No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to protect the right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state and religious liberty cases, including many cases before this Court.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBT people and people living with HIV, *see, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996), as well as regarding the scope and application of

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

protections under Title VII. *See, e.g., Bostock v. Clayton Cty., Ga.*, 140 S.Ct. 1731 (2020); *Equal Employment Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015); *Oncale v. Sundowner Offshore Serves.*, 523 U.S. 75 (1998).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Title VII, an employer must "reasonably accommodate … an employee's or prospective employee's religious observance or practice" unless that accommodation would constitute an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This case raises two questions about that rule: *first*, what quantum of hardship must an accommodation impose on the conduct of a business in order to be an "undue hardship"; and *second*, may an employer consider the burdens that an accommodation would impose on co-workers in its "undue hardship" analysis.

The first question is currently controlled by *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which held that an "undue hardship" exists when an accommodation would impose "more than a de minimis cost" on the business. *Id.* at 84. Although we believe the Court should revisit and revise the *Hardison* standard, we do not otherwise weigh in on the precise legal standard the Court should adopt—apart from explaining that it would be an error to transpose the "undue hardship" doctrines developed under the Americans with Disabilities Act and other very different statutory schemes.

Instead, we focus on the second question, which does not address the quantum of hardship necessary to deny a requested religious accommodation but instead concerns whether co-worker burdens may be considered as a hardship within that analysis.

As we show by reference to the plain text of Title VII, the answer to that question is "yes." Virtually any effect that an accommodation has on an employee's co-workers may at least potentially impose a hardship on the conduct of a business, since any such effect may well concern the act, manner, or process of how the organization carries out its own activities.

In practice, however, the assessment of co-worker burdens requires a fact-intensive analysis—and may depend partly on how co-workers are reasonably expected to respond to an accommodation. Sometimes they may be supportive of (or indifferent to) the conduct at issue. Sometimes they may oppose the accommodation because of hostility or animus toward the employee's religious beliefs. And sometimes they may experience it as imposing financial, logistical, health and safety, dignitary, or other burdens that result in hardship to the conduct of the business. These issues cannot be resolved in the abstract but instead require close attention to the specific facts and circumstances surrounding any request for accommodation.

We therefore describe the appropriate framework under Title VII for the evaluation of co-worker burdens—and show how that framework operates in practice by applying it to the three most common categories of co-worker burdens (namely, work rearrangement, health and safety risk, and dignitary harm). We

also demonstrate that this framework reasonably addresses hardships arising from burdens to customers.

At bottom, while co-workers are not entitled to a "heckler's veto" over religious accommodations, Title VII allows employers to consider the many respects in which accommodations may burden co-workers (and customers) as part of the "undue hardship" analysis.

ARGUMENT

I. *HARDISON*'S "DE MINIMIS" STANDARD SHOULD BE REVISITED AND REVISED.

Hardison held that an accommodation imposes an "undue hardship" under Title VII when it creates "more than a de minimis cost." 432 U.S. at 84. This decision constituted an interpretation of Title VII and is therefore cloaked by the doctrine of statutory stare decisis. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

Nevertheless, *Hardison* is wrong in too many ways to withstand scrutiny. As Justice Marshall explained in dissent, Congress made a deliberate choice to "require[] religious accommodation, even though unequal treatment would result"—and so employees must be exempted from neutral workplace rules that violate their religious observance "unless 'undue hardship' would result." 432 U.S. at 88-89 (Marshall, J., dissenting). Interpreting Title VII to allow the denial of accommodation based only on "more than a de minimis cost"—in service of the statute's equal treatment approach—was a "direct contravention of congressional intent in enacting the 1972 amendment." *Id.* at 89, 92. Moreover, as Justice Marshall noted, "simple English usage" does not permit "'undue hardship' to be

interpreted to mean 'more than de minimis cost.'" *Id.* at 92 n.6.

In the end, *Hardison*'s interpretation of the statute "effectively nullif[ied] it" and has brought about the very outcome that Congress legislated to avoid: employees being forced to "give up either [their] religious practice or [their] job." *Id.* at 88-89. This is therefore one of those exceedingly rare cases in which the Court should revisit its own errant reading of a statute.

