in religious observance by wearing a head covering after marriage, opting for a scarf or wig. *Ibid.* And in observance of *Leviticus* 19:27—"You [men] shall not round off the side-growth on your head, or destroy the side-growth of your beard"—some Jewish men grow various types of sidelocks, often sideburns or *pe'ot*, curled hair hanging down at the sides of the head. See *Encyclopedia Judaica* 756 (2d ed. 2007).

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[3] Matt Rothenberg, *Sandy Koufax responded to a higher calling on Yom Kippur in 1965*, National Baseball Hall of Fame, https://perma.cc/CAT8-2GZX. Although the Dodgers lost Game 1, they went on to win the Series.

[4] Joseph Lieberman, *The Gift of Rest* 1-4 (2012).

These personal appearance observances can come at great cost, because the distinctive appearance of Orthodox Jews often leads to violent targeting by antisemites. See, *e.g.*, Liam Stack, *'Most Visible Jews' Fear Being Targets as Anti-Semitism Rises*, N.Y. Times, Feb. 17, 2020, https://perma.cc/NM3T-8SVU ("the risk of street violence is greater for Orthodox Jews who wear religious clothing like yarmulkes; black suits and hats; and wigs or other hair coverings in their daily lives"); Nathan Diament, *Testimony to Committee on Homeland Security, Subcommittee on Intelligence and* Counterterrorism, Jan. 15, 2020, https://perma.cc/4XGC-TE4A ("it is the most visible Jews—those of us who wear a hat or *streimel* or *kippah*, who may have *peyos* (side-locks) or a long beard—who have been subject most to these physical and verbal assaults.").

Dietary observance. Orthodox Jews also have halachic rules about what and how to eat. "Keeping kosher" is a well-known aspect of Jewish dietary observance. While commentators have long debated the rationale underlying kosher dietary restrictions, the Torah's commandments guiding *kashrut* ensure that observant Jews adopt a diet centered on "holiness." See Timothy D. Lytton, *Kosher* 7-8 (2013) (discussing different reasons for kosher observance).

The dietary laws of *kashrut* divide animals into categories and instruct against eating certain categories of animals. See *Deuteronomy* 14:6-8. Of the kosher animals, the law forbids consuming certain parts, like the sciatic nerve of any animal not a bird. See *Encyclopedia Judaica* 650-659 (2d ed. 2007). The slaughter of an animal falls under close regulation, requiring a trained and licensed *shochet* to kill and examine the

animal for defects. See *id.* at 650-651. A defective animal is deemed *terefah* and the *kashrut* forbids eating it. *Ibid.* And the divine law guides how a person eats kosher food. For example, Orthodox Jews must not eat milk and meat together. *Id.* at 655.

In order to ensure compliance with *kashrut*, Orthodox Jews have developed a comprehensive system of rabbinic kosher supervision and kosher certification, which they have successfully integrated into food supply chains around the world.[5] Civil courts have consistently recognized the crucial role that a kosher supervisor, or *mashgiach*, plays in Judaism. See, *e.g.*, *Shaliehsabou* v. *Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (ministerial exception applies to mashgiach); *Markel* v. *Union of Orthodox Jewish Congregations of Am.*, No. 2:19-cv-10704, 2023 WL 1093676 (C.D. Cal. Jan. 3, 2023) (same).

Daily religious observances. Prayer figures prominently in the daily life of an Orthodox Jew. Jews are commanded to pray three times daily—in the morning (*shacharit*), in the afternoon (*minchah*), and at nightfall (*arvith* or *maariv*). See *Encyclopedia Judaica* 280-281 (2d ed. 2007). While it is preferable for Orthodox Jews to gather in the synagogue for prayer, an Orthodox Jew may privately pray even if unable to meet at the synagogue. See Rabbi Joseph Caro, *Shulchan Aruch* 90:6. In the context of the workplace, these

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[5] *Amicus* is the world's largest and most widely recognized international kosher certification agency, certifying over 1,000,000 products produced in more than 13,000 plants located in 105 countries around the world. See Orthodox Union, *Why Go Kosher*, https://perma.cc/42AP-93YM. The "Circle U" *hechsher*, or kosher certification symbol, is so well-known that it has its own Unicode character, ⓤ.

obligations mean that observant Jews must often set aside some time during the workday to pray.

