NO. 22-174

In the
Supreme Court of the United States

GERALD E. GROFF,
Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
Respondent.

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

BRIEF FOR THE SIKH COALITION, MUSLIM ADVOCATES, AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Sikh Coalition is the largest community-based organization working to protect Sikh civil rights across the United States. The Sikh Coalition's goal is working towards a world where Sikhs, and other religious minorities in America, may freely practice their faith without bias and discrimination. Since its inception, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. For over two decades, the Sikh Coalition has also led efforts to combat and prevent discrimination against Sikhs in the workplace, including by advocating for religious accommodations and against policies which require Sikhs to choose between their religious beliefs or their career.

Muslim Advocates is a national civil rights organization litigating, educating, and advocating for equality of all people in America regardless of their faith background. Muslim Advocates also serves as a legal resource for the American Muslim community,

[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amici certify that counsel of record for all parties received notice of the intent to file this brief at least ten days before it was due and have consented to the filing of this brief.

promoting the full and meaningful participation of Muslims in American public life.

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

Amici are deeply concerned by the ability of employers to discriminate against those requiring accommodations—including discrimination in such a manner that allows for segregation, failure to hire, and situations creating a retaliatory or hostile work environment—and how such discrimination disproportionately affects minority communities by failing to provide for equal access to employment opportunities. The issues at stake in this case relate directly to the right of practitioners of minority faiths in America to avail themselves of employment opportunities on equal terms. Amici submit this brief in the hope that this Court will protect the religious rights of all Americans in the workplace.

SUMMARY OF ARGUMENT

The First Amendment guarantees that all citizens of any faith (or no faith at all) can fully participate in public life. In 1972, Congress sought to extend that right of full and equal participation in the workplace with an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

As amended, Title VII goes beyond merely prohibiting discrimination on the basis of religion by also imposing a duty on employers to reasonably accommodate the religious beliefs and practices of their employees. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). But employers need not provide accommodations that would impose an "undue hardship" on their business. 42 U.S.C. § 2000e(j).

In 1977, a majority of this Court held that an "undue hardship" exists whenever an accommodation would require "more than a de minimis cost" to the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Justice Marshall dissented, noting that this new de minimis standard "effectively nullif[ied]" Title VII's faith-based protections and defied "simple English usage." *Id.* at 89, 92 n.6 (Marshall, J., dissenting).

Hardison is incorrect, and a growing chorus of judges and commentators—including three current members of this Court—have recognized that the de minimis rule has no grounding in the statutory language of "undue hardship." Notably, in ordinary usage and every other statutory context, that phrase denotes an imposition of significant costs—the opposite of what de minimis means. *See Small v.*

Memphis Light, Gas & Water, 141 S.Ct. 1227, 1228 (2021) (mem.) (Gorsuch, J., joined by Alito, J., dissenting from denial of cert.) (stating that *Hardison* "dramatically revised—really, undid—Title VII's undue hardship test"). Worse still, *Hardison*'s misreading of Title VII virtually nullifies the accommodation scheme Congress created to protect religious employees. The de minimis standard is so lax that a small cost or minor inconvenience for the employer can override any obligation to reasonably accommodate an employee's religious beliefs.

While *Hardison*'s misinterpretation of Title VII eviscerates the right to accommodations for practitioners of all faiths, it has especially pernicious effects for religious minorities. Adherents to minority faiths more often require workplace accommodations because their religious traditions are not already accommodated. As Justice Marshall correctly predicted in his dissent, the de minimis rule is "[p]articularly troublesome" for "adherents to minority faiths who do not observe the holy days on which most businesses are closed," like Sunday, Easter, and Christmas, but instead "need time off for their own days of religious observance." *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting). Further, members of minority faiths are more likely to wear religious clothing, like a headscarf or turban, that conflicts with a company's uniform policy. *See id.* at 88. Because *Hardison* strips Title VII of any meaningful accommodation requirement, employees whose religious practices include a certain appearance or attire may be forced "to give up either the religious practice or the job." *Id.*

The experiences of Muslim and Sikh employees epitomize this struggle. Both groups have distinct practices that may require modest accommodations in some workplaces. Yet, since *Hardison*, courts have rejected Sikh and Muslim workers' requests for reasonable accommodations in case after case under the de minimis rule—often because of a speculative harm or small financial cost. Unless this Court corrects *Hardison*'s misinterpretation of Title VII, far too many Muslims, Sikhs, and other religious minorities will continue to face the "cruel choice of surrendering their religion or their job." *Id.* at 87.