We do not address the verbal formulation that the Court should use to describe the quantum of hardship necessary to justify denying an accommodation. In our view, the phrase "undue hardship" requires consideration of a wide range of intensely context-dependent factors, since whether a hardship is "undue" must always be measured against the full circumstances and structure of the relevant enterprise. The Court should therefore make clear that under any standard or doctrine adopted to operationalize the statutory "undue hardship" requirement, the inquiry must be practical and sensitive to the myriad ways in which proposed religious accommodations may affect a business.

Moreover, the Court should recognize that the "undue hardship" standard set forth in Title VII differs from the "undue hardship" standard that Congress has employed elsewhere, including in the Americans with Disabilities Act (ADA) and the Pregnant Workers Fairness Act (PWFA). The ADA and the PWFA were enacted decades after Title VII; they address different kinds of discrimination giving rise to different legal and practical challenges; they embed their accommodation rules within different statutory schemes aimed at addressing specific forms of discrimination; and

they place varied (and varying) demands on employers, employees, and regulators. Given all that, there is no sound basis to read the ADA and PWFA *in pari materia* with Title VII. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972).

Any doubt on that score is confirmed by legislative history. *See Delaware v. Pennsylvania*, 143 S. Ct. 696, 711 (2023). In enacting the ADA, Congress made a considered choice to vary from Title VII's "undue hardship" rule as construed by *Hardison*—and the legislative record reflects Congress's intent that the ADA accommodation requirement be applied independently (rather than as a derivation or implementation of the Title VII standard). *See, e.g.*, Sen. Committee Rep. 101-116 at 33 ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977) are not applicable to this legislation."); H.R. Rep. 101-485, 40, 1990 U.S.C.C.A.N. 445, 463 (stating that "a definition [of 'undue hardship'] was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of title VII"). Congress was thus deliberate in its differentiation of the undue hardship language when it enacted the ADA and subsequent statutes—and this Court "must give effect to Congress' choice." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.3 (2009).

Accordingly, the Court should revisit and revise *Hardison*'s "undue hardship" standard; it should adopt a standard that recognizes the context-sensitive nature of any inquiry into whether a hardship ranks as "undue"; and it should properly distinguish Title

VII's "undue hardship" standard from comparable standards in materially distinct statutory schemes.

II. CO-WORKER BURDENS ARE GENERALLY RELEVANT TO ANALYZING UNDUE HARDSHIP ON THE CONDUCT OF A BUSINESS.

Petitioners have asked the Court not only to revisit and overrule *Hardison*, but also to address the significance under Title VII of burdens that an accommodation would impose on co-workers. As it turns out, the parties share some common ground on this issue: They both (rightly) agree that co-worker burdens are generally relevant to assessing whether an accommodation would impose an undue hardship on the conduct of an employer's business. *See, e.g.*, Petr. Br. 39 ("Employee dissatisfaction or inconvenience may be relevant evidence to support a showing that the business as a whole suffers undue hardship."); Resp. Br. 41-42 ("An accommodation that impairs employees' ability to do their work, or causes them to quit, transfer, or file grievances or litigation, has obvious effects on the conduct of the employer's business.").

That said, co-worker burdens can raise truly difficult questions. On the one hand, Title VII does not vest an employee's co-workers with a "heckler's veto" over proposed accommodations. On the other hand, an employer may consider how co-workers are reasonably expected to respond to a proposed religious accommodation in assessing whether it may impose an "undue hardship on the conduct of the employer's business."

To resolve that potential tension, the Court should clarify that burdens on co-workers are relevant where two conditions are met: (a) those burdens affect the

conduct of the employer's business and (b) those burdens are not the result of co-workers' religious hostility or animus. More generally, the Court should confirm that this is a fact-intensive inquiry which—in practice—depends upon the unique circumstances of any given workplace.

As we will show, this framework is helpful not only for analyzing co-worker burdens in a range of common scenarios, but also for addressing cases where an employer considers how granting an accommodation may result in burdens on the business's customers.