As these examples of four prominent arenas of the intersection of Jewish law demonstrate, *halacha* governs the lives of Orthodox Jews in all that they do: when they work, when they use electricity, what they wear, what they eat and how, and when and in what manner they should pray. Jewish religious practices in these areas have existed for millennia, and from the beginning, challenges both in the workplace and out of it have presented obstacles for Orthodox Jews to live a life that aligns with their rich heritage and beliefs—as Rabbi Lamm put it, a life of action that makes faith and love come alive.

B. Before the 1972 amendments to Title VII, Orthodox Jews frequently suffered from lack of accommodation in the workplace.

Although this country was from the beginning a haven from persecution for Jews, there have been persistent obstacles—particularly in the workplace—to full participation by observant Jews. For most of American history, there was little legal recourse for observant Jews, as there were few laws restricting discrimination in the workplace, and the Religion Clauses were not yet applied against state and local governments that operated workplaces. Jews were frequently put to a choice between their job or observing the tenets of their religion. For example, state courts routinely upheld Sunday closing laws—laws that forbade all work on the Christian Sabbath—against Jewish workers who challenged them. See, *e.g.*, *Commonwealth* v. *Wolf*, 3 Serg. & Rawle 48, 50, 51 (Pa. 1817); *City Council of Charleston* v. *Benjamin*, 33 S.C.L. (2 Strob.) 508, 529 (S.C. Ct. App. L. 1848); *Frolickstein* v. *Mayor of*

Mobile, 40 Ala. 725 (Ala. 1867); *Commonwealth* v. *Starr*, 144 Mass. 359, 361 (Mass. 1887).

After waves of Jewish immigrants fleeing persecution in Eastern Europe arrived in this country during the late 19th and early 20th Centuries, the problem became more acute, and also became connected to discrimination against Jews in employment. For example, a comprehensive study of discrimination against Jews conducted in 1955 indicated that such discrimination was widespread, and explicit. In one sample taken in Los Angeles, 17% of job listings with employment agencies specified that Jews should not apply; another sample from Chicago showed that more than 20% of listings expressly excluded Jews. See Lois Waldman, *Employment Discrimination Against Jews in the United States – 1955*, 18 Jewish Social Studies 208, 211 (1956). These of course were only those job listings where the employer felt comfortable stating openly that Jews were not welcome to work there; others would have discriminated covertly. *Ibid.* Moreover, most Jews who were discriminated against did not feel able to respond with a complaint, much less a lawsuit. See *id.* at 215-216 (although approximately 100 survey respondents reported discrimination, only one ventured to file a complaint).

As a result, Jews often sought employment in Jewish-owned companies or in professional fields such as medicine or law where they could have more autonomy. Waldman, 18 Jewish Social Studies at 210. Effectively there was some degree of ghettoization at the workplace. At the same time, state courts continued to uphold Sunday closing laws despite a new wave of challenges by observant Jewish litigants. See, *e.g.*, *People* v. *Friedman*, 96 N.E.2d 184 (N.Y. 1950) (sale of

kosher meat); *Commonwealth* v. *Chernock*, 336 Mass. 384, 386 (Mass. 1957) (upholding law requiring defendant to shut down his kosher market on Sundays).

