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Giving Hardison the Hook: Restoring Title VII's Undue Hardship Standard

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INTRODUCTION: A HALLOWED YET HOLLOW PROMISE

In 1972, Congress amended Title VII to place an affirmative duty on employers to reasonably accommodate all aspects of employees' sincerely held religious beliefs or practices.[1] Employers cannot surmount this congressional command unless they can show that doing so would impose an undue hardship on the conduct of their business operations.[2] Although a critical part of Congress's civil rights campaign, this "hallowed" protection designed to guide all religious accommodation cases has far too often proven a hollow promise for many Americans. Even though Title VII prescribes robust religious accommodations for America's workforce, in *Trans World Airlines, Inc. v. Hardison*,[3] the Supreme Court severely stunted the amendment's scope—binding all lower courts to its extremely narrow and unnatural construction of Title VII's undue hardship standard.[4]

Through one, almost passing, sentence, the Court confusingly interpreted "undue hardship" to mean anything more than a *de minimis* cost to the employer.[5] This created a toothless standard that flouts the text's ordinary meaning and the statute's purpose and corresponding legislative intent. More detrimental than mere defective statutory interpretation, however, *Hardison*'s holding hobbled Title VII's religious accommodation requirement, leaving many religious employees to face a harmful Hobson's choice. And because secularity and mainstream Christianity are the default of the American workplace and workweek,[6] people of minority faiths have been the most adversely affected by the Court's tenuous interpretation of undue hardship.[7]

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1. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (2000)).

2. *Id*.

3. 432 U.S. 63 (1977).

4. *See* Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., dissenting in denial of certiorari).

5. *Hardison*, 432 U.S. at 84 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

6. *See*, *e.g.*, Gwendolyn Yvonne Alexis, *Not Christian, but Nonetheless Qualified: The Secular Workplace – Whose Hardship?*, 3 J. RELIGION & BUS. ETHICS 1, 23–24 (2012).

7. *See id.*

By reasoning that employers need not spend a penny more or exert any energy beyond the *de minimis*, the Court unevenly passed crushing economic, social, and moral costs on to employees, especially religious minorities. And under *Hardison*'s harsh holding, many employees often must either choose to contravene their religious convictions to comply with their employers' seemingly neutral policies or render their obedience to the Divine, often at the expense of their job. For most devout believers, although financially difficult, the answer is easy: they will choose to "obey God rather than men."[8] Congress enacted the 1972 amendment to effectually forestall such steep choices,[9] but *Hardison* forbears the statute from fully functioning.

The stark dichotomy between the statute and *Hardison* has received much attention in academia.[10] Literature on the *de minimis* standard is legion. And while the arguments for or against correcting *Hardison* vary, most articles arise around times when it looks like the Court or Congress will rearrange the icy post-*Hardison* landscape in which religious accommodation claims find themselves. This paper follows hard on the heels of two significant developments that offer a glimmer of hope for future religious accommodation claimants. First, in 2020, three justices concurred in denying certiorari that although the particular petition was not the right vehicle, they would inevitably like to reconsider *Hardison*.[11] Second, in early April 2021, the Court denied two similar petitions asking it to revisit *Hardison*, but this time two justices directly lambasted *Hardison* in dissent.[12] Justice Thomas curiously did not join the recent dissent even though he joined the 2020 concurrence.[13] But based on his previous signaling that *Hardison* should be revisited, he likely did not consider the most recent petitions suitable vehicles for the endeavor rather than expressing his disinterest in the topic.

8. *Acts* 5:29; *see, e.g.*, Hardison, 432 U.S. 63.

9. *See infra* Section I.C.

10. *See, e.g.*, Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMPLOY. LAB. L. 575 (2000).

11. *See* Patterson v. Walgreen Co., 140 S. Ct. 685 (2020) (Alito, J., concurring in denial of certiorari) (along with Justices Thomas and Gorsuch).

12. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227 (2021) (Gorsuch, J., dissenting in denial of certiorari) (along with Justice Alito); Dalberiste v. GLE Assocs., Inc., 814 F. App'x 495 (11th Cir. 2020), *cert. denied*, No. 19-1461, 2021 WL 1240921 (U.S. Apr. 5, 2021).

13. *Compare Patterson*, 140 S. Ct. at 685 (Justice Thomas joining), *with Small*, 141 S. Ct. at 1227 (Justice Thomas not joining).

In light of these recent developments, it seems increasingly inevitable that the Court will someday take up a case that will finally give *Hardison* the hook. And although there are a couple of avenues to eliminate or at least mitigate *Hardison*'s hobbling effects, as Justice Gorsuch explained, the royal road to abrogating *Hardison* lies in the Court correcting its own mistake.[14] The difficulty navigating that road is finding an adequate vehicle. Yet when the Court finds a golden vehicle, it should grant cert and ultimately abrogate *Hardison*, ideally by interpreting undue hardship to mean significant difficulty or expense.

Part I of this paper begins by briefly reviewing the winding road to *Hardison* to tee up how its *de minimis* standard was decided on faulty grounds. Part II argues how the *Hardison* Court completely contravened the text, purpose, and legislative intent of the 1972 amendment, thus stunting the statute's full realization. Part III then highlights *Hardison*'s hobbling effects on religious accommodation claims, particularly claims brought by religious minorities. After reasoning that there are only two possible solutions that could truly give *Hardison* the hook, Part IV concludes by asserting that, although anything is better than *Hardison*'s unnatural *de minimis* standard, the ideal solution is the Court interpreting undue hardship to mean significant difficulty or expense. But to get there, the right vehicle has to reach the Court. Giving *Hardison* the hook will restore the undue hardship standard and promote pluralism in the workplace, fundamental to human dignity and equity.

I. THE WINDING ROAD TO *HARDISON*

A. The EEOC's Creation and Its 1966 and 1967 Guidelines

The enactment of the Civil Rights Act of 1964 was one of Congress's most seminal exercises of power.[15] At the core of Title VII of that Act, Congress sought to eradicate employment discrimination on the basis of race, color, sex, national origin, and religion—each a classification for which countless Americans have faced discrimination.[16] To ensure that Title VII would accomplish its mission, Congress created the Equal

14. *Small*, 141 S. Ct. at 1229 (2021) ("There is no barrier to our review and no one else to blame. The only mistake here is of the Court's own making—and it is past time for the Court to correct it.").

15. *See generally* Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424 (2015) (assessing the importance of the Civil Rights Act of 1964).

16. 42 U.S.C. § 2000e-2.

Employment Opportunity Commission (EEOC) and granted it regulatory power to implement the statute.[17] The EEOC's regulatory power would prove to be an integral part in developing the religious accommodation requirement.