A. Subject to Limited Exceptions, Title VII Permits Employers to Consider How an Accommodation Will Burden Co-Workers.

The interpretation of Title VII starts with its text. *See Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738-39 (2020). Here, Title VII provides that an employer must provide reasonable religious accommodations to its employees unless that would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). A "hardship" is "something that causes or entails suffering or privation" (Merriam-Webster) or "difficult or unpleasant conditions" (Cambridge Dictionary). "Conduct" is a broad term that encompasses "the act, manner, or process of carrying on" (Merriam-Webster) or, put differently, that covers all "personal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves" (Black's Law Dictionary). And a "business" is a "commercial or mercantile activity engaged in as a means of livelihood" (Merriam-Webster), though Title VII extends beyond commercial ventures in this sense to capture a wide range of social activity.

Pulling this all together: In assessing whether a proposed religious accommodation would cause an undue deprivation, an employer is statutorily authorized by Title VII to consider how the proposed accommodation would affect any aspect of the act, manner, or process of how the organization's activity is carried out.

Notably, the statutory text does not enumerate any kind or category of "hardship" that an employer *cannot* consider (so long as it involves an effect on the conduct of the business). There is thus no express statutory basis for deeming irrelevant any form of hardship to a business that may result from granting a proposed religious accommodation. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) ("[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions."). Employers (and also federal courts) may weigh a wide range of business-related hardships in assessing whether the total ensuing hardship would be "undue."

As anyone who has run a business knows, there are many ways in which a proposed accommodation could impose a hardship on a business. Here, given the scope of the issues presented for review, we will focus on one of them: burdens on co-workers. (In Part II.C, we will also briefly consider burdens on customers.)

Employee accommodations may burden co-workers for a simple reason: By their nature, accommodations involve a request that the employer alter an aspect of the *status quo*—and when that occurs in a workplace, it is common for co-workers to be affected in some way. Moreover, given the centrality of employees to the success of any business (and given the economic costs of

reduced employee efficiency, harmony, safety, morale, retention, and recruitment), any change that affects co-workers has the potential to affect the conduct of the business as a whole.

In practice, and as measured against the text of Title VII, virtually any effect that an accommodation has on co-workers may at least potentially impose a hardship on the conduct of a business, since any such effect will concern the *act*, *manner*, or *process* of how the organization carries out its activity—and may affect not only its financial bottom line, but aspects of culture, values, or other intangible qualities that employers view as central to their organizational vision. Therefore, evaluating co-worker burdens requires a fact-intensive inquiry, rather than a categorical claim that certain co-worker burdens by their very nature cannot cause hardship to the conduct of a business. *See* Petr. Br. 42 (conceding that "an accommodation's impact on co-workers can be *relevant* under the proper reading of Title VII").

This inquiry is not undertaken in the abstract. Instead, it requires consideration of how co-workers will respond to a proposed religious accommodation. There are few hard-and-fast rules: The same accommodation may result in very different co-worker burdens (and thus impose very different hardships on the conduct of a business) depending on specific workplace settings.

Consider, for example, an employee who seeks an accommodation to pray out loud during working hours because her religion requires prayer at certain hours and all such prayer must be out loud. Her co-workers may be totally indifferent to this conduct or may even approve of it, in which case there would be no burden

on co-workers. Or she may work at a construction site where there is so much ambient noise that nobody notices her prayer, in which case there is (again) no burden on her co-workers. Or she may work in a surgical setting where her audible prayer distracts and even endangers her co-workers, in which case this conduct would impose a very substantial burden. Or, to the extent her workplace prayer is proselytizing or disparages a specific group, it may disrupt, demean, offend, or otherwise injure her co-workers.[2] Or the employee's co-workers may complain that her prayer lowers their morale because of their hostility to her religion—or because they oppose "special treatment" for people of faith—in which case this conduct would impose a burden (but it would be perverse to deny her accommodation based on her co-workers' religious hostility).

In each of these cases, an employer may consider reasons *other* than co-worker burdens in assessing the requested accommodation. But with specific respect to the potential denial of an accommodation based on co-worker burdens, these hypotheticals confirm that the analysis is necessarily informed by co-workers' actual or reasonably anticipated reactions to the accommodation in question. Under the plain text of Title VII, employers may properly consider evidence (or an objectively reasonable belief) that granting an accommodation would cause co-workers to endure administrative or logistical challenges, financial consequences, violations of their collective bargaining agreement, infringements on other labor or employment rights,

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[2] Permitting such proselytizing or disparagement in the workplace might also, separately, subject the employer to potential liability under federal and state anti-discrimination laws.

concerns about their own health and safety, discrimination, workplace conflict, or disruption (among other possible hardships). *See* EEOC, *Compliance Manual* § 12-IV(B)(2) & (B)(3). All such effects would impact the conduct of a business. And in many cases, whether these possible results of an accommodation are salient will depend on how co-workers respond in their unique workplace settings.

