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Groff v. DeJoy: A Wrong Step in the Right Direction

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NOTE

GROFF V. DEJOY: A WRONG STEP IN THE RIGHT DIRECTION

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The Supreme Court of the United States intentionally misrepresented the precedential case, *Trans World Airlines v. Hardison*,[1] in *Groff v. DeJoy*[2] before claiming to uphold it, thus engaging in covert judicial policymaking.[3] In *Groff*, the Court found that *Hardison* established a "significant" cost standard to demonstrate an "undue hardship," which excuses employers from the accommodation requirement for religious employees under Title VII.[4] However, *Hardison* unequivocally established the "more than a *de minimis* cost" standard.[5]

The Court nonetheless decided justly in *Groff*.[6] The *de minimis* standard from *Hardison* essentially nullified the accommodation requirement in Title VII.[7] As a result, observant employees, especially those practicing minoritized faiths, were left vulnerable to discrimination that Congress intended to eliminate in passing Title VII.[8] For decades, scholars have

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1. 432 U.S. 63 (1977).
2. 143 S. Ct. 2279 (2023).
3. *See infra* Sections IV.A.–B.
4. *See infra* Part III.
5. *See infra* Section IV.B. For brevity's sake, any usage of "*de minimis* standard" in this piece refers to the "more than a *de minimis* cost" standard mentioned in the first sentence of the penultimate paragraph of *Hardison* and in the sentence above.
6. *See infra* Section IV.D.
7. *See infra* Sections IV.B.–C.
8. *See infra* Section IV.B.2.

proposed various solutions to revive the accommodation requirement, most often relying on the "significant difficulty or expense" standard supplied in the Americans with Disabilites Act.[9] This Note aims to address the gap in existing scholarship created by the Court's decision in *Groff*, incorporating an analysis of the Court's decisionmaking, how its solution compares to those proposed in scholarship, and likely policy outcomes following the resurrection of the protections for observant employees under Title VII.

This Note proceeds in four parts. Section IV.A. demonstrates that the *Groff* Court intentionally misrepresented *Hardison* in order to effectuate a change in case law it disliked.[10] Section IV.B. establishes that the *Hardison* Court ruled incorrectly in holding for the *de minimis* standard, which perpetuated workplace religious discrimination that disporoportionately impacts employees practicing minoritized faiths.[11] Section IV.C. explores popular fixes to the *de minimis* standard suggested by scholarship before arguing that the *Groff* Court's response provided a better alternative.[12] Section IV.D. argues that "undue hardship" standard set by *Groff*—which held that there must be a *substantial* burden on "the overall context of an employer's business"—should result in the promotion of workplace religious diversity, which will improve American workplaces.[13] Finally, this Note concludes with two questions left open by the opinion in *Groff:* What ramifications will the Court's deceptive decisionmaking have? What types of religious expression in the workplace will be protected under the new standard?

I. THE CASE

In 2012, Gerald Groff began working for the United States Postal Service ("USPS") as a Rural Carrier Associate.[14] At that time, the position generally did not involve Sunday work, which comported well with Groff's religious observance of the Sabbath, wherein he refrained from secular work each Sunday.[15]

In 2013, USPS and Amazon entered into an agreement to facilitate Sunday deliveries.[16] In 2016, USPS signed a memorandum of understanding

9. *See infra* Section IV.C.
10. *See infra* Section IV.A
11. *See infra* Section IV.B.
12. *See infra* Section IV.C.
13. *See infra* Section IV.D.1.
14. Groff v. DeJoy, 143 S. Ct. 2279, 2286 (2023).
15. *Id.* The choice to refrain from mentioning the specific religion Groff practices is intentional. The abstention is meant to reflect the underlying ethos of this piece—religious diversity should be promoted universally, without regard to which religion one observes.
16. *Id.*

with the relevant postal workers' union detailing how Sunday parcel deliveries would work going forward.[17] The memorandum detailed a plan wherein, during the two-month peak delivery season (around the holidays), each USPS office would use its own staff for Sunday deliveries, while only staff (including Rural Mail Carriers) from larger regional hubs would be responsible for deliveries during the off-peak season.[18]

Shortly after the memorandum of understanding, and the subsequent requirement that he work on Sundays, Groff transferred to a rural station that, at the time, did not make deliveries on Sundays.[19] In March 2017, Groff's new station began facilitating Amazon deliveries on Sundays.[20] USPS made accommodations for Groff, relying on other carriers from the same station during peak holiday delivery season and the regional hub during off-peak season.[21] During this time, Groff began to receive progressive discipline for his failure to work on Sundays.[22] In January 2019, Groff resigned from USPS in anticipation of the termination of his employment.[23]

Later in 2019, Groff brought suit against USPS under Title VII of the Civil Rights Act of 1964.[24] He "assert[ed] that USPS could have accommodated his Sunday Sabbath practice 'without undue hardship on the conduct of [USPS's] business.'"[25] The district court granted USPS's motion for summary judgment in 2021, finding that USPS offered reasonable accommodations to Groff and demonstrated undue hardship in accommodating Groff and thus was not obligated to accommodate him in the first place.[26] After determining that *Hardison* bound its decision, the Third Circuit affirmed the district court in 2022.[27] The Third Circuit understood *Hardison* to hold that an "undue hardship" exists when employers "bear more . . . than a de minimis cost" when making a religious accommodation.[28]

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 2286–87; *see also* Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *4 (E.D. Pa. Apr. 6, 2021) (detailing a warning letter, meetings, and suspensions Groff faced at USPS for failing to show on Sunday shifts), *aff'd*, 35 F.4th 162 (3d Cir. 2022), *vacated and remanded*, 143 S. Ct. 2279 (2023).