As originally enacted, the statutory language proscribed employment discrimination on the basis of religion,[18] but Title VII lacked an explicit requirement for employers to affirmatively provide religious accommodations.[19] The ambiguity brought up "whether the Act merely prohibited discrimination on the basis of religion[20] or whether it also required employers to affirmatively accommodate an employee's religious needs."[21] After receiving many employee complaints about being unable to observe their Sabbath or religious holidays, the EEOC first introduced a reasonable accommodation requirement in its 1966 Guidelines.[22] The EEOC expressed that under Title VII, "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without *serious inconvenience* to the conduct of the business."[23] Although the EEOC affirmed that Title VII obligated employers to provide reasonable accommodations, it reasoned that employers could "establish a normal workweek (including paid holidays) generally appliable to all employees."[24]

But only one year later, after receiving even more employee complaints about Sabbath-day observance, the Commission amended its Guidelines "to require accommodation except in cases where 'undue hardship,' as opposed to 'serious inconvenience,' would result."[25] The Commission also signaled that employers "could no longer rely on the establishment of a neutral work week as a defense against a claim of religious discrimination under Title VII."[26] The amended Guidelines thus

17. *Id.* at § 2000e-4.

18. Originally both disparate treatment and impact theories. *See* EEOC COMPLIANCE MANUAL, SECTION 12: RELIGIOUS DISCRIMINATION (2021).

19. Kaminer, *supra* note 10, at 580.

20. Like Title VII's other protected classes.

21. Kaminer, *supra* note 10, at 580.

22. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1967) (codifying the 1966 Guidelines).

23. *Id.* (emphasis added).

24. *Id.*

25. Kaminer, *supra* note 10, at 581; *see also* 29 C.F.R. § 1605.1 (1968) (codifying the 1967 Guidelines) ("Undue hardship" appearing for the first time in accommodation contexts).

26. Kaminer, *supra* note 10, at 581.

substantially heightened the threshold to successfully defend against a religious accommodation claim.

B. Typical Judicial Treatment of the Guidelines Pre-1972 Amendment

Even though the amended Guidelines substantially heightened the threshold to successfully defend against a religious accommodation claim, many courts ended up ignoring the amended, codified Guidelines by narrowly construing the statute by continuing to focus on neutrality.[27] Two cases, in particular, illustrate the narrow judicial reasoning that Congress ultimately rejected in Title VII's 1972 amendment.[28]

In 1971, an equally divided Supreme Court affirmed a Sixth Circuit ruling involving a Sabbath-observance accommodation.[29] After a decade at Reynolds Metals, Robert Dewey joined the Faith Reformed Church in 1961.[30] About a year prior, Reynolds Metal entered into a collective bargaining agreement that empowered the company "to set straight time and overtime schedules and the employees were obligated to work such schedules unless they had a *substantial* and *justifiable* reason for not doing so."[31] This eventually led to several mandatory shifts on Sunday, Dewey's Sabbath.[32] Dewey was ultimately fired after refusing to work on Sunday or seek a replacement, both of which he believed would have violated his faith.[33]

Despite both the 1966 and 1967 Guidelines,[34] the Sixth Circuit ultimately held that a "failure to accommodate an employee's religious observance should not be equated with religious discrimination."[35] It also held that the company could not have discriminated against Dewey's faith because the policy "was equal in its application to all employees and was uniformly applied."[36] The court went even further by reasoning that once applicants or employees knew company policies did not suit their religion,

27. Kaminer, *supra* note 10, at 582.

28. *See infra* Section I(C).

29. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) *aff'd mem., by an equally divided court*, 402 U.S. 689 (1971) (per curiam) (Justice Harlan did not participate in the case).

30. *Id.* at 329.

31. *Id.* (emphasis added).

32. *Id.* at 329.

33. *Id.* at 328.

34. The 1966 Guidelines were in effect before the litigation began, while the 1967 Guidelines were issued during the early stages of the litigation. *See* Dewey, 429 F.2d at 329–30.

35. Kaminer, *supra* note 10, at 582 (Kaminer is one of the most cited academics opposed to *Hardison*).

36. *Dewey*, 429 F.2d at 336.

they were "not entitled to demand any alterations … to accommodate [their] religious needs."[37]

In another denied accommodation case, Charles Riley, a Seventh-day Adventist, requested that he not be assigned to work from sundown on Friday to sundown on Saturday so he could observe his Sabbath.[38] His request was denied, and he was ultimately fired for not yielding his religious convictions.[39] Channeling *Dewey*, the district court focused on neutrality and shifted the burden onto employees by holding that a failure to provide a religious accommodation was not tantamount to discrimination.[40]

The district court in *Riley* reasoned that an employer have "a right to make rules and working conditions to be imposed upon its employees for the conduct of its business, if such rules are not in conflict with the law, and any one accepting employment is bound to accept such rules and working conditions."[41] The court went even further by broadly stating that

> surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief. If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he [or she] must conform to the working conditions of his employer or seek other employment.[42]

This district court also expressed doubt that the EEOC even had the authority to place the burden on the defendant to prove an undue hardship: "we feel it would be unreasonable . . . to require the complex American business structure to prove why it cannot gear itself to the 'varied religious practices of the American people.'"[43] It also held that the 1967 Guidelines did not repeal the 1966 Guidelines, so, in its view, employers were still free to establish a normal working week without accommodating employees.[44] The court's sentiments flew in the face of the 1964 version of Title VII[45] and 1966 and 1967 Guidelines,[46] which, when coupled,

37. *Id.*

38. Riley v. Bendix, 330 F. Supp. 583, 584 (M.D. Fla. 1971).

39. *Id.* at 585–86.

40. *Id*. at 591.

41. *Id.* at 589.

42. *Id.* at 590.

43. *Id.* at 588–89 (internal citations omitted).

44. *Id.* at 589.

45. *See* 42 U.S.C. § 2000e-2 (clearly prohibiting employment discrimination on the basis of religion).

46. *See* 29 C.F.R. § 1605.1 (1967) (codifying the 1966 Guidelines) (duty to not discriminate includes accommodation); *see also* 29 C.F.R. § 1605.1 (1968) (codifying the 1967 Guidelines)

established that failing to provide an accommodation resulted in discrimination.[47] The district court's sweeping statements also effectively signified that unless an employee espouses secularity or mainstream Christianity, then to fully participate in the workforce, they must leave their religion at home.

Running throughout these two typical pre-1972 decisions were the common threads of secularism, neutrality, and fairness. But these threads were woven through an inaccurate tapestry.[48] Fortunately for Riley, the Fifth Circuit reversed the district court.[49] It held that the "Act proscribe[d] not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."[50] It also determined that the EEOC clearly and authoritatively established a duty to provide religious accommodations.[51] Even though Riley ultimately prevailed, the Sixth Circuit's *Dewey* decision and the district court's *Riley* decision, and many others like them, finally led to Congress amending Title VII to address many courts' non-recognition or narrow treatment of religious accommodation.