Reasonable accommodations for religious beliefs are feasible in the workplace. In fact, the kinds of modest accommodations the de minimis standard often denies members of minority faiths—such as an exemption from a uniform policy; the purchase of suitable, alternative equipment; or an adjustment to the ordinary break schedule—are provided under other accommodation schemes, like the Americans with Disabilities Act (ADA) of 1990 and federal and state religious freedom restoration acts. If this Court grants Groff's petition and corrects *Hardison*'s error, these other accommodation schemes show that employers will not be forced to shoulder a burden greater than that which is already imposed and afforded to other employees.

ARGUMENT

I. This Court should grant review and apply the ordinary meaning of "undue hardship" to Title VII's accommodation scheme.

A. The de minimis standard is textually indefensible and strips Title VII of any meaningful mandate to accommodate religion.

By its own terms, Title VII does not excuse employers from providing accommodations that could cause *any* hardship. Instead, it excuses employers only from making accommodations that will lead to an undue hardship on the conduct of their business. 42 U.S.C. § 2000e(j). As lower court judges and three current Justices have noted, dictionary definitions and other statutes reflect that an undue hardship is one that "impose[s] significant costs." *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J., concurring), *cert. denied*, 141 S. Ct. 1227 (2021). That is the opposite of de minimis. *See id.* at 828 (noting definition of de minimis as a "very small or trifling matter"); *see also EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 660 (7th Cir. 2021) ("Three Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed.").

Hardison's reading of "undue hardship" is so out of step with normal usage of the term that the Code of Federal Regulations notes the phrase "has different meanings" depending on whether it is used "with regard to religious accommodation." 29 C.F.R. § 37.4 (2022); *see Patterson v. Walgreen Co.*, 140 S.Ct. 685, 686 (2020) (mem.) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in denial of cert.) (addressing

the Solicitor General's observation that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship'" and agreeing that review should be granted "in an appropriate case to consider whether *Hardison*'s interpretation should be overruled"). In every other context, undue hardship means "significant difficulty or expense." 29 C.F.R. § 37.4. But "[f]or purposes of *religious accommodation only*, 'undue hardship' means any additional, unusual costs, other than de minimis costs." *Id.* (emphasis added). Not only is the de minimis standard textually wrong, it effectively "single[s] out the religious for disfavored treatment"—something this Court has rejected as unconstitutional. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2020 (2017).

Similarly, *Hardison*'s de minimis standard is not used in any subsequent civil rights law enacted by Congress, such as the Uniformed Services Employment and Reemployment Rights Act, the Affordable Care Act, and the ADA. *See Small*, 141 S.Ct. at 1228 (Gorsuch, J., dissenting from denial of cert.) ("With these developments, Title VII's right to religious exercise has become the odd man out.").

In the end, by neglecting the "plain language" of § 2000e(j), *Hardison* "prevents the effectuation of congressional intent" in crafting Title VII's religious accommodation scheme. *Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986). Seven years ago, this Court explained that Congress created Title VII to extend "favored treatment" to religious employees and "affirmatively obligat[e] employers" to alter "otherwise-neutral

policies to give way to the need for an accommodation." *Abercrombie & Fitch*, 575 U.S. at 775. However, the de minimis standard offers no such protective mandate. Rather, it allows employers to override their employees' need for religious accommodations for almost any perceived cost or inconvenience. Indeed, in *Hardison* itself, an employee at one of the world's largest airlines did not receive an alternative work schedule that would have, at most, cost his employer a mere $150 spread over three months. *See* 432 U.S. at 91–92, 92 n.6 (Marshall, J., dissenting).

B. A plain reading of "undue hardship" creates a workable rule that aligns with other accommodation regimes.

This Court can correct *Hardison*'s error and prevent the ongoing harm to minority religious groups by interpreting Title VII's words—undue hardship—"as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Dictionaries from the time Congress enacted Title VII define "hardship" in a manner that would "imply some pretty substantial costs." *Small*, 952 F.3d at 826–27 (Thapar, J., concurring) (first citing *The American Heritage Dictionary of the English Language* 601 (1969); then citing *Black's Law Dictionary* 646 (5th ed. 1979); and then citing *Webster's New Twentieth Century Dictionary of the English Language* 826 (2d ed. 1975)). "Undue hardship" is hardship that "must be 'excessive.'" *Id.* at 827 (citation omitted).