It was around this time that the first cases involving Jewish observance in the workplace began to reach this Court, all having to do with Sunday closing laws.[6] In *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), Orthodox Jewish merchants closed their place of business and abstained from all work from nightfall each Friday until nightfall each Saturday. The lack of income during this time was recouped on Sundays, a day on which plaintiffs did "a substantial amount of business." *Id.* at 611 (Brennan, J., dissenting). Pennsylvania enacted a "blue law" criminalizing Sunday retail sales. The thrust of the Jewish plaintiffs' argument centered around a coerced choice—as Justice Brennan put it, "whether a State may put an individual to a choice between his business and his religion." *Ibid*. One of the other Sunday closing law cases decided the same day—May 29, 1961—also involved Jewish religious practice, *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961), while the other two, *McGowan* v. *Maryland*, 366 U.S. 420 (1961) and *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961), did not expressly turn on the religion of their owners. In all four cases, the Court ruled

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[6] *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935) was arguably an earlier example of a conflict between Jewish law and civil law in the workplace, as Schechter Poultry was a kosher slaughterhouse and the poultry in question was "immediately slaughtered, prior to delivery, by *schochtim* in defendants' employ." *Id.* at 521. But the case did not turn on any question of religion.

against the plaintiffs and upheld the challenged Sunday closing laws. *E.g.*, *Braunfeld*, 366 U.S. at 608 ("reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity").

Three years after *Braunfeld* and its companion cases were decided, Congress passed the Civil Rights Act of 1964. Under Title VII of the 1964 Act, religious discrimination in employment was forbidden. However, religious accommodations were not expressly required. As Petitioner recounts, the EEOC began to receive requests for guidance with respect to religious accommodations in the workplace, leading it to adopt first a reasonable accommodation standard (in 1966) and then pair it with the "undue hardship" employer defense (in 1967). See Pet. Br. 25-27.

In 1972, Congress amended Title VII in response to subsequent judicial decisions that sought to narrow the reasonable accommodation/undue hardship standard developed by the EEOC. The 1972 amendments "essentially codified" the 1967 EEOC regulations. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 6 (1996). Employers would be required to make "reasonable accommodations" to the religious needs of its employees so long as these did not cause the employer "undue hardship." 42 U.S.C. 2000e(j). See Pet. Br. 24-28 (describing historical origins of Section 2000e(j)). The promise of a new era of accommodation for Jewish religious observance in the workplace seemed within grasp.

C. The promise of the 1972 amendments was quickly smothered by *Hardison*.

But that promise was short-lived. As Petitioner ably explains, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), ripped away the protection the 1972 amendments sought to provide, dealing a fatal blow to the idea of workplace accommodation for observant Jews. Pet. Br. 3-6. Focusing on the lack of defined scope of words like "reasonable" accommodation and "undue" hardship, the Court ultimately decided that TWA's failure to accommodate did not violate Title VII. The Court rejected the Court of Appeals' belief that at least three reasonable alternatives would have satisfied the accommodation obligation without posing an undue hardship, instead replacing the statutory standard of "undue hardship" with a novel and textually-unrooted standard of "*de minimis* cost." *Hardison*, 432 U.S. at 84.

In practice, *Hardison* sets the bar so low for employers that any proposed conflict with their implemented policy could fall under the guise of an undue hardship. This mistreatment of those who exercise minority beliefs highlights the decision's real-world effects. It is not hard to recognize that inconvenience, or *de minimis* cost, is a totally different standard than hardship. Cf. Pet. Br. 18-20.

D. Since *Hardison*, Orthodox Jews have continued to suffer harms in the workplace.

The forty-six years since *Hardison* have found Orthodox Jews once again left at the mercy of their employers' good graces. In light of *Hardison*, courts have repeatedly allowed employers to justify their failures

to reasonably accommodate religious employees by showing anything more than a *de minimis* cost. Indeed, *Hardison*'s standard requires so little from an employer that it can be satisfied in nearly any circumstance. After all, *Hardison* requires "little more than virtual identical treatment of religious employees," which offers little protection to employees, since "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, 122, 138 (2015); see also *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 63-64, 71 (1986) (unpaid leave for religious holidays was reasonable accommodation unless "doled out in a discriminatory fashion").