This is not to say that an employer can point to entirely hypothetical burdens or wholly speculative assessments of conceivable hardships in deciding whether to grant accommodations; that would render the "undue hardship" analysis meaningless. *See E.E.O.C. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008); *Harrell v. Donahue*, 638 F.3d 975, 981 (8th Cir. 2011). When employers deny accommodations based on co-worker burdens, their decisions must rest on concrete evidence or an objectively reasonable conclusion about the burdens at issue. *See Firestone Fibers*, 515 F.3d at 317 (allowing employer to consider "predictable consequences" and to deny accommodation where he "reasonably believes" it would unduly burden co-workers). But of course, employers can rely on their knowledge and reasoned judgment; they are not required to test every possible accommodation and see what happens before denying requests. *See Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 275 (5th Cir. 2000).

Indeed, experience teaches that employers must be sensitive to workplace dynamics that may prevent co-workers from speaking out, even if they are negatively affected by an accommodation granted to another employee. Employees may hesitate to discuss personal

matters with their employer; for instance, a co-worker impacted by an accommodation allowing an employee to openly display anti-gay messaging at work may be reluctant to disclose his sexual orientation to his employer, or a co-worker may be hesitant to discuss how he feels demeaned in his own faith by a colleague's proselytizing. Employees may also fear retaliation if they complain about the burdens caused by an accommodation—especially if it is requested by their supervisor. For these reasons, employers can look beyond actual complaints (or reported difficulties) to reach objectively reasonable judgments about how an accommodation would affect co-workers in their workplace.

But even still, there is one set of co-worker burdens that an employer *cannot* consider: namely, those motivated by co-workers' religious animus or hostility concerning the proposed religious accommodation. For example, an employer is prohibited from considering whether granting an employee's request to wear a hijab as a religious accommodation would upset co-workers based on their anti-Muslim views, or whether granting an employee's request to end work before sundown on Fridays in observation of Shabbat would offend customers because of their anti-Semitic views.

This conclusion follows from the text and structure of Title VII. The major purpose of Title VII is the eradication of discrimination in the workplace. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 788 (1976). It thus prohibits (among other things) employment decisions motivated by religious animus. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015). Indeed, a focus on the motives for employment decisions is central to much of Title VII law. *See id.*;

see also 42 U.S.C. § 2000e-2(m). It is therefore simply unthinkable that Title VII—in providing for religious accommodations—authorized employers to deny such protection based on co-worker complaints motivated by religious animus or hostility. Although employers may consider a wide range of co-worker burdens in assessing whether an accommodation would impose an "undue hardship," employers may *not* allow co-workers to effectively veto proposed religious accommodations based on motives that Title VII itself outlaws.[3]

Accordingly, and in summary, Title VII generally allows employers to consider co-worker burdens (among other potentially relevant factors) in deciding whether a religious accommodation would impose an undue hardship on the conduct of a business. When considering such burdens, employers must engage in a fact-intensive inquiry—and rely on evidence and reasonable analysis—to assess whether co-workers would in fact be burdened in a manner imposing a hardship on the conduct of the business. In some cases, this will depend on how co-workers react or are likely to react to the accommodation. But in all cases, employers cannot deny accommodations because co-workers will experience a burden based on religious hostility or animus.

We now turn to how this framework can be applied to commonly recurring co-worker burden situations.

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[3] Of course, where a religious accommodation would involve an employee engaging in conduct that discriminates against or disparages co-workers based on their own faith, gender, sexual orientation, or other protected characteristics, it does not evince religious hostility to conclude that those co-workers suffer cognizable burdens based on the ensuing dignitary harms to them.

B. Most Co-Worker Burden Cases Involve Three General Categories of Burden.

Caselaw and experience reveal three general categories of co-worker burden that arise with the greatest frequency in Title VII cases: (1) work rearrangement harms, (2) health and safety harms, and (3) dignitary harms. To aid the Court in its consideration of this issue, we describe these categories and demonstrate how the framework we've described would apply.