Applying the plain language would create a workable balance between the interests of employees and employers. Employees would receive meaningful accommodations of their faith-based practices unless such a change would impose a significant cost or inefficiency to the conduct of the employer's business. No longer would a minor inconvenience to an employer force employees to choose between their religious beliefs and their livelihoods. Employers, however, would not need to provide accommodations that would hamstring their business.

As mentioned, several other accommodation schemes enacted since *Hardison* prove that greater accommodations are not only possible but are what Congress intends when it creates accommodation schemes. The widespread application of these statutes should alleviate any fear that enforcing Title VII's actual text would prove too burdensome in practice.

The ADA offers an obvious comparison. This subsequently enacted statute uses "undue hardship" language nearly identical to Title VII. Employers must accommodate an employee's disability unless doing so would demand "an action requiring significant difficulty or expense"—evaluated in light of the employer's size, financial condition, and other factors. 42 U.S.C. § 12111(10)(A), (B). This scheme protects disabled workers while ensuring that employers do not "go broke or suffer other excruciating financial distress" due to providing accommodations. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995); *see EEOC v. Amego, Inc.*, 110 F.3d 135, 147–48 (1st Cir. 1997) (affirming lower court's denial of an ADA claim where accommodating a disabled

former employee would have required a small nonprofit to hire additional staff and incur significant expense).

Religious freedom statutes, found at the federal level and in twenty-one states, offer another example of a more demanding, yet workable, religious accommodation scheme. *See* Tanner Bean, *"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 BYU L. Rev. 1, 2 n.4 (2019). Most resemble the Religious Freedom Restoration Act (RFRA) of 1993, which mandates that the federal government cannot "substantially burden a person's exercise of religion" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b)(1)–(2).

Under such schemes, the federal government (and state governments in states with RFRA statutes) must "accommodate the exercise of actual religious convictions" of religious individuals. *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995). These schemes provide greater religious protections without becoming unworkable because they do not require accommodations that would impinge upon compelling government interests. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018) (rejecting RFRA claim because of government's "compelling interest in combating discrimination in the workforce"), *aff'd on other grounds sub nom.*, *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020); *United States v. Jefferson*, 175 F.Supp.2d 1123, 1130 (N.D. Ind. 2001) (rejecting claim under the

RFRA where the requested accommodation posed threat of "harm to the public health and safety").

Given the wide experience with other accommodation statutes, this Court can be confident that interpreting Title VII to mean what it says will not impose unbearable costs on employers.

II. As shown by the experiences of Sikh and Muslim employees, the de minimis standard causes serious harm to adherents of minority faiths.

A. Sikh employees routinely face exclusion from employment and segregation in the workplace under the de minimis rule.

Sikhism is the fifth-largest religion in the world, and its followers are guided by three daily principles: work hard and honestly, always share your bounty with the less fortunate, and remember God in everything you do. *A Brief Introduction to the Beliefs and Practices of the Sikhs*, The Sikh Coalition (2008), https://tinyurl.com/t3dxycej.

Sikhs outwardly display their commitment to these principles and Sikh beliefs by wearing the Kakaars, or the five articles of faith: uncut hair, which men cover with a turban and which women may cover with a scarf or turban (Kesh); a small comb usually placed within one's hair (Kanga); soldier shorts traditionally worn as an undergarment (Kachera); a swordlike instrument worn with a shoulder strap (Kirpan); and a bracelet worn on one's wrist (Kara). *Accommodating Sikhs in the Workplace: An Employer's Guide*, The Sikh Coalition (2022), https://tinyurl.com/3hbmypvj.