23. *Groff*, 143 S. Ct. at 2287, 2287 n.2.

24. *Id.* at 2287.

25. *Id.* (quoting 42 U.S.C. § 2000e(j)).

26. *Groff*, 2021 WL 1264030, at *10, *12–13 (finding that USPS reasonably accommodated Groff with shift-swapping, and that nonetheless, the accommodation posed an undue hardship because forcing his fellow Rural Carrier Associate to work every Sunday posed more than a "*de minimus*" burden on USPS).

27. Groff v. DeJoy, 35 F.4th 162, 174, 174 n.18, 175–76 (3d Cir. 2022), *vacated and remanded*, 143 S. Ct. 2279 (2023).

28. *Id.* at 174 n.18 (quoting Trans. World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

Finding that Groff's accommodation "actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale,"[29] the Third Circuit found that USPS "far surpasse[d] a de minimis burden" and thus did not violate Title VII.[30] Dissenting, Judge Hardiman found that USPS failed to demonstrate any effect on its "*business*"[31] and merely demonstrated an impact on its employees—which had yet to be held sufficient as an undue hardship by the Third Circuit or the Supreme Court.[32] The Supreme Court of the United States granted *certiorari* in January 2023.[33]

II. LEGAL BACKGROUND

In passing Title VII of the Civil Rights Act of 1964 ("Title VII"), Congress forbade employers from engaging in workplace discrimination based on an employee's race, color, religion, sex, and national origin.[34] After the Equal Employment Opportunity Commission ("EEOC") interpreted Title VII to require employers to accommodate employees' religious observances in 1967,[35] and courts resisted applying such an accommodation requirement, Congress amended Title VII to require employers to provide employees[36] with reasonable accommodations.[37] However, Congress also excused employers from the requirement if providing an accommodation would impose an "undue hardship" on the "employer's business."[38]

Faced with the question of interpreting "undue hardship," the Supreme Court decided *Trans World Airlines v. Hardison*.[39] In its analysis, the Court mentioned both "substantial costs" and "more than a *de minimis* cost" to employers.[40] Since the Court decided *Hardison* in 1977, federal courts and the EEOC have interpreted the holding of *Hardison* to declare that an

29. *Id.* at 175.

30. *Id.* at 174 n.18, 175–76.

31. *Id.* at 176 (Hardiman, J., dissenting) (quoting 42 U.S.C. § 2000e(j)).

32. *Id.*

33. Groff v. DeJoy, 143 S. Ct. 646, 646 (2023) (granting *certiorari*).

34. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 253, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (1964) (amended 1972)).

35. 29 C.F.R. § 1605.1(a)(2) (1967).

36. Throughout this piece, the terms "employee" and "employees" refer to both employers' actual, existing employees and prospective employees, both of whom Title VII covers. Civil Rights Act of 1964 § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1) (1964) (amended 1972)) (referring to the hiring and discharging of individuals by an employer).

37. *See infra* notes 56–57; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (Supp. II 1970)).

38. Equal Employment Opportunity Act of 1972 § 2(7) (codified at 42 U.S.C. § 2000e(j) (Supp. II 1970)).

39. 432 U.S. 63 (1977).

40. *Id.* at 83–84, 83 n.14.

employer demonstrates an "undue hardship" when they can establish "more than a *de minimis* cost" to their business.[41]

A. Title VII of the Civil Rights Act of 1964

1. Title VII's Creation and the Events Leading to its Revision

Title VII outlawed employer actions wherein one "fail[s] or refuse[s] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."[42] While the original Title VII outlawed religious discrimination by employers, it failed to define what exactly constituted workplace religious discrimination.[43] In response, the newly created EEOC promulgated regulations to define the term.[44]

In 1967, the EEOC interpreted Title VII to require employers to "accommodate . . . the reasonable religious needs of employees and, in some cases, prospective employees."[45] In considering whether to grant an accommodation, the EEOC stated that employers who closed for particular religious holidays faced no obligation to give employees leave for observance of other religious holidays,[46] but that employers should attempt to make a reasonable accommodation to the extent they "can do so without serious inconvenience to the conduct of [the] business."[47]

A year later, the EEOC reworked its Title VII regulations.[48] The EEOC concluded that Title VII mandated that employers must "make reasonable accommodations to the religious needs of employees and prospective employees" as long as doing so would not place an "undue hardship on the conduct of the employer's business."[49] The EEOC concluded that employers

41. *See infra* Section II.C.

42. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 253, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (1964) (amended 1972)).

43. *Id.*

44. 29 C.F.R. § 1605.1(a)(2) (1967). Title VII created the EEOC to enforce and develop regulations on the legislation. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 705(a), 706(a), 78 Stat. 253, 258, 259 (codified at 42 U.S.C. §§ 2000e-4 to 2000e-5).

45. 29 C.F.R. § 1605.1(a)(2) (1967).

46. *Id.* §§ 1605.1(a)(3), (b)(1) ("[A]n employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.").

47. *Id.* § 1605.1(b)(2).

48. 29 C.F.R. § 1605.1 (1968).

49. *Id.* § 1605.1(b). The EEOC provided one example of an undue hardship—when a similarly qualified employee could not perform the work of the Sabbatarian on the day of their observance. *Id.* The specific guidelines and examples present in the 1967 edition of the code disappeared from the 1968 guidelines, making the new regulations more employee-friendly. *Id.* § 1605.1(c).

carried the burden of proof for establishing the "undue hardship" on their business that makes the accommodation request unreasonable.[50]

Courts struggled ascertaining what sufficed for employers to establish "undue hardship."[51] *Dewey v. Reynolds Metal Co.*,[52] a 1970 decision by the Sixth Circuit, which the Supreme Court affirmed by an evenly divided vote, dismissed the EEOC's accommodation requirement.[53] Noting that the requirement appeared exclusively in the EEOC's regulations, the Sixth Circuit stated that Title VII does not force employers "to accede to or accomodate [sic] the religious beliefs of all of his employees."[54] After finding that failure to accommodate an employee's observance does not constitute religious discrimination, the Sixth Circuit nevertheless concluded that the employer did accommodate the employee's Sabbath observance by interpreting its collective bargaining agreement to allow the plaintiff to find a replacement for his Sabbath shifts.[55] Ultimately, *Dewey* and a subsequent case, *Riley v. Bendix Corp.*,[56] prompted Congress to revise Title VII in 1972.[57]

50. *Id.* § 1605.1(c).

51. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 86 (1977) (Marshall, J., dissenting) (describing the plentiful, yet conflicting opinions, before and after the 1972 amendments, on the circumstances in which an employer must accommodate the religious observance of an employee); *id.* at 76 n.10 (majority opinion) (noting that the circuit courts' decisions after the 1972 amendments provided little guidance on the reasonableness of accommodations, especially considering two circuits' holdings conflicted with their own precedent with no explanation as to why).

52. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

53. *Id.* at 334 ("Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.").

54. *Id.*

55. *Id.* at 335.

56. 330 F. Supp. 583, 590–91 (M.D. Fla. 1971) (finding that (1) the employer's ninety-day cycling process of foremen applied universally to employees, and thus did not constitute religious discrimination against the plaintiff under *Dewey*, and (2) that religious individuals must conform to the work schedule of their employer or find employment elsewhere), *rev'd*, 464 F.2d 1113, 1117 (5th Cir. 1972) (reversing and remanding, after Title VII's amendment in 1972, as the amendment and its legislative history supported the EEOC's earlier interpretation that Title VII required religious accommodations).

57. 118 CONG. REC. 705–06 (1972). Referencing *Dewey* and *Riley*, Senator Jennings Randolph, a Sabbatarian, said:

> Unfortunately, the courts have, in a sense, come down on both sides of this issue [guaranteeing freedom from religious discrimination in the private workplace]. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. 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 [of 1964]—that which the courts apparently have not resolved.

Id.

2. Revision of Title VII: The Equal Employment Opportunity Act of 1972

Congress materially updated Title VII with the Amendments of 1972 present in the Equal Employment Opportunity Act.[58] Congress first defined religion broadly in Title VII, including "all aspects of religious observance and practice, as well as belief,"[59] expanding the definition of religion in hopes of providing more expansive protection against all forms of religious discrimination in the workplace.[60] Congress also added the EEOC's affirmative accommodation requirement, in hopes of "assur[ing] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."[61] With these changes, Congress intended that accommodations be refused only in a "very, very small percentage of cases."[62]

Following the 1972 amendments, the Supreme Court failed to reach a conclusion about the newly-codified accommodation requirement.[63] Initially, in the Court's 1975 ruling in *Parker Seal Co. v. Cummins*,[64] an equally divided Supreme Court affirmed the judgment of the Sixth Circuit which found that an employer failed to reasonably accommodate his employee's Sabbath observance by merely providing him the opportunity for shift swaps.[65] Moreover, the Court found that the employer did not demonstrate undue hardship after dismissing the employee after providing the initial accommodation.[66] Ultimately, after rehearing, the Court remanded the case to be decided in light of *Hardison*.[67]

58. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (Supp. II 1970)).

59. 42 U.S.C. § 2000e(j).

60. *Id.*

61. 118 CONG. REC. 705 (1972).

62. *Id.* at 706.

63. *See supra* notes 52–55 and accompanying text.

64. 429 U.S. 65 (1976), *aff'g by an equally divided court* 516 F.2d 544 (6th Cir. 1975), *vacated and remanded*, 433 U.S. 903 (1977).