Sabbath and holiday observance. *Hardison* has frequently allowed employers to terminate Orthodox Jews for seeking accommodations to observe the Sabbath or holidays. In one notable case, Sears refused to hire or terminated Orthodox Jewish technicians who refused to perform repairs on Saturdays, even where those employees offered to perform extra work on Sundays or on other evenings through the week. In that case, Kalman Katz, an Orthodox Jew from Brooklyn, was told that to work as a repair technician at Sears, he would have to work Saturdays and forgo his observance of the Sabbath solely because the company claimed Saturdays were the busiest repair days. See *Spitzer* v. *Sears, Roebuck & Co.*, Agreed Final Judgment, N.Y. Sup. Ct. Kings County (April 4, 2000). It took an official state investigation—which revealed that Tuesdays, not Saturdays, were the busiest repair days—to

ultimately vindicate Katz's (and other Jewish and Adventist employees') rights. See Adam Dickter, *Sears Settles With Sabbath Observers*, Jewish Telegraphic Agency, Apr. 7, 2000, https://bit.ly/3ING5Qv.

Other employees have not been as fortunate. Indeed, even where courts have recognized the strictness of Sabbath observance, *e.g.*, *Sides* v. *NYS Div. of State Police*, 2005 WL 1523557, at *2 (N.D.N.Y. June 28, 2005), those courts have nevertheless held that reasonable accommodations permitting Orthodox Jews to observe the Sabbath "would create undue hardship" on employers. *Id.* at *6. See also *Miller* v. *Port Auth. of N.Y. & N.J.*, 788 Fed. Appx. 886, 889-891 (3d Cir. 2019). Time and time again, Orthodox Jews have been denied accommodations to observe the Sabbath because an employer's claim of undue hardship was sustained under the *Hardison* standard. See, *e.g.*, *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (rescheduling Jewish pharmacist's shifts "would involve more than a de minimus [sic] cost"); *Litzman* v. *New York City Police Dep't*, No. 12 Civ. 4681, 2013 WL 6049066, at *6 (S.D.N.Y. Nov. 15, 2013) (undue hardship where allowing Orthodox Jewish police recruit one-inch beard would "decreas[e] the efficiency of the Department"); *Wagner* v. *Saint Joseph's/Candler Health Sys.*, No. 4:20-cv-284, 2022 WL 905551 at *10 (S.D. Ga. Mar. 28, 2022) (although "no [ ] financial harm" to hospital, undue hardship where coworkers "had to take on a disproportionate workload" so Orthodox Jewish insurance notification specialist could observe High Holidays).

Personal appearance. So too do Orthodox Jews experience significantly more harm when it comes to

accommodations for their personal appearance. Employers operating under the guidance of *Hardison* can easily refuse to accommodate Orthodox Jews who seek to work while wearing specific items or having specific hairstyles. For instance, a federal district court found that the Las Vegas Police Department's policy of denying a beard and a yarmulke to an Orthodox Jewish police officer violated the Free Exercise Clause, but could not determine whether Las Vegas had nevertheless met the *de minimis* undue hardship standard. See *Riback* v. *Las Vegas Metro. Police Dep't*, No. 2:07-cv-1152, 2008 WL 3211279, at *8 (D. Nev. Aug. 6, 2008). Similarly, a New York hospital terminated an Orthodox Jewish woman who was a paramedic at the hospital, because she wanted to wear a skirt in accordance with her religious principles, instead of the pants required in the hospital's dress code. See Josefin Dolsten, *Orthodox Jewish Paramedic Sues NY Hospital Over No-Skirts Policy*, *The Times of Israel*, May 25, 2017, https://perma.cc/3MNH-TFMB.

Dietary and daily religious observances. *Hardison*'s harmful effects extend to essential dietary and daily observances for Orthodox Jews. As with observance of the Sabbath and religious holidays, *Hardison* allows employers to justify their refusal to accommodate daily prayer on the basis that daily prayer poses scheduling difficulties, interrupts workflow, or other similar concerns. Cf. *EEOC* v. *JBS USA, LLC*, No. 8:10-cv-318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013) (holding that an employer did not need to accommodate Muslim employees' requests for prayer breaks since it would constitute an undue hardship).