The articles of faith sometimes require modest workplace accommodations. But employers often deny Sikh employees' requests for accommodations because of image-based objections and safety-based concerns—which have each qualified as undue hardships under the de minimis standard. Because the de minimis standard is so easy to satisfy, courts have permitted paltry theories of undue hardship—based on the negative feelings of customers or other employees, insignificant financial costs, and hypothetical "threats" to safety—to override the religious needs of Sikh employees. The examples below illustrate how *Hardison*'s de minimis standard forces adherents of minority faiths to choose between their religion and their job—the "cruel choice" that Title VII was intended to prevent. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

Image-based objections. The Sikh articles of faith rarely, if ever, prevent Sikh employees from performing their jobs. Instead, employers much more often object to a Sikh employee's appearance, which they believe violates the company's desired public image and will lead to an adverse reaction by customers. Applying *Hardison*, courts have said that the risk of harm to public perception or a possible violation of customer preference can impose more than a de minimis cost.

For example, in *EEOC v. Sambo's of Georgia, Inc.*, a restaurant denied a Sikh man's application for a managerial position because his turban and beard violated the restaurant's grooming policy. 530 F.Supp. 86, 88 (N.D. Ga. 1981). The court affirmed this rejection of employment because "the wearing of a

beard . . . or headwear" did "not comply with the public image that Sambo's ha[d] built up over the years." *Id.* at 89. The court relied on the restaurant's belief in the public's "aversion to, or discomfort in dealing with, *bearded people*." *Id.* (emphasis added). Thus, the possibility of an "[a]dverse customer reaction" to the Sikh applicant's appearance imposed more than a de minimis cost on the restaurant. *Id.* at 89–90.

This case illustrates how the de minimis standard can lead to a segregated workplace, which is contrary to Title VII's intended protections. Under *Hardison*, a request for an accommodation can be overridden by "nothing more than an appeal to customer preference." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) (quoting *Sambo's*, 530 F.Supp. at 91). Thus, the visible presence of Sikhs (or others whose faith informs their appearance) can "be an undue hardship because it would adversely affect the employer's public image." *Id.* Under the de minimis standard, it is easy for an employer to show that it is "too costly" for Sikhs to be seen in the workplace. And so Sikh employees are all too often sent to work hidden from the public eye. Such workplace segregation was upheld in *Birdi v. UAL Corp.*, where a district court held that it was reasonable for an airline to fire a Sikh ticket agent who wore a turban after he refused to move to a position where customers could not see him. No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002).[2]

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[2] More recently, Walt Disney Parks and Resorts segregated a Sikh employee for seven years (until the Sikh Coalition

Such a dynamic—where perceived public bias can relegate practitioners of minority faiths to less desirable or visible positions—causes real harm. "Segregated positions isolate a person; limit that person's ability to interact with co-workers, customers, and the public at large; and validate public or employer bias as to who is worthy of representing a company." Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change 103, 125 (2012). Further, if there is no out-of-view position available, members of minority faiths like Sikhism may be excluded from employment entirely. *See id.*

Safety-based concerns. Employers frequently deny Sikh workers accommodations because of safety concerns. While actual risks of danger to health or well-being could amount to an undue hardship, the de minimis standard sets the bar too low and allows employers to deny religious accommodations because of incorrect perceptions of danger or because safe alternatives are more expensive.

A common example involves the kirpan, the Sikh article of faith resembling a knife or sword that obligates a Sikh to uphold justice for all people. Many kirpans are not dangerous (usually, they are not sharp and are kept in a tight sheath under a Sikh's shirt). Yet employers have mistakenly viewed them as illegal weapons or unsafe (even when other objects found in

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intervened) because his turban and beard violated the company's "Look Policy." Emil Guillermo, *Disney Desegregates Sikh Employee After Civil Rights Groups Intervene*, NBC News (Jul. 13, 2015), https://tinyurl.com/2heatucy.

the workplace are objectively as or more dangerous). And courts have found that the perceived risk of danger amounts to more than a de minimis burden.

For instance, in 2013, the Fifth Circuit held that permitting a Sikh federal employee to wear a three-inch, dulled kirpan to her job at the Internal Revenue Service was an undue hardship. *Tagore v. United States*, 735 F.3d 324, 329–30 (5th Cir. 2013). Even though her kirpan was indisputably safe because it was dull, the court held it still would be more than a de minimis cost to ask security "to ascertain whether a blade is sharp or dull" every day when the employee came to work. *Id.* at 330. The court disregarded the Sikh employee's testimony that other objects in her workplace—like scissors and box cutters—were objectively more dangerous than her small, dull kirpan. *See id.* at 326. To add insult to injury, the government even had a security protocol for allowing kirpans pursuant to applicable RFRA statutes permitting an employee to carry one—Title VII's de minimis standard was just too weak to require the accommodation. *See id.* at 331.