1. Work Rearrangement Burdens.

The first and most common category of co-worker burden in this field is work rearrangement harms—in other words, the burdens that result from rearranging schedules or duties to accommodate an employee's religious observance. For example, a Jewish airport-authority employee might request time off to observe Passover. *See Abeles v. Metro. Washington Airports Auth.*, 676 F. App'x 170 (4th Cir. 2017). A Seventh-day Adventist clinical technician might ask to avoid shifts from Friday evening to Saturday evening to observe her Sabbath. *See Jean-Pierre v. Naples Community Hospital, Inc.*, 817 F. App'x 822 (11th Cir. 2020). A Roman Catholic FBI agent might decline to investigate vandalism perpetrated by pacifist groups. *See Ryan v. U.S. Dep't of Just.*, 950 F.2d 458 (7th Cir. 1991). Or a Nigerian-Christian factory worker might seek leave to perform his father's burial rites. *See Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013).

In cases involving work rearrangement harms, an employee seeks an accommodation that requires the employer to redistribute schedules, shifts, or work obligations to other workers. When this occurs, the

employer may identify hardships independent of those resulting from co-worker burdens—and may consider all those hardships in assessing whether granting the accommodation would impose an "undue hardship" on the conduct of the business. But with particular respect to the employer's consideration of co-worker burdens, the analysis will necessarily depend on how co-workers would react if the proposed accommodation were granted (and on the motives for those reactions).

In some cases, co-workers might readily accept (or be indifferent to) the work rearrangement. Where that occurs, the employer cannot properly invoke co-worker burdens to justify denying an accommodation.

For instance, co-workers may happily pick up extra shifts to make more money, or may be willing to do a colleague a favor, or may swap shifts for their own convenience, or may rearrange duties because they would prefer different work. An avid football fan might readily trade his Super Bowl Sunday shift for a Sabbath-observant employee's Saturday schedule. Or a co-worker might volunteer to substitute for another employee while she attends church. *See*, *e.g., Davis v. Fort Bend County*, 765 F.3d 480, 489 (5th Cir. 2014) ("With a volunteer substitute available, Fort Bend would not have had [to] incur any cost requiring an employee to substitute for Davis, nor would Fort Bend necessarily be left short-handed."). Or an FBI agent's co-worker might jump at the chance to work on the cases another agent declined. *See Ryan*, 950 F.2d at 459 ("Agent James Swinford volunteered to swap assignments with Ryan. He declined."). In at least some circumstances, co-workers may not be burdened by a

work rearrangement—and in such cases, co-worker burdens cannot justify denying an accommodation.

Co-worker burdens also cannot be relied upon in cases where co-workers object to the rearrangement because of religious animus or hostility. *See* EEOC, *Compliance Manual* § 12-IV(B)(4) ("Undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged 'special treatment' afforded to the employee requesting religious accommodation."). No matter how forcefully a co-worker might object to trading shifts with a Jewish employee over the High Holidays, for example, those objections cannot justify the denial of an accommodation if based on anti-Semitism.

But where co-workers do find work rearrangement to be burdensome—and where that burden is not the result of religious animus—Title VII plainly allows employers to consider those co-worker burdens in assessing whether an accommodation would impose an undue hardship on the conduct of the business. After all, work rearrangements that co-workers find unwelcome may impose direct financial burdens on the business (paying overtime, hiring additional staff), as well as logistical burdens (reshuffling schedules, complying with a collective bargaining agreement ("CBA"), reorganizing work duties), recruitment burdens (attracting and retaining talent), and efficiency burdens (rearrangements may intrude upon employees' ability to perform their work effectively and timely, or may require swapping employees with less training or experience into specialized duties).

Consider, for example, *Noesen v. Medical Staffing Network, Inc.*, 232 F. App'x 581 (7th Cir. 2007). There,

a Catholic pharmacist objected to "any interaction, no matter how brief, with any person seeking birth control." *Id.* at 582. He therefore requested an accommodation exempting him from answering *any* customer phone calls. *See id.* at 583. This would have required pharmacy technicians to answer all calls, in addition to their normal work of inputting prescription information and verifying insurance. *See id.* It would also have required them to monitor the counter, since the pharmacist walked away and refused to alert other personnel when customers at the counter requested birth control. *See id.* On these facts, the court easily held that the requested accommodation in *Noesen* would impose an undue hardship, since it would have required other employees to "assume a disproportionate workload," it would have "divert[ed] them from their regular work," and it would have forced the employer to absorb "the undue cost of uncompleted data work." *Id.* at 584-85. This accommodation may also have created major retention and recruitment issues for the employer, all cognizable under Title VII.