Similarly, employers can easily dismiss kosher dietary accommodations for Orthodox Jews as an undue hardship because providing kosher meals, or access to a kitchen that can be kept kosher in order to prepare kosher food, can involve expenditures that go beyond *Hardison*'s nominal *de minimis* requirement. A kosher-observant employee's request to her employer to obtain a second microwave, reserved for kosher food use, in the staff kitchen could be rejected without consequence, simply because of the fifty or sixty dollars that second microwave would cost.

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As we explained above, each one of these practices is fundamental to the Orthodox Jewish religious tradition. And each of these practices, as part of a minority religion, requires some accommodations that are not already ingrained into workplace culture. As such, employers can deny these accommodations on the ground that the accommodations are effectively so out of the ordinary that they constitute an "undue hardship." *Hardison* thus established a legal framework in which Orthodox Jews, and other Americans of faith, can be forced to choose between their career and their conscience.

II. The experience of Orthodox Jews shows that an undue hardship standard like the ADA's is a good fit for resolving disputes over workplace religious accommodations.

Petitioner has explained why the ADA religious accommodation standard—including its undue hardship provision—is truer to the text and history of Title VII's religious accommodation provisions. Pet. Br. 14-28. We focus here on the workability of the ADA standard

as a resource in the Title VII religious accommodation context, especially when viewed through the lens of Orthodox Jewish experience.

A. The ADA's fact-dependent balancing test is well-suited to resolve typically fact-dependent religious accommodation requests.

An individual's ability to freely practice her sincerely held religious beliefs in the workplace without fear of consequence is central to the promise of religious freedom in the United States. *Hardison* currently sets a standard for religious accommodations that is tilted to favor employers and to permit inequality of religions. Rather than continue with *Hardison*, this Court should rebalance the scale by mirroring the ADA's fact-dependent balancing test.

The ADA states that by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business", an employer is in violation of federal law. 42 U.S.C. 12112(b)(5)(A). The ADA definition of undue hardship is "an action requiring significant difficulty or expense" when considered in light of listed factors. 42 U.S.C. 12111(10)(A). These fact-focused factors take into consideration the overall financial resources of the facility, number of employees at the facility, effect on expenses and resources, and impact of the accommodation on facility operation, among others. 42 U.S.C. 12111(10)(A)(B).

Tracking the fact-sensitive ADA balancing test will provide for simpler, more effective means of employer accommodation.

Sabbath and holiday observance. ADA caselaw frequently deals with specific scheduling requests. For example, in *EEOC* v. *Howard University,* the ADA plaintiff's dialysis schedule rendered him unable to work nights, weekends, and holidays. 70 F. Supp. 3d 140, 145 (D.D.C. Sept. 30, 2014). The court held that it could not rely on "false assumptions" about the plaintiff's diabetes disability and that the employer had a duty to determine the feasibility of working around the dialysis schedule. *Id.* at 150. See also *Lett* v. *SEPTA*, No. 19-cv-3170, 2021 WL 5544933, at *12 (E.D. Pa. Nov. 26, 2021) (employer failed to engage in good-faith interactive process regarding accommodation of dialysis schedule). ADA caselaw would therefore provide helpful guidance for courts considering Title VII reasonable accommodation claims.

In addition to Sabbath observance, holiday observance would be better analyzed under an ADA-like balancing test. Oftentimes religious individuals who must miss work for a religious holiday are able to coordinate with co-workers of other faiths to ensure all employer needs are met. This issue frequently arises for medical professionals, including residents, who work in a setting like a hospital where every hour of every day must be covered by sufficient medical staff. Thus, Christian physicians will often cover for their Jewish colleagues on Yom Kippur and Jewish physicians will cover for their Christian colleagues on Christmas. See Daniel J. Wakin, *Off on Yom Kippur? It's Probably Time To Work a Holiday*, N.Y. Times (Dec. 22, 2003), https://nyti.ms/3SynTyD.