Other Sikh articles of faith have also caused safety-based concerns, including when they have prevented the use of an employer's existing safety equipment. *See, e.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383–84 (9th Cir. 1984) (ruling unshorn hair created an undue hardship because it prevented an employee from wearing a respirator needed to prevent toxic gas exposure); *Kalsi v. N.Y.C. Transit Auth.*, 62 F.Supp.2d 745, 760 (E.D.N.Y. 1998) (ruling a turban created an undue hardship because it

prevented wearing a hard hat during hazardous work), *aff'd*, 189 F.3d 461 (2d Cir. 1999).

To be sure, correctly interpreting Title VII does not demand an unsafe workplace. But the de minimis standard imposes such a low threshold for denying an exemption that employers have almost no incentive to develop safe alternative processes or purchase safe alternative equipment if doing so would impose any meaningful cost. Thus, Title VII rarely requires accommodations for safety protocols, even when safe and affordable alternatives are available or possible.[3] This practical reality leads to serious barriers for Sikhs seeking employment—especially in sectors that typically use safety equipment, like construction, emergency services, or medicine.

Sikh healthcare workers fighting the COVID-19 pandemic have especially struggled under the trivial de minimis standard. *See Update: Sikh Medical Professionals and PPE*, The Sikh Coalition (May 13, 2020), https://tinyurl.com/mwnzu5r8. Medical

[3] The paltry de minimis standard emboldens employers to deny accommodations imposing no costs at all. For example, a trucking company denied Sikh applicants employment for declining to give hair samples for a drug test (a violation of the commandment to maintain unshorn hair), even though urine and nail tests were also available; it took eight years to settle the case. *See* Dan Weikel, *Sikh Truck Drivers Reach Accord in Religious Discrimination Case Involving a Major Shipping Company*, L.A. Times (Nov. 15, 2016), https://tinyurl.com/y7aadnkh. Similarly, it required years of litigation in federal court for a national automotive parts retailer to grant a minor accommodation of a Sikh's articles of faith and adopt a policy about religious accommodations. *See AutoZone Settles Religious Discrimination Suit With Winthrop Man*, WBUR News (Apr. 3, 2012), https://tinyurl.com/62v4b4en.

professionals must wear personal protective equipment to prevent the virus's spread. Many use the low-cost N95 mask, but some employers continue to disallow male healthcare workers with facial hair from wearing N95 masks. Even though there are several equally safe options that Sikh men can use (like power supplied air respirators and controlled air purifying respirators), those options cost more than N95s and thus may be found to impose more than a de minimis burden on employers to provide. *See id.* As a result, employers have threatened Sikh doctors, nurses, and technicians with suspension or termination if they refuse to violate their faith by shaving or cutting their hair. *Id.*

In sum, the de minimis standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace and forces Sikh workers to choose between their livelihood and their faith.

B. Muslim employees are routinely denied accommodations for trivial reasons under the de minimis standard.

Many Muslims believe that their faith requires them to engage in certain practices. Observances include praying five times a day at set times (Salat), attending weekly congregational worship on Fridays (Jum'ah), fasting from dawn to sunset for a month each year (Ramadan), and observing two annual days of festivity (Eid). *An Employer's Guide to Islamic Religious Practices*, Council on American-Islamic Relations (2005), https://tinyurl.com/242afhzj. Islam prescribes that both men and women dress modestly. Many Muslim men wear beards for religious reasons, and some wear a small head covering called a kufi. *Id.*

Likewise, many Muslim women wear a head covering, such as a hijab, while some others may cover their face. *See id.*

Muslim employees are particularly vulnerable to workplace discrimination. Applying *Hardison*, courts routinely allow employers to deny accommodations for these religious practices. Though Muslim Americans comprise 1% of the U.S. population, from 2009 to 2015, Muslim workers submitted 19.6% of all EEOC complaints, and 26% of EEOC lawsuits were brought on behalf of Muslim employees. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, Wash. Post (June 21, 2016), https://tinyurl.com/44sx78ra.

Because the de minimis standard is so easy to satisfy, courts have permitted tenuous theories of undue hardship—based on the negative feelings of customers or other employees, insignificant financial costs, and hypothetical "threats" to safety—to override the religious needs of Muslim employees. The examples below show how the de minimis standard fails to achieve Title VII's goal of eradicating workplace discrimination and, instead, can lead to unfair (and sometimes outrageous) results for Muslim employees.