Religious accommodations that require work rearrangements can also have concrete and adverse financial impacts on co-workers that properly justify the denial of a request. In *Weber v. Roadway Express, Inc.*, for example, a trucker (Weber) refused to make overnight long-haul truck runs with any female driver due to his religious beliefs. 199 F.3d 270, 272 (5th Cir. 2000). The court noted that accommodating him (by modifying the scheduling system) would "adversely affect other drivers." *Id.* at 274. For instance, the runs Weber passed up could lead a female driver to "accept a shorter run than she might otherwise, which provides less compensation and is therefore less

valuable." *Id.* His substitute "might also receive less rest and time off between runs than he or she might otherwise." *Id.* On these facts, the court concluded that the proposed accommodation would impose an undue hardship on the employer. *See id.* at 274-75. The court did not observe (but could have) that this accommodation also risked violating the Title VII rights of female drivers, if the result would have been that they were deprived of more desirable workplace opportunities because Weber could be partnered solely with male drivers.

Of course, work rearrangement harms may often result in grumbling from co-workers, and that grumbling alone does not qualify as an "undue hardship." *See, e.g.*, *Crider v. Univ. of Tennessee, Knoxville*, 492 F. App'x 609, 615 (6th Cir. 2012) (co-worker's threat to quit if forced to cover employee's Sabbath shifts would be relevant to undue hardship analysis only if it were established to be more than "mere 'grumbling'"). But where an employer has a reasoned basis for believing that co-workers would experience a work rearrangement as burdensome for reasons other than religious hostility, those burdens are appropriately accounted for in the "undue hardship" analysis under Title VII.

2. Health and Safety Burdens.

A second common category of co-worker burden in this field involves health and safety harms. These burdens most often arise when employees seek religious exemptions from workplace requirements concerning vaccination, personal grooming, or workplace attire. Such requirements serve important interests (and in some cases are grounded in legal requirements) but may give rise to conflict with religious teachings about

bodily autonomy or physical appearance. *See, e.g.*, *Sambrano v. United Airlines, Inc.*, 2022 WL 486610 (5th Cir. 2022) (airline cited health and safety concerns to deny exemption from COVID-19 vaccination requirement); *E.E.O.C. v. GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010) (prison cited safety concerns to deny female Muslim employee an exemption from its dress policy prohibiting employee head coverings).

The same legal framework described above applies to health and safety concerns, though we expect that (in general) burdens implicating co-worker health and safety are especially likely to support findings of an "undue hardship." While work rearrangement harms often implicate meaningful interests, health and safety regulations are usually creatures of law and serve core interests in preventing injury, illness, and death. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. 647, 652-53 (2022) (agreeing with the U.S. Secretary of Health and Human Services that a COVID-19 vaccination requirement for Medicare and Medicaid healthcare workers "is necessary to promote and protect patient health and safety in the face of the ongoing pandemic").

In rare circumstances, accommodation from health and safety rules may not burden co-workers (though it may still give rise to independent hardships appropriately considered by an employer under Title VII). For instance, an employee who works at an outdoor parking lot as the sole attendant may not burden co-workers if exempted from a vaccine requirement (but here, customers who access their cars just after the parking lot attendant would surely experience a burden from the heightened risk of contagion).

Of course, if co-workers object to an exemption not because of any health or safety risk, but instead based on their own hostility to the employee's religious belief or practice, that objection would itself carry no weight.

Otherwise, where an employer has reason to think that co-workers would be burdened by an exemption from health and safety requirements, that burden is properly considered in deciding whether to grant the exemption. Imagine a receptionist at a doctor's office who objects on religious grounds to vaccine requirements; if that accommodation were granted, he would have a higher risk of infecting not only customers (patients), but also staff (doctors and nurses), and that would pose a hardship to the conduct of the business.