65. *Cummins*, 516 F.2d at 550–51 (finding that the previous year of providing the accommodation showed that it was in fact, reasonable and manageable, and that to construe otherwise would equate undue hardship with "an Alice-in-Wonderland world where words have no meaning" (quoting Welsh v. United States, 398 U.S. 333, 354 (1970))).

66. *Id.*

67. *Parker Seal Co.*, 433 U.S. at 903.

B. Trans World Airlines, Inc. v. Hardison

Before *Groff*, the Court's seminal ruling on the meaning of an "undue hardship" in Title VII appeared in *Trans World Airlines v. Hardison*.[68] In *Hardison*, the Court emphasized that Congress passed Title VII to eliminate workplace discrimination, but nevertheless found that religious accommodations themselves are discriminatory against non-observant employees.[69] Guided by an ethos of neutrality, the Court found that accommodating the plaintiff would impose an undue hardship on his employer, using the language "substantial" and "more than a *de minimis* cost."[70] In *Hardison*'s sole dissent, Justice Marshall decried the Court's ruling, finding it directly contravened the intent behind Title VII.[71]

1. Factual and Procedural Background

In June 1967, Trans World Airlines ("TWA") hired Larry G. Hardison to work in an essential maintenance and repairs department.[72] A collective-bargaining agreement between TWA and the relevant union existed at the time of Hardison's hire, binding each employee at the Kansas City base.[73] About a year after his hire, Hardison converted and became observant of the Sabbath from sundown Friday to sundown Saturday.[74] Hardison conferred with his manager and transferred to the night shift, which allowed him to observe Sabbath without a work conflict.[75]

Hardison soon transferred to another building to work the day shift, losing his seniority status in the process and thus losing his ability to avoid working occasional Saturdays.[76] While TWA agreed to permit the union to change Hardison's shift assignment, the union refused to do so as it would violate the provisions of their seniority system.[77] With no accommodation

68. *See infra* Part III. The *Groff* Court relied on *Hardison* to guide its decision, performing an in-depth analysis of the case before coming to its conclusion. *Groff*, 143 S. Ct. at 2288–94 (spanning seven of the eleven pages of the Court's opinion).

69. *See infra* notes 91–92 and accompanying text.

70. *See infra* notes 93–97 and accompanying text.

71. *See infra* notes 98–102 and accompanying text.

72. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 66 (1977).

73. *Id.* at 67 (binding employees through a bidding system wherein "[t]he most senior employees have first choice for job and shift assignments, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs").

74. *Id.*

75. *Id.* at 67–68.

76. *Id.* at 68.

77. *Id.* TWA refused to permit Hardison to work a four-day work week as (1) the position was pivotal to airline operations and could not be left empty, (2) replacing the shift with another employee still left the department underwater, and (3) paying another employee not already scheduled would require the airline to pay overtime. *Id.* at 68–69.

reached, Hardison refused to report on Saturdays, eventually leading to his discharge for failure to work designated shifts.[78]

Hardison brought suit against TWA and the union under Title VII, claiming that his dismissal and the union's failure to advocate for him constituted workplace religious discrimination.[79] Ultimately, Hardison's claim rested upon the 1968 EEOC guidelines,[80] which were then codified by Congress in 1972 as Title VII amendments.[81] The district court ruled in favor of the union after finding that the 1967 EEOC regulations did not require the union to set aside its seniority system to make religious accommodations.[82] The district court further found that TWA satisfied the reasonable accommodation obligation and that any alternatives would impose an undue hardship on the company.[83] The Eighth Circuit affirmed the district court's ruling for the union as Hardison did not appear to attack it.[84] However, it reversed the judgment for TWA, finding that TWA did not satisfy its obligations to accommodate.[85] The Supreme Court granted certiorari.[86]

2. The Court's Reasoning

In *Hardison*, the Court held that an employer demonstrates an "undue hardship," excusing them from making an accommodation for a religious employee as required by Title VII, when doing so would impose "more than a *de minimis* cost" on their business.[87] In coming to its decision, the Court emphasized that "both the language and the legislative history of [Title VII] is on eliminating discrimination in employment," and in doing so, clarified that this holds true whether discrimination is aimed at minorities or majorities.[88] After finding that TWA offered numerous reasonable accommodations to Hardison, including the seniority system (which the Court lauded as a neutral accommodation to all employees),[89] the Court held "neither a collective-bargaining contract nor a seniority system may be

78. *Id.* at 69.

79. *Id.*

80. *Id.* The events in question took place after the EEOC's updated "undue hardship" guidelines from 1968, but before the congressional codification of the standard into Title VII in 1972. *Id.*; *see* 29 C.F.R. § 1605.1 (1968); 42 U.S.C. § 2000e(j) (Supp. II 1970).

81. 42 U.S.C. § 2000e(j).

82. *Hardison*, 432 U.S. at 69. The district court found that the 1967 regulations applied to the union, not the 1968 version. *Id.*

83. *Id.* at 70.