Impact on customers or other employees. Under the de minimis standard, negative reactions of customers or other employees to the appearance of Muslim employees can amount to an undue hardship. *See Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009) ("Both economic and non-economic costs can pose an undue hardship upon employers . . . .").

For instance, in 2017, a business denied a Muslim woman's request to wear a hijab while working as a customer service representative and then fired her when she insisted on adhering to her faith. *See Camara v. Epps Air Serv., Inc.*, 292 F.Supp.3d 1314, 1319 (N.D. Ga. 2017). The district court approved this termination after the employer argued that the hijab "did not project the image he sought for his company" and that customers may have "negative reactions" when seeing a woman in a hijab. *Id.* The court ruled that allowing the hijab could have harmed the "image" the company sought "to present to the public" and might have cost the company "business if some customers [went] elsewhere." *Id.* at 1331–32. The court reasoned that such possible costs were "more than de minimis" and therefore ruled against the Muslim employee. *Id.* at 1332. Thus, the de minimis standard led to *possible* customer perceptions, even those potentially rooted in animus, overriding the employee's obligation to don a hijab.

The current rule also permits employers to deny an accommodation if it might impact the "morale" of other employees. For instance, in 2018, a district court denied Muslim employees' request for a meal break that coincided with sunset during Ramadan, finding that the possible effect on employee morale was more than a de minimis cost. *EEOC v. JBS USA, LLC*, 339 F.Supp.3d 1135, 1182 (D. Colo. 2018). The court relied, in part, on testimony that moving the break "hurt non-Muslim employee morale because many employees prefer[red] a late break." *Id.* at 1181. And the change could have hurt morale if employees became "more tired and hungry" because of the earlier break—even

though the Muslim employees had nothing to eat or drink all day due to their religious observance. *Id.*

Similarly, another district court ruled that altering Muslim employees' break schedule to allow for their daily prayer imposed more than a de minimis cost, in part because the "extra breaks could have a negative impact on employee morale." *EEOC v. JBS USA, LLC*, No. 8:10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013). In these cases, the de minimis standard allowed the hypothetical impact on the "morale" of non-Muslim workers to override Muslim employees' requests for accommodation, without regard for the Muslim employees' own "morale" or religious obligations.

Minor financial costs to employers. Under *Hardison,* even large, well-financed employers can avoid paying overtime or incurring minimal costs to provide religious accommodation. Instead, the burden is shifted to Muslim employees to incur the immense cost of either surrendering their religious practices or their employment.

To illustrate, in *El-Amin v. First Transit Inc.*, a district court ruled it an undue hardship to provide an alternative training time to a Muslim employee who had missed trainings to attend prayer. No. 1:04-CV-72, 2005 WL 1118175, at *6–8 (S.D. Ohio May 11, 2005). Despite the employee suggesting that the large company retain the trainer at another time to accommodate his religious needs, the court reasoned that requiring the company to pay overtime was more than a de minimis cost—thus sanctioning the Muslim employee's termination. *Id.* at *8.

Similarly, in *Abdelwahab v. Jackson State University*, a district court rejected a Muslim employee's request that his employer arrange for another employee to cover plaintiff's midnight shift to allow him his obligatory nightly worship. No. 3:09CV41TSL–JCS, 2010 WL 384416, at *2 (S.D. Miss. Jan. 27, 2010). The court held that Title VII required no accommodation because the logistics of identifying another available employee and the possibility of overtime pay imposed more than de minimis cost. *Id.*

Unfounded or hypothetical threats to safety. An accommodation imposes an undue hardship if it would put others in harm's way. Unfortunately, religious practices and customs of minority faiths may appear "threatening" to the unfamiliar, which has resulted in courts finding essentially any degree of hypothetical risk imposes more than a de minimis cost. While perhaps faithful to *Hardison*, that narrow view of religious freedom in the workplace is irreconcilable with Title VII and allows unspoken bias to taint an employer's decision-making.