In this setting, where workplace requirements exist to reduce risk, it is particularly appropriate for employers to rely on reasoned judgment in assessing the burdens (including increased health and safety risk) that may result from an accommodation. Consider, for instance, *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984). There, consistent with state law, Chevron "required all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving a gas-tight face seal when wearing a respirator." *Id.* at 1383. A Sikh machinist filed suit to challenge Chevron's denial of an exemption from this policy—and the Ninth Circuit upheld a grant of summary judgment against him. *See id.* at 1384. It reasoned that if the machinist retained duties involving exposure to toxic gas, then Chevron would violate state occupational safety law; however, if those duties were reassigned, Chevron would have to wholly revamp its duty assignment

system and (as relevant here) his co-workers "would be required to assume his share of potentially hazardous work." *Id.* These burdens on the conduct of the business, including the shift of more dangerous tasks to co-workers, were appropriately considered under Title VII.

3. Dignitary Harms.

A final common category of co-worker burden involves dignitary harms. These burdens occur when an employee requests a religious accommodation that would allow him to engage in conduct that co-workers experience as discriminatory or offensive.

There are many ways such burdens might arise. For instance, an employee seeks an accommodation to post a sign above his desk that says, "Jesus is the Only True Path – Repent for Your Sins." Or an employee requests an accommodation allowing him to express to female colleagues his view that their proper place is in the home. Or an employee requests an accommodation so that she can refuse to address co-workers by the pronouns that accord with their gender identities. Or an employee who works in medicine seeks an exemption from office policies because of a religious calling to criticize (and dissuade) colleagues who provide blood transfusions. Or an employee seeks an exception from a uniform dress code to wear a button stating "Marriage is between a man and woman." Or an employee does not wish to have any dealings with certain co-workers of the same faith because he believes they have sinned and must be ostracized.

When an accommodation from workplace policies would result in co-workers facing hostile,

discriminatory, derogatory, or otherwise offensive statements or conduct at work, those burdens may unquestionably affect the conduct of the employer's business. Indeed, an employer may well conclude that such accommodations would generate hardships even independent of their dignitary harms to co-workers: for example, they may alienate customers or vendors, risk liability under state or federal law, and create substantial logistical and/or administrative challenges. But even focusing only on hardships attributed to coworker burdens, dignitary harms can devastate employee morale and produce inefficiency, distraction, confusion, recruitment and retention problems, and CBA issues.[4]

Accordingly, the framework described above covers cases involving possible dignitary harm to co-workers, and such cases require a fact-intensive analysis.

For example, imagine an Orthodox Jewish employee whose faith calls him to proclaim the correctness of his religious tradition against other Jewish denominations—and so he seeks an exemption from a company dress code to wear buttons and t-shirts that say, "Reform Jews are Not Real Jews." Or, conversely, consider a Reform Jewish employee who seeks a

[4] In addition, dignitary harms can sometimes coincide with work rearrangement harms. *See Walden v. Centers for Disease Control and Prevention*, 669 F.3d 1277 (11th Cir. 2012) (therapist contracted by the CDC refused to assist employee seeking relationship counseling for same-sex relationship, requiring employer to find alternative counselor for that purpose). In such cases, the employer may account for both sources of burden in weighing whether an accommodation would result in undue hardship to the business.

comparable exemption to spread a message critical of Orthodox Judaism. In these cases, if the employee works alone (like the parking lot attendant described above), then co-worker dignitary burdens would not be an appropriate ground for the employer to deny the requested accommodation.[5] Or if the employee works only with his supervisor, and the supervisor experiences no actual burden from these buttons and t-shirts (perhaps he simply doesn't care), the supervisor could not deny an accommodation based on a burden to himself.

Similarly, an employer could not properly invoke dignitary burdens on co-workers if the basis for those burdens was religious hostility—in other words, if co-workers would have no objection to such statements or conduct in a secular register, but they object to it here solely because of hostility to its religious nature.

For instance, consider a female employee who requests an accommodation to display a poster that says, "Women belong in the House … of Representatives." And assume her co-workers initially have no objection to the poster, believing it to be a reference to feminist political beliefs. If co-workers later object to the poster after they learn that the poster arises not from political convictions but instead from a religious calling for women to lead a political community, then such objections cannot be accounted for in the undue

[5] As set out in Sections II.B.2 and II.C, however, even in the absence of co-worker burdens, the accommodation may nevertheless impose a burden on customers who access the parking lot, in which case the employer may be able to show that the exemption from the company dress code would amount to an undue hardship.

hardship analysis. Employers cannot account for co-worker objections arising only from religious hostility.