84. *Id.*

85. *Id.*

86. Trans World Airlines, Inc. v. Hardison, 429 U.S. 958 (1976) (granting certiorari).

87. *Hardison*, 432 U.S. at 84.

88. *Id.* at 81.

89. *Id.* at 78.

employed to violate [Title VII], but . . . the duty to accommodate [does not] require[] TWA to take steps inconsistent with the otherwise valid agreement" unless there is a "clear and express indication from Congress."[90]

The Court also found that requiring religious accommodations to supersede otherwise neutral accommodations, such as a collective bargaining agreements, discriminated against employees who do not observe a particular Sabbath day.[91] The Court concluded that allowing religious accommodations to supersede neutral systems would be an "anomalous" conclusion of Congress's intent in creating Title VII, given the statute's clear anti-discrimination purpose and the accommodation exception afforded to seniority systems.[92] Dismissing the dissent's contentions that TWA could have accommodated Hardison without undue hardship, the majority, in a footnote, emphasized that Title VII does not require employers to incur "substantial additional costs" or "substantial expenditures" when making religious accommodations.[93]

Opening its penultimate paragraph, the majority stated that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[94] In a footnote, the Court expounded, finding that ruling against TWA would require the company not only to incur the costs of accommodating Hardison's Sabbath observance, but also would mandate that TWA accommodate any Sabbatarian employee's observance.[95] The Court then found that requiring an accommodation for Hardison would require TWA "to bear additional costs when no such costs are incurred to give other employees the days off that they want," and thus TWA's required actions "would involve unequal treatment of employees on the basis of their religion."[96] Concluding with an emphasis that Title VII's ultimate purpose is to eliminate discrimination in the workplace, the *Hardison* Court held that it would not interpret the statute to require employers to discriminate against some employees in order to accommodate the religion of other employees.[97]

90. *Id.* at 79.

91. *Id.* at 81. The Court reasoned that the employee would otherwise be required to work an undesirable shift to accommodate a Sabbatarian coworker, and it found such a requirement to be unfair. *Id.*

92. *Id.* at 81–82. The Court distinguished seniority systems intended to discriminate from those that did not, finding that the former were unlawful and the latter were lawful. *Id.* ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); 42 U.S.C. § 2000e-2(h) (1964) (amended 1972).

93. *Hardison*, 432 U.S. at 83 n.14.

94. *Id.* at 84.

95. *Id.* at 84 n.15.

96. *Id.* at 84.

97. *Id.* at 85.

4. Justice Marshall's Dissent

Justice Marshall dissented from the majority, finding that the Court "seriously eroded" "one of this Nation's pillars of strength—our hospitality to religious diversity."[98] Justice Marshall found that nullifying an accommodation because it gives preferential treatment to religious employees reduces Title VII to nothing.[99] Emphasizing that the amended statute's text and legislative history plainly require accommodations unless an "undue hardship" were imposed on the employer, Justice Marshall found that the majority decided "in direct contravention" of the intent behind the 1972 amendments to Title VII.[100] Applying his findings, Justice Marshall concluded that TWA failed to demonstrate an "undue hardship" because the company failed to take many available options to make a reasonable accommodation, noting that TWA did not (1) make efforts to find volunteers to take Hardison's Saturday shifts, (2) consider passing the cost of overtime onto Hardison, or (3) transfer Hardison back to his original building (in which he had sufficient seniority statute to avoid working Saturdays).[101] Justice Marshall admitted that the latter two options would violate the terms of the collective bargaining agreement, but reasoned that neither would have violated the rights of any other employee or the seniority system.[102]

C. The Subsequent Embrace of the "More Than a De Minimis *Cost" Standard*

After *Hardison*, the Supreme Court, federal circuit courts, and the EEOC consistently embraced the *de minimis* standard.[103] From 1986 to 2022, the Supreme Court maintained that *Hardison* established a *de minimis* standard, though it began to voice its displeasure with the *de minimis* standard in 2020.[104] Universally, the circuit courts found that *Hardison* established a *de minimis* standard.[105] Until *Groff* was decided in 2022, the EEOC also promulgated regulations based on this understanding.[106]

98. *Id.* at 97 (Marshall, J., dissenting). Justice Marshall wrote the sole dissent, and only Justice Brennan joined his opinion. *Id.* at 85.

99. *Id.* at 87.

100. *Id.* at 88–89 (stating that the majority elected to follow the precedent set by *Dewey*, which Congress abrogated through the 1972 amendments to Title VII).

101. *Id.* at 92–95.

102. *Id.* at 95–96.

103. *See infra* Sections II.C.1–3.

104. *See infra* Section II.C.1.

105. *See infra* Section II.C.3.

106. *See infra* Section II.C.2.