Consider the example of *EEOC v. GEO Group, Inc.*, where the Third Circuit held that accommodating several Muslim female employees' need to wear head coverings at a private prison posed the chance of danger and thus imposed more than a de minimis cost on the employer. 616 F.3d 265, 267, 274–75 (3d Cir. 2010). Even though the employees had worn head coverings without issue before, the prison claimed the head coverings posed various hypothetical risks: they could cast a shadow on the employee's face or could be used to smuggle contraband or strangle someone. *Id.*

at 268, 272, 274. While the Third Circuit observed that this was a "close case," it reasoned that, even if the head coverings posed "only a small threat of the asserted dangers," allowing Muslim employees to wear them imposed more than a de minimis cost on the prison. *Id.* at 274–75; *accord Parker v. Ark. Dep't of Corr.*, No. 4:05CV00850, 2006 WL 8445187, at *8 (E.D. Ark. Apr. 26, 2006) (declining to accommodate a correctional officer's hijab that may "potentially create a safety risk" (citation omitted)).

C. The accommodations denied to Muslim and Sikh employees under Title VII are available in other contexts.

The denial of Muslim and Sikh employees' common requests for religious accommodations in the workplace under Title VII is especially unfair and anomalous because other statutes routinely grant the same or similar accommodations in other contexts.

As an example, while Muslim employees often do not receive alternative break schedules that allow fast breaking or their daily prayer, the ADA regularly requires altered break schedules. *See, e.g.*, *Kaganovich v. McDonough*, 547 F.Supp.3d 248, 270 n.7 (E.D.N.Y. 2021) (noting that breaks are a recognized form of reasonable accommodation for diabetic employees.); *see also Bracey v. Mich. Bell Tel. Co.*, No. 14-12155, 2015 WL 9434496, at *2, *6 (E.D. Mich. Dec. 24, 2015) (providing an altered break schedule for employee with irritable bowel syndrome).

Likewise, although Title VII does not currently require healthcare organizations to purchase more costly respirators for their Sikh medical professionals, the ADA mandates meaningful expenditures to allow

disabled employees' inclusion in the workplace. *See Searls v. Johns Hopkins Hosp.*, 158 F.Supp.3d 427, 438–39 (D. Md. 2016) (ruling that an accommodation costing $120,000 was not undue hardship when hospital's budget was $1.7 billion); *McGregor v. United Healthcare Servs., Inc.*, No. H-09-2340, 2010 WL 3082293, at *10 (S.D. Tex. Aug. 6, 2010) (ruling that an expenditure of $2,375 to install automated door openers was not an undue hardship).

Moreover, while some adult Sikh employees cannot bring their sword-like kirpans to work due to "safety concerns," the RFRA has permitted even Sikh children to bring their kirpans to school. *Cheema v. Thompson*, 67 F.3d 883, 885–86 (9th Cir. 1995).[4] And while Sikhs regularly are denied accommodations for beards and head coverings that violate a company's uniform policy, a RFRA suit compelled the United States Army to alter its thirty-year policy of banning beards and adopt regulations that allowed service members to wear religious turbans, unshorn hair, and beards if their faith so requires. *See Singh v. Carter*, 168 F.Supp.3d 216, 233–34 (D.D.C. 2016); Ben Kesling, *Army Eases Uniform Regulations to Allow More Religious Exemptions*, Wall St. J. (Jan. 6, 2017), https://tinyurl.com/3m6252fu; *see also* Stephen Losey, *Air Force Officially OKs Beards, Turbans, Hijabs for Religious Reasons*, Air Force Times (Feb. 11, 2020), https://tinyurl.com/3ynz8kve.

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[4] Although *Cheema* was decided before this Court limited the federal RFRA to federal government action, its analysis still applies to states with their own state-level RFRA. *See State v. Hardesty*, 214 P.3d 1004, 1007 (Ariz. 2009) (citing *Cheema* when applying Arizona's Free Exercise of Religion Act).

A related statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), requires faith-based accommodation even in prisons—a place where safety concerns are at their zenith. *See* 42 U.S.C. § 2000cc-1(a). For instance, seven years ago, this Court held that a Muslim prisoner's beard must be accommodated despite the State's undisputed "compelling interest in prison safety and security" because the prison grooming policy was not narrowly tailored to the government's safety interest. *Holt v. Hobbs*, 574 U.S. 352, 361–69 (2015).

Thus, there is no doubt that the greater religious protections requested by Sikh and Muslim employees are possible without imposing unworkable burdens on employers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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