Apart from those kinds of scenarios, Title VII authorizes employers to reasonably consider whether and how an accommodation would cause dignitary harm to co-workers affecting the conduct of the business. A proposed accommodation may properly be denied when, because of the dignitary harms it would produce, it would cause hardships for the conduct of the business (e.g., reduced efficiency, less collaboration, threatened or actual employee departures, difficulty recruiting employees, and shift reassignments).

For these reasons, and subject to the limitations we have described, employers may appropriately account for a range of co-worker burdens in assessing under Title VII whether an accommodation would impose an undue hardship on the conduct of their business.

C. The Co-Worker Burden Framework Is Also Applicable to Customer Burdens.

The same general framework described above can also be productively applied to analyze customer burdens that may result from a religious accommodation.

At the risk of stating the obvious, when granting an accommodation would burden actual or prospective customers of a business, that accommodation necessarily works a hardship on the conduct of the business: It is *always* a hardship for a business to lose or alienate customers. Therefore, the key question is the same as noted above: whether, looking at the specific facts and circumstances, granting an accommodation is reasonably likely to burden customers. However, when granting an accommodation would burden customers

only because of those customers' hostility to the employee's religious belief or practice, that burden cannot be accounted for (since Title VII does not transmute customer prejudice into a lawful basis for denying workplace religious accommodations).

The three categories of common burdens described above neatly track to this setting, as well.

First, rearrangement harms occur when customers are asked to bear material or logistical inconvenience (or delay) as the result of a religious accommodation. For instance, imagine a customer who goes to her pharmacy to refill her birth-control prescription, but the pharmacist refuses to interact with her and she must wait (on average) an extra ten minutes to meet with a technician. This experience will reflect negatively on the business, damaging its reputation and goodwill with customers who expect consistent and prompt service. It may lead any number of actual or prospective customers to shop elsewhere. The employer may rightly account for these practical hardships under Title VII.

Second, health and safety harms to customers may occur when an employee has a religious objection to performing job duties that would protect customers or the public. Think back to the medical office receptionist who seeks an exemption from a vaccination policy; this accommodation would increase the risk of infection not only for staff, but also for patients and those who accompany them. Or imagine a police officer who seeks an accommodation that would exempt him from guarding an abortion clinic—but who refuses reassignment to a beat without such a clinic, and who would thus leave the clinic and its visitors unguarded.

See Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998) (police officer refused to guard an abortion clinic based on his religious beliefs, putting the clinic's patients and employees at risk of harm); *see also id.* at 779 (Posner, C.J., concurring) ("[P]olice officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."). In cases like these, Title VII authorizes employers to account for harms to those who their business serves.

Finally, dignitary harms to customers occur where an accommodation would allow an employee to engage in speech or conduct perceived by customers as hostile, discriminatory, derogatory, or otherwise offensive. For example, imagine that a bank teller sought an exemption to wear a button opposing marriage for same-sex couples. Every customer who interacted with the teller would see that button, and it would be objectively reasonable for the employer to conclude that at least some of those customers would be offended or upset (or would feel discriminated against) by that message. Authorizing such accommodations could easily cause a business to lose customers and incur local ill-will, and hardships of that kind are properly considered under Title VII.

* * *

By virtue of its plain text, Title VII generally permits consideration of burdens on co-workers and customers in assessing whether an accommodation would impose a hardship on the conduct of a business. This analysis requires careful consideration of the facts and circumstances of each case, and it precludes

consideration of any burdens resulting only from co-worker or customer hostility to an employee's religion. Because the Third Circuit correctly recognized that co-worker burdens are properly accounted for in "undue hardship" analysis under Title VII, this Court should affirm that aspect of its judgment and confirm that Title VII allows consideration of such co-worker burdens.[6]

CONCLUSION

The Court should affirm the judgment below.

[6] To the extent the Court revisits and revises *Hardison*'s "de minimis" standard, the Court may conclude that it is appropriate to vacate and remand, in which case it should still reach the second question presented and affirm the Third Circuit's conclusion on that issue to afford guidance about the application of Title VII.

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