C. Congress Enacts the 1972 Amendment

In a direct repudiation of the *Dewey* court and others that did not recognize or significantly narrowed the religious accommodation requirement, Congress overwhelmingly amended Title VII, virtually incorporating the 1967 Guidelines.[52] Section 701(j) of the amendment imposed an affirmative duty on employers to reasonably accommodate their employees' religious beliefs unless it would impose an undue

(compliance with Title VII requires accommodation unless employer can prove an undue hardship would arise).

47. Historically courts treated denied accommodation claims as a separate cause of action. However, the Supreme Court has since clarified that there are only two causes of action under Title VII: disparate treatment or impact. EEOC COMPLIANCE MANUAL, *supra* note 18, at 12-I (citing EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015) (treating a claim based on a failure to accommodate as a form of disparate treatment)).

48. "Neutrality is a theory about freedom of religion in a world that does not and cannot actually exist." STEPHEN L. CARTER, GOD'S NAME IN VAIN 159 (2000); *see also infra* Part III.

49. Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).

50. *Id*. at 1115–16 (quoting Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971)).

51. *Id.* (quoting *Griggs*, 401 U.S. at 433 (stating that "enforcing agency is entitled to great deference" and treating "guidelines as expressing the will of Congress")).

52. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (2000)).

hardship.[53] In its entirety, it reads: "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[54] Although relatively brief and open-ended, the language unambiguously requires accommodation, and employers are exempt if and only when facing undue hardship. And together with Section 701(j)'s purpose and corresponding legislative history, it is obvious that Congress envisioned undue hardship to require something much greater than a *de minimis* cost.[55]

Senator Randolph, the amendment's sponsor, "was alarmed at the inconsistent Title VII decisions with respect to religious discrimination."[56] And as a Seventh Day Baptist, he was particularly worried about cases involving Sabbath observance.[57] Against this backdrop, he introduced the amendment "with the express purpose of protecting Sabbatarians."[58] While introducing the amendment, he directly expressed how *Dewey* and other decisions, unfortunately, failed to realize Title VII's scope.[59] He also signified that various decisions had "clouded the matter with some uncertainty."[60] These cases were decided at the expense of workers who had been marginalized because their "religious practices rigidly require them to abstain from work . . . on particular days."[61] He believed the amendment would "assure that freedom from religious discrimination in

53. 42 U.S.C. § 2000e(j). The accommodation requirement and undue hardship standard appear in Title VII's definitions section.

54. *Id*.

55. *See, e.g.*, Kaminer, *supra* note 10, at 585 (most likely requiring significant or meaningful expense).

56. Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 523 (2010) (internal citation omitted).

57. *Id.*

58. Kaminer, *supra* note 10, at 584.

59. *Id*. (quoting 118 CONG. REC. 705, 705–06 (1972) ("This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved.")).

60. *Id.* (quoting 118 CONG. REC. at 706).

61. 118 CONG. REC. at 705 (specifically mentioning the 750,000 Orthodox Jews and 425,000 Seventh-day Adventists who experienced a "partial refusal at times on the part of employers to hire or to continue in employment" those employees.).

the employment of workers is for all time guaranteed by law."[62] Ultimately, the amendment was unanimously passed by the Senate.[63]

During the floor debate, Randolph was asked questions about work schedules and undue hardship. Regarding uniform work schedules, Senator Dominick asked, "[a] young man . . . works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6- day week?"[64] Randolph responded that this type of rescheduling "would not constitute 'undue hardship.'"[65] Expressing approval of the amendment's scope, Dominick stated that the amendment would help handle "various situations [that] keep arising because of our pluralistic method of conducting our business in this country."[66] But when Senator Williams posed the following scenario about a weekend-only work schedule, Randolph responded that it would constitute an undue hardship:

> There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the two days of the employment; this would be an undue hardship, and the employer's situation is protected under the amendment.[67]

These two answers present some boundaries of when an undue hardship arises. Randolph stated, "701(j) would mandate accommodation in most cases and that only 'in perhaps a very, very small percentage of cases' would accommodation not be possible."[68] Likewise, Randolph explained that the flexibility and gray areas were features rather than bugs.[69] He and other senators were fully confident that the purpose of the amendment would be achieved.[70] "Randolph believed this discretionary approach would work because 'the employer and employee, are of an understanding frame of mind and heart.'"[71] But he had too optimistic of

62. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 370 (1997).

63. *Id.*

64. *Id.* at 371 n.225 (quoting 118 CONG. REC. at 706).

65. *Id.*

66. 118 CONG. REC. at 715.

67. *Id.*

68. Kaminer, *supra* note 10, at 585 (quoting 118 CONG. REC. at 706).

69. *Id*. (internal citation omitted).

70. 118 CONG. REC. at 714.

71. Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 751 (1998) (quoting 118 CONG. REC. at 706).

an outlook on the relationship between employers and employees and the types of cases that would reach the courts.[72] As a result, the intended broadness of the language became the impetus of the *Hardison* Court's "weakening of the amendment's accommodation obligation."[73]

II. *HARDISON*'S ANOMALOUS *DE MINIMIS* STANDARD

The 1972 amendment was destined to be the lodestar in all future religious accommodation disputes involving undue hardship. Instead, the *Hardison* Court's unnatural *de minimis* standard "dramatically revised—really, undid—Title VII's undue hardship test."[74] In his dissent, Justice Marshall condemned the *Hardison* Court's stark departure from the statute, in part, because of its overemphasis on neutrality and reverse discrimination, which mirrored *Dewey's* congressionally rejected reasoning.[75]

A. Factual and Procedural Background

Like *Dewey* and a slew of other accommodation cases, *Hardison* involved a religious minority's Sabbath observance being at odds with a company's collectively bargained seniority system.[76] In 1967, Larry Hardison became a clerk at Trans World Airlines (TWA).[77] Hardison was a member of a department that operated 24-hours a day, 365-days a year, and, like all employees, he was subject to a seniority system as part of a collective-bargaining agreement.[78] Under the agreement, shift assignments were by seniority.[79] The friction between Hardison's requested accommodation and the rigid seniority system was the focal point of the parties' dispute.[80]

After about a year on the job, Hardison joined the Worldwide Church of God.[81] A central tenant of his new faith involved observing the Sabbath

72. *Id*. at 752.

73. *Id*.

74. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting in denial of certiorari).

75. *Compare* TWA v. Hardison, 432 U.S. 63 (1977), *with* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970).

76. *Hardison,* 432 U.S. 63.

77. *Id*. at 66.

78. *Id.* at 66–67.

79. *Id.* at 67.

80. *See id*. at 66–71.

81. *Id.* at 67.