However, these informal arrangements—which are not legally mandated—only go so far. For example, some medical residency programs have been reluctant to accommodate Jewish holiday and Sabbath observances. That has deterred highly qualified individuals from joining the medical field, exacerbating the longstanding physician shortage. See, *e.g.*, *Orthodox Medical Students Aspire to Touro's Shomer Shabbat Residency Programs*, Jewish Link, Apr. 4, 2019, https://perma.cc/7XHV-P55B ("[F]or Jewish students, negotiating the seven-day-a-week schedules adds an additional challenge.").

Under an ADA-style balancing test adopted for Title VII religious accommodations in the workplace, Jewish medical students would have equal education opportunities. Medical residencies currently accommodate disabled residents as a matter of course. See Accreditation Council for Graduate Medical Education, *ACGME Institutional Requirements* III.B.7.d).(6), July 1, 2022, https://perma.cc/T8KR-JAWZ (providing for accommodations for residents with disabilities). And given the means of most residency programs to accommodate Jewish holiday and Sabbath observance, significant difficulty or expense in doing so will not arise, as programs have already demonstrated that they can adjust without severe complication. See Aaron Howard, *Can a Shabbat-observant Jew get through medical residency at Baylor? Jewish Herald Voice*, Mar. 8, 2012, https://perma.cc/EW8K-DTYZ (Baylor College of Medicine Pediatric Residency Program worked in tandem with Jewish medical resident to ensure both academic success and Shabbat observance).

Personal appearance. Implementation of a balancing test like that of the ADA is also an obvious solution for religious practices related to personal appearance. As urged in the 2003 version of the Workplace Religious Freedom Act (WRFA), an employee's ability to perform essential functions of a job "does not include carrying out practices relating to clothing, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions." James F. Morgan, *In Defense of the Workplace Religious Freedom Act: Protecting the Unprotected Without Sanctifying the Workplace*, 56 Labor L. J. 4, 75 (2005). With a context-oriented balancing test, employers will be made to accommodate these religious practices that often do not influence the quality of work done by the employee.

Dietary and daily religious observances. A modification of the rule to match ADA balancing will also better grapple with dietary and daily religious observances in the workplace. It is improbable that permitting an employee to eat and pray in a manner which aligns with her faith would impose a significant difficulty or expense when considering all factors. See, *e.g.*, *EEOC* v. *Walgreen Co.* 34 F. Supp. 3d 1049 (N.D. Cal. Apr. 11, 2014) (employer denied summary judgment on reasonable accommodation issue where employee with diabetes disability ate chips at work to combat hypoglycemic episode, violating company's workplace rule).

Workplace rules are also implicated by Jewish bereavement practices. The Jewish bereavement process contrasts with those of other faiths, because it demands—with some exceptions—that the deceased be buried within 24 hours of death. See Maurice Lamm,

The Jewish Way in Death and Mourning 18-19 (1969). Consequently, if, for example, an Orthodox Jewish employee needs to attend a funeral, causing the employee to miss work, the employer will typically receive less notice than if the same were to happen to a non-Jewish co-worker.

In such a situation, the employer's ability to treat a Jewish employee differently than the employee's non-Jewish counterparts is dependent on whether the *Hardison* or ADA definition of undue hardship applies. Under the *Hardison* standard, if the employer can show any *de minimis* cost will be incurred because of the employee's attendance at the funeral on short notice, the employer may be justified in taking adverse action against the employee. Yet, under an ADA-like standard, more facts would be taken into consideration. The decision would likely turn on the employer's ability to accommodate based on situational factors such as other available staff and resources.