1. The Court Historically Understood Hardison to Establish a De Minimis *Standard*

Until *Groff*, the Court consistently found that *Hardison* established the *de minimis* standard for undue hardship.[107] Nine years after *Hardison*, the Court decided *Ansonia Board of Education v. Philbrook*.[108] There, the Court found that its earlier opinion in *Hardison* "determined that an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer."[109] Likewise, as recently as 2019,[110] Justice Alito reiterated in a concurrence to the Court's denial of *certiorari* that *Hardison* issued a *de minimis* cost standard for Title VII accommodations.[111] Three years later, in her dissenting opinion in *Kennedy v. Bremerton School District*,[112] Justice Sotomayor applied the *de minimis* standard, citing Justice Alito's earlier opinion.[113] Finally, in 2021, in *Small v. Memphis Light, Gas & Water*,[114] Justice Gorsuch stated, "*Hardison* held that an employer does not need to provide a religious accommodation that involves 'more than a *de minimis* cost.'"[115]

2. The EEOC Understood Hardison *to Hold for the* De Minimis *Standard*

The 2022 EEOC guidelines (those in effect at the time of *Groff*) understood *Hardison* to establish a *de minimis* standard.[116] They allowed "[a]n employer [to] assert undue hardship to justify a refusal to accommodate an employee's need . . . if the employer [could] demonstrate that the

107. *See infra* Section II.C.1.

108. 479 U.S. 60 (1986).

109. *Id.* at 67 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)). The *Philbrook* Court found that an unpaid leave policy, allowing leave for any purpose—except religious reasons—does not constitute a reasonable accommodation of religion under Title VII. *Id.* at 71 (describing the defendant's leave policy as "the antithesis of reasonableness" in religious accommodations).

110. 139 S. Ct. 634 (2019) (denying certiorari). The Court would later grant certiorari in 2022. *Kennedy v. Bremerton Sch. District*, 142 S. Ct. 857 (2022).

111. *Id.* at 637 (Alito, J., concurring) ("[I]n . . . *Hardison*, the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden." (citation omitted)). Justices Thomas, Gorsuch, and Kavanaugh joined Justice Alito. *Id.* at 635.

112. 142 S. Ct. 2407 (2022).

113. *Id.* at 2448 n.5 (Sotomayor, J., dissenting) (using the *de minimis* standard from *Hardison* when finding that a football coach's on-field prayers, which caused individuals to rush the field and knock others over, imposed an undue burden on the school district for which he worked).

114. 141 S. Ct. 1227 (2021) (denying certiorari).

115. *Id.* at 1228 (Gorsuch, J., dissenting from the denial of certiorari).

116. 29 C.F.R. § 1605.2(e)(1) (2022) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

accommodation would require 'more than a *de minimis* cost.'"[117] In order to determine this, the regulations stated that the analysis should consider "the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation."[118] The EEOC also specified what would not contribute to the *de minimis* calculus: "the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought" and "the payment of administrative costs necessary for providing the accommodation."[119]

3. The Circuit Courts Universally Adopted the De Minimis *Standard*

The federal circuit courts universally found that *Hardison* held for the *de minimis* standard when faced with the question of *Hardison*'s holding.[120] The Third Circuit found that *Hardison* held that the *de minimis* cost standard determines whether an employer would experience an undue hardship and "strongly suggests that the undue hardship test is not a difficult threshold to pass."[121] Likewise, the Fifth Circuit held that an undue hardship exists as a matter of law when an employer bears more than a *de minimis* cost.[122] The Ninth Circuit found that an employer could establish an undue hardship when there is an impact on employers or coworkers that is "more than *de minimis*," giving examples such as lost efficiency for employers or more time doing hazardous work as a coworker.[123] Furthermore, the Second Circuit,[124] the

117. *Id.* (quoting *Hardison*, 432 U.S. at 84).

118. *Id.*

119. *Id.* The EEOC provided one example of an administrative cost—"costs involved in rearranging schedules and recording substitutions for payroll purposes." *Id*.

120. *See infra* Section II.C.3.

121. *See* Webb v. City of Phila., 562 F.3d 256, 259–60 (3d Cir. 2009) (quoting United States v. Bd. of Educ. for the Sch. Dist. of Phila., 911 F.2d 882, 890 (3d Cir. 1990)). The court found that the plaintiff established a prima facie case of religious discrimination when her police force employer refused to permit her to wear a headscarf. However, the court ruled for the defendant as it found that a police force must remain religiously neutral in order to receive public cooperation. *Id.* at 261–62.

122. *See* Weber v. Roadway Express, Inc., 199 F.3d 270, 274–75 (5th Cir. 2000) (finding that the plaintiff's proposed accommodation, to skip paired driving assignments involving women, posed more than a *de minimis* cost to his employer due to the burdens placed on his coworkers).

123. *See* Balint v. Carson City, 180 F.3d 1047, 1053–55 (9th Cir. 1999) (remanding for further fact-finding as to whether an undue hardship existed when the possible implementation of a shift-splitting accommodation for the plaintiff's Sabbath observance did not violate the existing seniority system).

124. *See* Baker v. The Home Depot, 445 F.3d 541, 547–48 (2d Cir. 2006) (finding that *Hardison* established the *de minimis* standard before remanding for fact-finding as to whether the plaintiff established a *prima facie* case of religious discrimination).

Fourth Circuit,[125] the Eighth Circuit,[126] the Tenth Circuit,[127] and the Eleventh Circuit[128] all uphold the *de minimis* standard to excuse an employer from an accommodation under Title VII.