"by refraining from performing any work from sunset on Friday until sunset on Saturday."[82] It also obligated him to observe specific religious holidays.[83] When he first informed his supervisor of his religious beliefs, the supervisor worked with Hardison and the union foreman to reach an amicable agreement.[84] At first, Hardison's supervisor suggested that the union should seek a job swap or change his days off.[85] Hardison also agreed to a framework that would allow him to observe his religious holidays in exchange for him working more traditional holidays when asked.[86] Fortunately, the problem temporarily went away when he transferred to a new shift that allowed him to work at times conducive to his Sabbath.[87]

The situation unraveled when Hardison switched buildings to work a day shift.[88] Although he merely moved from one building to the next, "the two buildings had entirely separate seniority lists."[89] In his original building, Hardison's seniority allowed him to work at times in harmony with his Sabbath.[90] But in the new building, he was the second lowest employee in seniority, which precluded him from bidding to have Saturday off.[91] Because of his low seniority, he was asked to work on Saturday to cover a coworker, and, although "TWA agreed to permit the union to seek a change of work assignments for Hardison," the union was unwilling to play ball.[92] A four-day work week proposal was also rejected, and a change to the twilight shift would have still caused him to work on Friday after sundown.[93] After he could not obtain an accommodation, Hardison was fired for insubordination because he did not report to work on Saturday.[94]

Because the dispute arose before 1972, relying on the pre-amendment version of Title VII and the 1967 Guidelines, Hardison sued for religious discrimination.[95] While the district court held that it would have been an

82. *Id*.
83. *Id*.
84. *Id*. at 67–68.
85. *Id*. at 68.
86. *Id.*
87. *Id*. (the referenced shift was 11:00 PM to 7:00 AM).
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id.* at 68.
92. *Id*.
93. *Id*.
94. *Id*. at 69.
95. *Id*.

undue hardship for TWA to accommodate Hardison,[96] the Eighth Circuit reversed after outlining several accommodations TWA could have granted that would not have resulted in an undue hardship.[97] Contrasting TWA's lack of effort to grant an accommodation, the Eighth Circuit noted that Hardison repeatedly went out of his way to minimize the impact his religious needs might have had on the company.[98] Despite the circuit court's thoughtful analysis that was fully in line with EEOC guidance, the Supreme Court went back to its old ways—relying on neutrality and fairness, which Congress outright rejected in the 1972 amendment.

B. Dubious Legal Analysis, Faulty Legal Conclusion

The *Hardison* Court's decision was built on legal reasoning that flouted the relevant statutory and regulatory texts, the purpose of Title VII, and relevant legislative intent. Channeling the *Dewey* court's reasoning, the *Hardison* Court relied on neutrality and fairness arguments that failed to view the uneven playing field religious minorities face in a workplace catered to secularity and mainstream Christianity.[99] Ultimately, the Court's holding prevented the 1972 amendment from ever attaining its full fruition, which has left countless religious employees to bear high economic, social, and moral costs.

At the outset, the *Hardison* Court quickly dispatched the Eighth Circuit's thoughtful holding, along with the several suggested accommodations TWA could have granted.[100] After haranguing Congress and the EEOC for providing what it considered "no guidance for determining the degree of accommodation that is required," the Court concocted its own formulation for determining undue hardship.[101] Although it would have cost TWA a meager $150 to accommodate Hardison for three months,[102] the Court ultimately concluded that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[103] This "single sentence with little

96. *Id.* at 70.

97. *See* Hardison v. TWA, 527 F.2d 33, 39–42 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977) ("The company may not accept the role of a Pontius Pilate. An effort to accommodate … must be made.").

98. *Hardison*, 432 U.S. at 70.

99. *See* Alexis, *supra* note 6, at 23–24.

100. *Hardison*, 432 U.S. at 77 ("We disagree with the Court of Appeals in all relevant respects.").

101. *Id*. at 73.

102. After three months, Hardison could have transferred back to his previous assignment, which would have solved the problem. *Id.* at 84.

103. *Id*.

explanation or supporting analysis" announced the Court's newly minted *de minimis* standard.[104] Although the sentence is facially unremarkable, it has had a long-lasting, detrimental effect on religious accommodation claims.

The *de minimis* standard is now the marching order for the entire federal judiciary. If accommodation costs merely a penny more than the *de minimis,* all courts must hold that the employer is absolved of its affirmative duty to accommodate an employee. By making the threshold to prove undue hardship so low, the Court essentially gave employers carte blanche to preclude certain religious persons from obtaining or maintaining meaningful employment—the very thing Title VII was enacted to prevent.[105] Though the *Hardison* Court's interpretation of undue hardship is unfortunate, it is not a surprise after examining where it spent most of its focus.

Interestingly, the Court's primary focus was not determining the extent of the religious discrimination Hardison experienced. Instead, most of the Court's attention was directed to the value and importance of collectively bargained seniority systems and the neutrality such systems bring.[106] Just like the *Dewey* court and others that incorrectly focused on neutrality and fairness for all employees, the Supreme Court treated Hardison's faith with a measure of incredulity and as a substantial threat to unionized labor.[107] After referencing the seniority system throughout several pages, the Court wrote the following strong words:

> [I]t appears to us that *the system itself represented a significant accommodation to the needs*, both *religious and secular*, of all of TWA's employees. As will become apparent, the seniority system represents a *neutral* way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off. Additionally, recognizing that weekend work schedules are the least popular, the company made further accommodation by reducing its work force to a bare minimum on those days. . . .
>
> . . . .
>
> . . . We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not

104. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting in denial of certiorari).

105. *See id*. ("With *Hardison*, uneven results like these have become increasingly commonplace.").

106. *See Hardison*, 432 U.S. at 79–83.

107. *See id*.

> believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts.[108]

In this lies how the Court completely sidelined Title VII and the 1967 Guidelines to promote its endorsement of collective bargaining in national labor policymaking—all at the expense of religious minorities.[109] Here the Court treats Title VII's congressionally mandated religious accommodation as inconsequential when compared to companies providing other, neutral accommodations to all employees through a collective bargain.

But this is the same type of reasoning Congress rejected when it enacted the 1972 amendment.[110] And even though Title VII gives some deference to a seniority merit system, the statute requires the employer to accommodate regardless of whatever system is in place, leaving an undue hardship as the only congressionally mandated exception.[111] So, under Title VII, preserving neutrality is not a justifiable excuse to keep employers from providing reasonable accommodations. Because of the Court's overemphasis on collective-bargaining seniority systems, it is easy to understand why it so easily agreed with the district court that "TWA had done all that could reasonably be expected within the bounds of the seniority system."[112] It is similarly apparent why the Court dubiously interpreted undue hardship to favor seniority systems.

C. Where Purpose, Text, and Intent Meet: Justice Marshall's Scathing Dissent

Responding to the Court's questionable interpretation of undue hardship, Justice Marshall, joined by Justice Brennan, issued a scathing dissent.[113] It utilized the purpose, text, and intent of Title VII and the

108. *Id*. at 78–79 (emphasis added).