Sensitive balancing test. If adopted, a multi-factor balancing test for religious accommodations under Title VII mirroring the ADA's test for reasonable accommodations and undue hardship will provide a fair, workable test that respects both the First Amendment free exercise rights of Orthodox Jews and the interests of business owners. The ADA's undue hardship test is not the inverse of *Hardison's* lopsided test; it does not provide employees with *carte blanche* to evade workplace responsibilities in almost every circumstance. Instead, it offers a moderate, balanced approach that respects both parties to a dispute. Consequently, businesses win ADA disputes where accommodations for disabilities would legitimately be unreasonably burdensome. Under an accurate interpretation of Title

VII's undue hardship requirement as it was originally intended, business owners will not be required to bear the cost of unreasonable accommodations. Courts will rule in their favor just as they have in comparable ADA cases.

For example, in *Core* v. *Champaign County Board of County Commissioners,* a district court ruled in favor of an employer who refused to accommodate an employee's request to work entirely from home as a result of chemical sensitivity to certain kinds of perfume. No. 3:11-cv-166, 2012 WL 4959444 at *5-7 (S.D. Ohio Oct. 17, 2012). Since the employee's essential job duties required performing tasks that could not be accomplished from her home and the employee had refused alternative accommodations, she could not prevail under the ADA's reasonable accommodation/undue hardship standard. *Id.* at *7-8.

The outcome would be no different in the myriad situations in which Orthodox Jews employees demanded accommodations that would prevent them from performing their essential job duties. For example, an Orthodox Jew who is a *Kohen*—a member of the priestly class—is forbidden by Jewish law from being in the same enclosed space as a deceased person. See *Leviticus* 21:1. Such a person who is an accountant for a hospital system could reasonably request to carry out his accounting work duties in a different building within a large medical complex than in a building where the dead may be located. But it would not be reasonable for an employee who is a *Kohen* to seek a job as a mortician and then demand to work entirely from home as a religious accommodation.

Similarly, since nearly all college football games are held on Saturday, an Orthodox Jew seeking employment in college football broadcasting (having successfully built a career broadcasting weekday high school games) could reasonably be rejected from a position for which he requested to take all Saturdays off to observe Shabbat, preventing him from accomplishing essential job tasks.

Adopting an interpretation of Title VII religious accommodation requirements mirroring those of the ADA will therefore not force employers to bear unreasonable, undue hardships, but will instead properly balance their interests with the religious rights of Orthodox Jews and other religious Americans.

B. Adopting the ADA's balancing test will allow Orthodox Jews to participate more fully in commercial and professional life.

In addition to preserving the interests of business owners, adopting a multi-factor balancing test that draws on the ADA's undue hardship test will also expand Orthodox Jews' ability to participate more fully in commercial and professional opportunities already enjoyed by other Americans. For many Orthodox Jewish Americans, correcting *Hardison's* misinterpretation of what constitutes an undue hardship will mean they are able to access meaningful professional careers that were previously inaccessible to them. For example, Jewish medical students hoping to serve their communities will no longer be forced to avoid or be rejected from medical residency programs that do not currently accommodate Sabbath and holiday observances.

If employers with sufficient resources and employees are required to accommodate scheduling requests for Orthodox Jews seeking to observe Sabbath and Jewish holidays like Yom Kippur, Jews will no longer have to fear the kinds of confrontations and discrimination that have led to lengthy and expensive litigation since *Hardison*. With a clear understanding of this standard for accommodation, businesses will be able to plan and prepare for making religious scheduling accommodations a part of their standard operating policy.

Similarly, observance of important daily Jewish practices will become possible during the workday and make certain previously inaccessible jobs accessible. For example, Orthodox Jews would have the expectation that they can take time during the workday for their daily prayers, or that offices will be accepting of their religious attire.

"Respect for religious expressions is indispensable to life in a free and diverse Republic." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432-2433 (2022). Orthodox Jews who are unable to fully engage in the full expression of their own religious faith because of *Hardison* are not living freely in this Republic. They are being denied the promise of the Nation's hard-won civil rights laws. Restoring the proper meaning of Title VII's undue hardship test will allow Orthodox Jews the ability to participate in American professional and civic life as freely and with the same rights as all other Americans.

III. Adopting an ADA-like standard would also allow Title VII's religious discrimination standard to dovetail with other religion-in-the-workplace standards recognized by the Court.