Though it seemed to disapprove of the standard, the Sixth Circuit, in *Small v. Memphis Light, Gas and Water*,[129] found that an employer can demonstrate an undue burden through "(apparently) anything more than a 'de minimis cost.'"[130] Similarly, the Seventh Circuit found an undue hardship on the nation's largest private employer, Walmart, when one prospective assistant manager required an accommodation to allow his once-weekly Sabbath observance.[131] The First Circuit, a mere month before *Groff*, cited circuit precedent and *Hardison* before reaffirming that the current test for undue hardship under Title VII is the *de minimis* standard.[132]

125. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312–14, 317 (4th Cir. 2008) (applying the two-prong test described in *Philbrook*, wherein the second prong required an employer to establish more than a *de minimis* cost to overcome an accommodation requirement).

126. *See* Harrell v. Donahue, 638 F.3d 975, 980–81 (8th Cir. 2011) ("[A]n accommodation creates an undue hardship if it causes more than a de minimis impact on co-workers."). This case also found an undue hardship when the employer, USPS, would need to grant the plaintiff leave on Saturdays to accommodate him, violating the seniority system and forcing his coworkers to work more. *Id.*

127. *See* Tabura v. Kellogg USA, 880 F.3d 544, 557–58 (10th Cir. 2018) (remanding for further fact-finding as to whether the defendant's shift-swapping and vacation day options to miss workdays coinciding with the Sabbath was a reasonable accommodation, after noting that *Hardison* established a *de minimis* cost standard).

128. *See* Lake v. B.F. Goodrich Co., 837 F.2d 449, 450–51 (11th Cir. 1988) (finding that *Philbrook* established a *de minimis* cost standard before refusing to question the district court's finding that the employer suffered undue hardship after it began scheduling the plaintiff, a Sabbatarian, for a seven-day workweek and four hours of one of the plaintiff's shifts went uncovered after repeated shift swaps).

129. 952 F.3d 821 (6th Cir. 2020) (per curium), *cert. denied*, 141 S. Ct. 1227 (2021).

130. *Id.* at 825 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)) (ruling for the defendant on the technicality that the plaintiff did not argue whether an undue hardship would have been imposed on the company if he had been accommodated).

131. EEOC v. Walmart Stores Eastern, L.P., 992 F.3d 656, 658–60 (7th Cir. 2021) (finding such would pose an undue hardship on the megacompany when managerial shifts at one location would occasionally need to be swapped or the existing rotation system modified).

132. Lowe v. Mills, 68 F.4th 706, 720–22 (1st Cir. 2023) (maintaining—given the oral arguments for *Groff v. DeJoy* occurred the previous month—that a finding of undue hardship suffices "under any plausible interpretation of the statutory text," before finding that loss of the employer's medical license from employee refusal to be vaccinated for COVID-19 constituted an undue hardship); *see also* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136–37, 138 (1st Cir. 2004) (finding an undue hardship from the *de minimis* standard on employer Costco because of the plaintiff's facial piercings, as they might undermine the "neat, clean and professional image" that the employer sought its employees to convey).

III. THE COURT'S REASONING

In a unanimous opinion in *Groff v. DeJoy*, the Court held that an "undue hardship" exists when religious accommodation(s) for an employee result in a *substantial* burden on "the overall context of an employer's business."[133] The Court clarified that the *de minimis* standard for undue hardship analysis, in fact, was insufficient in excusing an employer from making an accommodation for an observant employee under Title VII.[134]

The *Groff* Court found that *Hardison* could not be reduced to its line describing an undue hardship as a *de minimis* cost, especially given the ordinary meaning of the phrase and *Hardison*'s use of "substantial" in its opinion.[135] Beginning its analysis with statutory interpretation, the Court found that the key statutory phrase in Title VII's exemption to religious accommodations appeared in the phrase "undue hardship."[136] Finding that a "hardship" could be variably defined as "something hard to bear," "[e]xtreme privation," or "adversity," the Court concluded that the term, however defined, constituted something "more severe than a mere burden."[137] Subsequently, the Court found that the modifier "undue" further supported that the requisite burden an employer shows "must rise to an 'excessive' or 'unjustifiable' level" in order to be exempt from making a religious accommodation for an employee.[138] Thus, the meaning of "undue hardship" is "very different" from a burden that is more than *de minimis*, which is defined as "very small or trifling."[139] The Court then concluded that the plain language of "undue hardship," as it appears in Title VII, sets a substantial threshold that an employer must surpass in order to be exempt from making an accommodation.[140]

The Court then turned to the opinion in *Hardison* and found that the opinion's repeated mentions of "substantial costs" and "substantial expenditures" supported the Court's current interpretation.[141] Likewise, the Court reasoned, the pre-1972 amendment decisions from the EEOC, which required employers to demonstrate substantial costs to excuse themselves

133. Groff v. DeJoy, 143 S. Ct. 2279, 2294 (2023).

134. *Id.*

135. *Id.* at 2295 (quoting Trans World Airlines v. Hardison, 432 U.S. 63, 83 n.14 (1977)).