109. Although collective bargaining agreements (CBAs) should be afforded some deference, under the statutory scheme (without *Hardison*'s low *de minimis* standard), rigid enforcement of CBAs would preclude most religious minorities from accommodations in many key parts of the workforce, therefore, nullifying Title VII's purpose.

110. *See* Kaminer, *supra* note 10, at 583 (responding "to the refusal of the courts to follow the 1967 EEOC Guidelines, Congress enacted § 701(j), which tracks the language of the 1967 Guidelines.").

111. *See Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

112. *Id*. at 77 (majority opinion).

113. *See id.* at 85–97 (Marshall, J., dissenting).

EEOC guidelines to their fullest extent. And because the Court concocted such a convoluted definition of undue hardship, Justice Marshall had no shortage of statutory interpretation ammunition to use against the Majority.

As to Title VII's purpose, Justice Marshall began by acknowledging the "[p]articularly troublesome … plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance."[114] Then, after recounting the great lengths Congress and the EEOC went to issue the religious accommodation requirement, he explained that the Court's decision dealt a "fatal blow to all [of] those efforts."[115] As one who was himself no stranger to discrimination and marginalization, Justice Marshall knew the heavy burden the Court placed on the backs of religious minorities. To him, such a result was "deeply troubling."[116] By reducing the threshold required to prove an undue hardship to a negligible level, the Court was in effect subjecting "adherents of minority religions to make the cruel choice of surrendering their religion or their job."[117] But this is a choice that should be completely foreign "for a society that truly values religious pluralism."[118]

Justice Marshall also took to task the Court for its inordinate focus on neutrality and fairness, which ran directly counter to the religious accommodation requirement:

> With respect to each of the proposed accommodations . . . that the Court discusses, it ultimately notes that the accommodation would have required "unequal treatment" in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," ultimately "signif[y] nothing."
>
> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. . . . What all [accommodation] cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each

114. *Id*. at 85.

115. *Id*. at 86.

116. *Id*. at 87.

117. *Id.*; *see also* Robert J. Friedman, *Religious Discrimination in the Workplace: The Persistent Polarized Struggle*, 11 TRANSACTIONS: TENN. J. BUS. L. 143, 160 (2010) ("A virtually negligible financial loss is not a hardship at all.").

118. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

> instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs," unless the employer gratuitously decides to repeal the rule *in toto*.[119]

Although Justice Marshall did not draw a line of where an accommodation becomes an undue hardship, his reasoning about neutrality squared with the purpose of Title VII's religious accommodation requirement, and it handily dispatched the banality of the Majority's misplaced focus on neutrality and fairness.[120] His reasoning also tracked the statute's text.

Hearkening to the text, Justice Marshall concluded that "[w]hat the statute says, in plain words, is that such allocations are required unless 'undue hardship' would result."[121] And about the Court-created *de minimis* definition, he wrote that "[a]s a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.'"[122]

Justice Marshall also reprimanded the Court for stating that the "brief legislative history of [Section] 701(j) is . . . of little assistance" in interpreting undue hardship.[123] He found that the legislative "history [was] far more instructive than the Court allow[ed]."[124] Because of the Court's "oblivious[ness] of the legislative history" of the 1972 amendment, it "reject[s] any accommodation that involves preferential treatment [and] follows the *Dewey* decision in direct contravention of congressional intent."[125]

Justice Marshall's dissent brought together the purpose, text, and legislative intent of Title VII's religious accommodation requirement in a way that repudiates the Majority's reasoning. His reliance on the text, above all else, along with the purpose and statutory history, also serves as a model the current Court should emulate in religious accommodation cases. But Justice Marshall's greatest contribution to future accommodation cases was not his keen inter-theory statutory interpretation. He concluded his dissent with a profound statement on Hardison's real cost—a cost that is still being paid:

119. *Id.* at 87–88 (internal citations omitted).

120. To follow the Court's arguments regarding "unequal treatment" to their natural conclusions would make what Justice Marshall called "a mockery of the statute." *See id.* at 88.

121. *Id*.

122. *Id.* at 93 n.6.

123. *Id.* at 74 (majority opinion).

124. *Id.* at 88 (Marshall, J., dissenting).

125. *Id.* at 88–89.

> What makes today's decision most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshiping their God. The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased.[126]

Justice Marshall understood the immeasurable value of human dignity. Unfortunately, the Majority made it easier for employers to protect their pocketbooks rather than provide religious accommodations, and Justice Marshall's statement has proven prophetic as for the countless Americans who have received Hardison's same fate.

III. *HARDISON*'S HOBBLING EFFECTS AND HIGH COSTS

Larry Hardison is not the only person forced to pay a high cost imposed on him by the *Hardison* Court. Shortly after *Hardison* was decided, the EEOC reported that many employers believed that *Hardison* relieved them of any obligation to provide religious accommodations.[127] The EEOC also said that *Hardison* led to "widespread confusion concerning the extent of accommodation," and some groups of individuals were not accommodated,[128] "especially those with non-traditional religious needs."[129] These trends have persisted in the ensuing decades.

In 2016, the Department of Justice reported that many employers are still not aware of their obligation to provide accommodations and that there is a concern that religion-based employment discrimination is underreported.[130] Even though there is an underreporting concern, religious accommodation cases have ballooned during the past two

126. *Id.* at 96–97 (footnote omitted).

127. *See* Federal Legislation Clinic, *Title VII and Flexible Work Arrangements to Accommodate Religious Practice & Belief*, GEO. UNIV. L. CTR. (2005).

128. 29 C.F.R. § 1605 Appendix A (including Sabbath and religious holiday observance, prayer breaks during a shift, dietary restrictions, prohibition against membership in labor and other organizations, and exemptions from dress and grooming standards).

129. Engle, *supra* note 62, at 381 (internal citation omitted) (quoting EEOC Commissioner Eleanor Holmes Norton).

130. U.S. DEP'T OF JUST., COMBATING RELIGIOUS DISCRIMINATION TODAY: FINAL REPORT 17–18 (2016).

decades as the United States has become more diverse.[131] This is especially true for Muslims or other religious groups perceived to be Muslim.[132] A recent amicus brief before the Court shared the startline statistic that although "Muslim Americans comprise 1.1% of the national population, 25% of religious accommodation cases involve Muslim employees."[133] And much of the time, accommodation claimants belong to other protected classes, creating strong intersectional undercurrents.[134]

Moreover, although *Hardison* and a significant number of accommodation cases have involved Sabbath-day or religious holiday observance,[135] employees whose faiths require strict dress and grooming have also not fared well.[136] This is true of cases involving religious expression or practice in the workplace as well, such as a Muslim requiring an accommodation to pray five times a day.[137] Looking at *Hardison*'s *de minimis* standard, lower courts traditionally consider negligible economic impact and lost efficiency.[138] But *Hardison*'s *de minimis* standard allows employees to establish undue hardships far too easily even when money or efficiency are not involved. By looking at a few model cases, it becomes apparent how easy it is for an employer to buck an accommodation just by amorphously alleging an undue hardship under the *de minimis* standard. They also illustrate the typical toll religious minorities pay in trying to enter the secularized and mainstream-Christianized American workplace.[139]

131. *See Religion-Based Charges FY 1997 – FY 2020*, EEOC, https://www.eeoc.gov/statistics/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2020 (last visited Mar. 20, 2022); *see also* Alexis, *supra* note 6, at 2; Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673 (2020).