There is one other reason to adopt an ADA-like standard for reasonable accommodation/undue hardship: it would fill a remaining gap in the set of protections for religion in the workplace already recognized by this Court.

Over the past decade, the Court has laid out a consistent, coherent framework for interpreting the rights and responsibilities of both employers and employees concerning disputes about religion in the workplace. Broadly speaking, this Court has examined the standards pertaining to the free exercise of religion in the workplace and corresponding rights and obligations along two axes: one pertaining to religious employers and employees and one pertaining to public versus private entities.

Private religious employers. Starting with its decision in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, the Court has recognized the ability of religious employers to control (including hiring and firing) their "ministerial" employees—that is, employees exercising religious functions. 565 U.S. 171, 188 (2012). The Court has also recognized that the underlying church autonomy right extends beyond "ministerial" employees: religious institutions have "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). With these decisions, the

right of religious employers—including Orthodox Jewish employers—to control how religious activities are performed in their own workplaces has been firmly established.

Religious business owners. Similarly, the free religious exercise of citizens who own businesses that are not religious entities are separately protected under both the Free Exercise Clause and the Free Speech Clause. As set forth in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, religious business owners are "entitled" to "respectful," "neutral," and "tolerant" treatment of their beliefs, even when those beliefs come into conflict with antidiscrimination laws. 138 S. Ct. 1719, 1729, 1731 (2018). And the Court is likely to say more on this topic in *303 Creative LLC* v. *Elenis*, No. 21-476. The workplace religious practices of these business owners thus already enjoy some protection.

Public employers—religious employees. The Court has also moved to protect religious employees working for governmental employers. In *Kennedy*, this Court again recognized Free Exercise and Free Speech protections for religious employees working for public employers. 142 S. Ct. at 2433. Since government employees are a large percentage of all employees, a significant part of the workforce already enjoys some protections under the First Amendment for workplace religious practices.[7]

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[7] Federal employees enjoy an additional layer of protection for workplace religious observances under the Religious Freedom Restoration Act. See, *e.g.*, *Singh* v. *Berger*, 56 F.4th 88 (D.C. Cir. 2022).

Notably, the plaintiff employee's overlapping protections under Title VII had been addressed by some of the Justices in a previous iteration of the case. See *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of certiorari). But under the *Hardison* standard, it is hard to see how Kennedy could have prevailed under Title VII; at the time his only means of recourse were his constitutional claims.

Private non-religious employers—religious employees. The last big piece of the puzzle is presented in this case. Because Title VII is applicable to both private and public employers of sufficient size, as well as to the entire federal government as an employer, the proper interpretation of Title VII's religious accommodation requirement, mirroring the requirements established under the ADA's reasonable accommodation standard, will address the substantial gap in accommodation standards for religious employees working for private non-religious employers.

In effect, private employers would not arbitrarily have a greater ability to deny the reasonable requests of religious employees than public employers. Instead, all employers would be held to similar-but-not-identical high standards. Across the board, employers would have to accommodate the reasonable requests of religious employees to engage in observance of their religious beliefs where observance does not result in a truly undue hardship. Where accommodations may be more difficult or costly for some companies to make than others, those business interests will be protected by the multi-factor, fact-specific analysis the courts already successfully use when ruling on ADA accommodation cases.

Overturning *Hardison*'s harmful misinterpretation of Title VII's religious accommodations standard would thus fix one of the largest remaining gaps in the Court's otherwise comprehensive framework for adjudicating religious workplace disputes. And with that change, Orthodox Jewish Americans will finally be able to fully participate in American commercial and professional life without fear of reprisal for adhering to the principles of their faith.

* * *

Amicus knows that it will not always be easy for employers to accommodate Orthodox Jewish religious practices. The obligations of Jewish law are both demanding and comprehensive. But putting the Title VII standard back into a balance that takes account of the interests of both the religious employee and the secular employer will do justice—to both Orthodox Jews and the society they live in.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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