132. *See* Alexis, *supra* note 6, at 2 (Much of the discrimination arose in the wake of 9/11.).

133. Brief for Amici Curiae Muslim Advocates and the Sikh Coalition in Support of Petitioner at 10, Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227 (2021), *cert. denied*.

134. *See, e.g.*, EEOC COMPLIANCE MANUAL, *supra* note 18, at 12-V(A) ("Where a given religion is strongly associated—or perceived to be associated—with a certain national origin, the same facts may state a claim of both religious and national origin discrimination. All four bases might be implicated where, for example, coworkers target a dark-skinned Muslim employee from Saudi Arabia for harassment because of his color, religion, national origin, and/or race.").

135. *See* Blair, *supra* note 56, at 517.

136. Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII's Role in Legitimizing Religious Discrimination against Sikhs*, 21 S. CAL. INTERDISC. L. J. 215, 216 n.6 (2011) (some faiths require, for example, "that Sikh men wear a turban and not shave their beards; that Muslim women wear a hijab; that Orthodox Jewish men wear a yarmulke; and that Pentecostal women wear skirts, rather than pants.").

137. *See* EEOC COMPLIANCE MANUAL, *supra* note 18, at 12-IV(C).

138. *See, e.g.*, Kaminer, *supra* note 10, at 614.

139. *See* Alexis, *supra* note 6, at 24 ("[A]ll non-Christian employees face an uphill battle under the current 'undue hardship' standard . . . .").

Alima Delores Reardon was a schoolteacher and devout Muslim.[140] According to her faith, she wore a headscarf whenever she was in public, including in her classroom.[141] She did so for two years without incident.[142] But in 1984, she was told three times to go home and change out of her headscarf and long flowing dress that covered everything but her hands.[143] If she refused, she could not teach because of an archaic law forbidding religious garb in the classroom.[144] True to her religious convictions, she refused and was excluded from teaching.[145] When the United States sued on her behalf against the Board and the Commonwealth, the district court ruled in Reardon's favor.[146] The court denied the defense's arguments that they would have suffered an undue hardship by not enforcing the religious garb law and that the Board's interest to not endorse religion in public schools made such an accommodation an undue hardship.[147] In its analysis, the district court relied on the fact that the Commonwealth had never enforced the religious garb law, nor had it "ever taken any responsive action against violators of the statute" as dispositive.[148] Furthermore, "the Board itself ha[d] permitted teachers in . . . public schools to wear religious garb or symbols in the past without adverse legal consequences."[149]

Relying on the reasoning from a nearly indistinguishable Oregon Supreme Court case involving a Sikh teacher, the Third Circuit vigorously reversed the district court.[150] With little analysis, the court quickly held that accommodating Reardon "would have been an undue hardship."[151] Relying on neutrality, the court concluded that Pennsylvania "regards the wearing of religious attire by teachers while teaching as a significant threat to the *maintenance of religious neutrality* in the public school system, and accordingly conclude that it would impose an undue hardship to require the Commonwealth to accommodate Ms. Reardon and others similarly

140. United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 884 (3d Cir. 1990).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 884–85.

145. *Id.* at 885.

146. United States v. Bd. of Educ. for Sch. Dist. of Phila., No. CIV. A. 87-2842, 1989 WL 52506, at *14 (E.D. Pa. May 17, 1989), *rev'd*, 911 F.2d 882 (3d Cir. 1990) (also mentioning that Title VII superseded the state's law).

147. *Id.*

148. *Id.*

149. *Id.*

150. *See Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d at 888.

151. *Id.* at 891 (finding that sanctions attached to the unenforced law were the undue hardship).

situated."[152] By reaching this conclusion, the Third Circuit effectively held that Muslims, Sikhs, Jews, and other individuals that require overt religious garments need not bother becoming teachers in Pennsylvania unless they willingly discard that integral part of their faith.

In another accommodation case, twenty-eight current and former employees of JBS USA, the world's largest producer of meat, sued the company for denying them an accommodation to shift meal breaks during Ramadan.[153] All the plaintiffs were black Muslims from Somalia, and all believed, to one extent or another, that missing prayers was a sin against God and that prayers needed to be offered within an appointed window.[154] The JBS plant had a CBA that entitled employees to two breaks during each shift, but the CBA had a rigid timetable for when the breaks could be taken.[155] There was also an unofficial policy allowing employees to ask supervisors for unscheduled breaks, which were then given at a supervisor's discretion.[156] The facts are somewhat messy because of the number of plaintiffs and the number of years involved. But for present purposes, it is sufficient to say that the court ultimately found "that the possible effect on employee morale" by moving the meal break "was more than a *de minimis* cost."[157] Again, by considering how non-praying coworkers might feel about some employees taking a modified break to pray, the court focused on neutrality in a way that precludes minority religious adherants from being able to participate in a "neutral" and secular workforce entrenched in mainstream Christianity.

The Fifth Circuit also decided a case based on coworker morale.[158] Marvin Brener, an Orthodox Jew, was employed as a pharmacist at a hospital pharmacy, which operated seven days per week.[159] After informing his employer of his faith, his supervisor ordered another pharmacist to switch shifts with Brener on a few instances, after which Brener arranged additional shift swaps with his coworkers.[160] When Brener informed his supervisor that Rosh Hashanah and Yom Kippur fell

152. *Id.* at 894 (emphasis added).

153. EEOC v. JBS USA, LLC, 339 F. Supp. 3d 1135, 1149, 1152 (D. Colo. 2018).

154. *Id.* at 1154 (showing a prime example of intersectional plaintiffs).

155. *Id.* at 1155–56.

156. *Id.* at 1156–57.

157. Brief for Amici Curiae Muslim Advocates and the Sikh Coalition in Support of Petitioner at 12, Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227 (2021) (citing *JBS USA*, 339 F. Supp. 3d at 1182, 1195), *cert. denied*.

158. Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982).

159. *Id.* at 143.

160. *Id.*

on days when he was scheduled, the supervisor directed other pharmacists to trade Christmas holidays with Brener so he could observe Jewish holidays.[161] Around this time, the supervisor began to receive complaints from employees about what they perceived as Brener's "special treatment."[162] Then, when Brener asked for an accommodation to observe another Jewish holiday, the supervisor said that he could not direct a shift swap because of morale but that he would approve voluntary swaps.[163] After failing to find another pharmacist to swap with him, Brener did not show up to work, and, after disciplinary meetings with his supervisor and hospital administrators, Brener ultimately had to offer his resignation.[164] Relying on *Hardison*'s neutrality rationale, the Fifth Circuit held that accommodating Brener not only affected morale, but it also discriminated against his coworkers because they were not Jewish like Brener.[165] The court, therefore, found that any accommodation would have resulted in an undue hardship.[166]

Each of these cases shows how easy it is for an employer to establish undue hardship and how courts still rely on specious secularity and uneven neutrality rationales to show that undue hardships are present. Although *Hardison* has not ever received a robust defense for its statutory interpretation, some *Hardison* proponents think its result was necessary, despite dubious statutory interpretation. The strongest proponents couch their support of the *de minimis* standard as "an attractive and workable standard for limiting harms to third parties."[167] And to them, avoiding harm to others is a "bedrock tenet of the law"[168] because "it is 'disturbing' to 'forc[e] third parties to pay for the exercise of . . . [religious] rights' of other parties."[169]

There are two primary problems with these arguments. First, the *de minimis* standard flouts the language, purpose, and legislative intent of the statute, and so it is built on a shaky foundation.[170] Second, and even more

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 143–44.

165. *See id.* at 147.

166. *Id.*

167. Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 217 (Holly Fernandez Lynch et al. eds., 2017).

168. *Id.* at 229.

169. Stephanie H. Barclay, *First Amendment "Harms"*, 95 IND. L.J. 331, 334 (2020) (quoting Tebbe et al., *supra* note 167).

170. *See supra* Section I(C)–Part II.

deleterious, focusing mainly on third party harm assumes that all parties are on an equal playing field. Religious minorities are not on an equal playing field but "face a stacked deck in a society" built upon secularity and mainstream Christianity.[171] Somebody has to pay the high cost for these Americans to fully participate in the workforce. Congress primarily placed the bill on employers—the party more fit to pay the price.[172] But by reducing undue hardship to no more than the *de minimis*, the *Hardison* Court took the bill from the employers and passed it to employees. So, as Stephen L. Carter aptly put it, "[W]hat we are bold to call neutrality means in practice that big religions win and small religions lose."[173] Fortunately, *Hardison*'s hold is waning.

IV. THE IDEAL WAY TO GIVE *HARDISON* THE HOOK

The past forty-five years are laden with literature on *Hardison* and possible solutions. Although nearly all of the solutions are thoughtful and would help mitigate *Hardison*'s heavy hold,[174] only two solutions have enough gumption to give *Hardison* the hook: legislation or Supreme Court action. Ultimately, the Supreme Court is the surest avenue to restore Title VII's undue burden standard. The challenge is finding the right vehicle.

A. Legislation

Legislation might be the most potent solution, but it is not the ideal solution. Legislation in this context would be superfluous. Congress already addressed the matter in 1972. But then the "Court dramatically revised—really, undid—Title VII's undue hardship test."[175] The error is the Court's alone, not Congress's.[176] Besides maybe the *Hardison* Court, no serious person would ever equate *de minimis* with undue hardship.

171. *See* Alexis, *supra* note 6, at 24.

172. Even though the de minimis standard really doesn't comport with the statute, getting rid of it wouldn't mean that just any accommodation would be allowed. An undue hardship would still be the cap. *See infra* Part IV.

173. CARTER, *supra* note 48, at 160.

174. *See, e.g.*, Matthew P. Mooney, *Between a Stone and a Hard Place: How the Hajj Can Restore the Reasonable Accommodation to Title VII*, 62 DUKE L.J. 1029 (2013) (calling for more aggressive enforcement by the DOJ and EEOC); Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467 (2006) (arguing that employees should only receive accommodations when employees face a true Hobson's choice).

175. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021), *cert. denied* (Gorsuch, J., dissenting).

176. *See id.* at 1229 ("There is no barrier to our review and no one else to blame. The only mistake here is of the Court's own making—and it is past time for the Court to correct it.").

Their respective definitions are simply incompatible. "The *de minimis* cost test cannot be reconciled with the 'plain words' of Title VII, defies 'simple English usage,' and effectively nullif[ies]' the statute's promise."[177]

Not only would further legislation be redundant, the current political landscape makes a legislative solution unlikely.[178] It is also "costly to draft and pass legislation overriding an undesirable judicial interpretation."[179] Congress has tried to repudiate *Hardison* several times, including months after *Hardison* was decided,[180] but no attempt has ever been successful, despite widespread support.[181] Even so, Congress has in a way already responded to *Hardison* by how it devised other statutes involving undue hardships.

In his recent dissent in the denial of certiorari, Justice Gorsuch explained that since *Hardison*, Congress has included undue hardship standards in other civil rights laws.[182] Challenging *Hardison*'s *de minimis* standard, he explained how these statutes require employers to furnish accommodations unless it would impose "'significant difficulty or expense' in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities."[183] Congress went out of its way to ensure that these laws would not receive the *Hardison* treatment.[184] The careful congressional calculation in subsequent legislation evinces that Congress intended Title VII's undue hardship standard to be akin to substantial difficulty or expense rather than *Hardison*'s peculiar *de minimis* threshold.[185]

177. *Id.* (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 88, 89, 92 n.6, 93 (1977) (Marshall, J., dissenting)).

178. *See generally* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

179. Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L.
REV. 1251, 1258 (2013).

180. *See* Robert A. Caplen, Note, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J. L. & PUB. POL'Y 579, 592–93, 600 (2005).

181. *See* Flake, *supra* note 131, at 1683.

182. *Small*, 141 S. Ct. at 1228 (referencing the Americans with Disabilities Act (ADA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Affordable Care Act (ACA)).

183. *Id*. ("With these developments, Title VII's right to religious exercise has become the odd man out.").

184. *See* Stephen B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 390, 425 (1995).

185. *Small*, 141 S. Ct. at 1228–29.

Although Congress hasn't given *Hardison* the hook, it doesn't need to. Congress provided enough for the Court to undo what it did in *Hardison*, which at the very least means abrogating the *de minimis* standard, and at the very most, comporting Title VII to a significant difficulty or cost threshold. And such an outcome seems much more likely in the current Court.

B. Supreme Court Action

The landscape has fundamentally changed since *Hardison*. The Roberts Court is much more favorable to cases involving religion than the Burger Court was when deciding *Hardison*.[186] On top of being far more favorable to cases involving religion, there have been major developments that show why it is inevitable that the Court will at some point give *Hardison* the hook.

First, in a disparate-treatment case involving a young Muslim woman's headscarf, the Court made it easier for claimants to establish Title VII religious discrimination claims.[187] Although *Abercrombie* did not involve accommodation or undue hardship, the Court neutralized *Hardison*'s flawed neutrality rationale. The Court held that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."[188] The Court reached this conclusion "because Title VII does not demand mere neutrality with regard to religious practices … it gives them favored treatment."[189] Justice Thomas also pointed out that *Hardison* didn't really interpret the current form of Title VII but only the 1967 EEOC guidelines.[190] Though insightful, lower courts still regard their hands as tied by *Hardison*.[191] For this reason, the most recent developments are paramount.

In the past three years, three Justices have signaled that hope is on the horizon.[192] The hope comes from three denied petitions asking the Court

186. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, SUP. CT. REV. (forthcoming 2022).

187. *See generally* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015) (failing to hire her because of her religion violated Title VII's nondiscrimination provision).

188. *Id*. at 775.

189. *Id.*

190. *Id*. at 785–86 (Thomas, J., concurring in part and dissenting in part).

191. *See* Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting in denial of certiorari).

192. It only takes four justices to grant petitions for certiorari. Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 612 (1984).

to reconsider *Hardison*'s *de minimis* standard.[193] Each petition involved a member of a minority religion requesting a schedule accommodation to observe their respective Sabbath, just like in *Hardison*.[194] And each gives a glimpse of what is, and more on point, what is not, the right vehicle for the Court to reconsider *Hardison*.

In *Patterson v. Walgreen Co*., Justice Alito, with Justices Thomas and Gorsuch joining, opined that although the specific petition wasn't the right vehicle, the Court should reconsider *Hardison* given its dubious *de minimis* standard.[195] Within the year, two more similar petitions were sent to the Court.[196] Justice Gorsuch, along with Justice Alito, dissented this time. Instead of merely stating that the Court should reconsider *Hardison*, Justice Gorsuch threw down his gauntlet against *Hardison*'s *de minimis* standard.[197] The main inference to draw from Justice Gorsuch's dissent is his direct challenge to his colleagues, which suggests that the Court seriously considered granting the petitions.[198] He stated, "I cannot see what more we could reasonably require," implying that, at least, he and Justice Alito found Small's petition a worthy vehicle.[199] But an even greater takeaway from this dissent is Justice Thomas's absence. Given that Justice Thomas joined the other two in *Patterson*, he most likely did not find *Small* a suitable vehicle. Herein lies the difficulty getting the Court to give *Hardison* the hook: finding the right vehicle.

C. Finding the Right Vehicle

Although three Justices have openly expressed their desire to revisit *Hardison*, the right vehicle first needs to make its way to the Court. Once there, because of the defects of the *de minimis* standard, it is all but inevitable that the Court will abrogate *Hardison*.[200] Although Sabbath-observance accommodation claims have played the primary role in

193. Patterson v. Walgreen Co., 140 S. Ct. 685 (2020) (Alito, J., concurring in denial of certiorari); *Small*, 141 S. Ct. at 227–29; Dalberiste v. GLE Assocs., Inc., 814 F. App'x 495 (11th Cir. 2020), *cert. denied*, No. 19-1461, 2021 WL 1240921 (U.S. Apr. 5, 2021).

194. Except the petitions did not involve CBAs.

195. *Patterson*, 140 S. Ct. 685, 685–86 (2020) (Alito, J., concurring in denial of certiorari).

196. *Small*, 141 S. Ct. at 1227; *Dalberiste*, 814 F. App'x at 495.

197. *See Small*, 141 S. Ct. at 1228–29.

198. *Small v. Memphis Light, Gas & Water*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/small-v-memphis-light-gas-water/ (last visited Mar. 21, 2022) (the case was distributed and relisted for conference over the course of several months).

199. *See Small*, 141 S. Ct. at 1229 (reasoning that, but for Hardison, the lower courts would have ruled in Small's favor).

200. *See supra* Section I(C)–Part II.

developing the case law, they are typically more complex and more often involve monetary expenses than other accommodation claims.[201] Sabbath observance cases are, therefore, not the ideal vehicle for giving *Hardison* the hook, as shown in *Patterson*, *Small*, and *Dalberiste*'s failures to garner four votes for cert.

Instead, petitions involving intangible costs, coworker complaints, and intersectionality are more likely to be granted, especially ones about dress and grooming.[202] This is because they don't typically involve tangible monetary costs,[203] they often involve intersectionality,[204] and they almost always require employees to choose between their job or religion.[205] Additionally, as Part III demonstrated, these types of cases are usually built upon sweeping yet sparse judicial reasoning and neutrality's shaky foundation—both foundations that would not withstand the Court's review.[206] But even if a vehicle arrives with perfect factual features, as two respected Sixth Circuit judges noted in *Small*, "litigants should consider" directly challenging the *de minimis* standard "going forward."[207] In other words, the right vehicle needs to challenge *Hardison* head on.

Once an ideal vehicle finally reaches the Court, it is almost inevitable that the Court will give *Hardison* the hook. Based on the statute's text, purpose, and accompanying legislative intent, there is no way that the current Court will preserve *Hardison*'s unnatural *de minimis* standard. And relying on the same, in lieu of the *de minimis* standard, the Court should follow the reasoning of Justice Gorsuch,[208] other judges,[209] and the majority of Title VII scholars[210] by interpreting Title VII's undue hardship

201. *See* Kaminer, *supra* note 10, at 614–15.

202. For example, a case involving similar facts to *Abercrombie* would be great, but *Abercrombie* unfortunately didn't turn on *Hardison*.

203. *See, e.g.*, Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer under Title VII?*, 78 FORDHAM L. REV. 1331, 1370 (2009) (quoting Ninth Circuit: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.") (internal citation omitted).

204. *See supra* Part III.

205. *See supra* Part II.C. (Justice Marshall's dissent).

206. "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

207. Small v. Memphis Light, Gas & Water, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring) (joined by Judge Kethledge) (reasoning that Small didn't really contest employer's undue hardship defense), *cert. denied*, 141 S. Ct. 1227 (2021).

208. *See* Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1227–29 (2021) (Gorsuch, J., dissenting in denial of certiorari).

209. *See, e.g.*, *Small*, 952 F.3d at 826–29 (Thapar, J., concurring).

210. *See, e.g.*, Blair, *supra* note 56; Caplen, *supra* note 180; Kaminer, *supra* note 10.

standard to mean significant difficulty or expense. But even if the Court takes a gentler approach, "it is past time for the Court to correct it."[211] *Hardison* is an affront to the civil rights crusade and anathema to pluralism, and, as Justice Marshall said in the beginning, "All Americans will be a little poorer until [*Hardison*] is erased."[212] Giving *Hardison* the hook will restore the undue hardship standard and inevitably promote religious pluralism and protect employees' dignity, especially religious minorities who have long borne *Hardison*'s high costs.

*Kade Allred**

211. *Small*, 141 S. Ct. at 1229.

212. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 (1977) (Marshall, J., dissenting).

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