136. *Id.* at 2294.

137. *Id.* (first quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 646 (1966) [hereinafter RANDOM HOUSE]; and then quoting AMERICAN HERITAGE DICTIONARY 601 (1969) [hereinafter AMERICAN HERITAGE]). Of note, the Court sourced its definitions from dictionaries published within two calendar years, before or after, the codification of the Civil Rights Act of 1968.

138. *Id.* (first quoting RANDOM HOUSE, *supra* note 137, at 1547, and then quoting AMERICAN HERITAGE, *supra* note 137, at 1398).

139. *Id.* at 2295 (quoting *De minimis*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

140. *Id.*

141. *Id.* (quoting Trans World Airlines v. Hardison, 432 U.S. 63, 83 n. 14 (1977)).

from a compulsory religious accommodation, supported the Court's statutory interpretation.[142] Given the plain language of Title VII, *Hardison*, and the EEOC decisions, the Court found that the meaning of "undue hardship" could not be reduced to *Hardison*'s singular mention of a *de minimis* cost.[143]

Following its statutory interpretation, the Court refused to adopt the alternative standards for "undue hardship" that the parties suggested, which relied on language outside of Title VII and *Hardison*.[144] The Court held that "it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[145] In order to determine whether an undue hardship exists, courts must now conduct a fact-specific inquiry of all relevant factors, including the particular accommodation(s) at hand and the practical impact of said accommodation(s) on the employer in light of the employer's nature, size, and operating costs.[146] The Court also found it unwise to further expound upon the meaning of "undue hardship" outside of Title VII.[147] The opinion specifically rejected Groff's request to endorse the existing EEOC regulations *in toto*,[148] concluding that courts should rely upon the plain meaning of "undue hardship" in Title VII when conducting each fact-based inquiry.[149]

The Court concluded with clarification on several recurring issues that arise in Title VII claims.[150] First, the Court clarified that the undue hardship calculus only includes effects that impact "the *conduct* of the employer's business."[151] As such, the Court noted, the impact of an employee's religious

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* The plaintiff suggested overruling *Hardison* and replacing its holding with a "'significant difficulty or expense' standard," borrowing language from the Americans with Disabilites Act ("ADA"). *Id.* at 2297 (Sotomayor, J., concurring) (quoting Brief for Petitioner at 17–38, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174)); *id.* at 2295 (majority opinion) (detailing how plaintiff proposed the decades of ADA jurisprudence to apply to "undue hardship" as it appears in Title VII). The respondent proposed that the Court should adopt the EEOC's guidance regarding the meaning of "undue hardship" in place of *Hardison*. *Id.* at 2295–96.

146. *Id.* at 2295.

147. *Id.* at 2296.

148. The Court concluded that doing so would be unwise as the body of EEOC regulations has not been fully reviewed and clarified by the Court, but it did note that:

> [A] good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today . . . prompt[ing] little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs.

Id.; *see* 29 C.F.R. § 1605.2(d).

149. *Groff*, 143 S. Ct. at 2296.

150. *Id.*

151. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000e(j)).

accommodation on their coworkers only contributes to an undue hardship if they go on to affect the employer's business.[152] However, if the effects on coworkers result from their own biases, such as employee animosity towards (1) a particular religion, (2) religion generally, or (3) religious accommodations, a court cannot factor such effects as "undue" hardships.[153] Second, the Court clarified that merely assessing the reasonableness of a proposed accommodation is not equivalent to reasonably accommodating an employee's practice of religion under Title VII.[154] Rather than just dismissing a proposed accommodation as an undue hardship, the Court held that an employer must also consider other options to accommodate the employee's religious practice in order to comply with the mandates of Title VII.[155]

Justice Sotomayor authored the only concurrence.[156] First, Justice Sotomayor agreed that the majority wisely refused to adopt the plaintiff's suggested standard for an undue hardship.[157] Justice Sotomayor found that *stare decisis* possessed an "enhanced force" here as the question involved a statute.[158] Given that Congress revised Title VII in response to other cases, yet abstained from doing so after *Hardison*, Justice Sotomayor found that adherence to *stare decisis* in this case was further justified.[159] Second, Justice Sotomayor emphasized that impacts on coworkers may affect the "*conduct* of the employer's business," especially given that "for many businesses, labor is more important to the conduct of the business than any other factor."[160] Justice Sotomayor noted, however, that employee animus towards statutorily protected groups, or labor costs resulting from coordinating voluntary shift swaps, do not contribute to the undue hardship calculus.[161]

In short, the unanimous majority opinion and the concurrence in *Groff* asserted that *Hardison* has been misunderstood for decades.[162] The *Groff* Court averred that rather than setting a "more than a *de minimis* cost"

152. *Id.* Courts determine whether the effect goes to the business. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 2296–97.

156. *Id.* at 2297–98 (Sotomayor, J., concurring).

157. *Id.* at 2297; *see supra* notes 145–149 and accompanying text.

158. *Id.* at 2297 (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015)). Justice Sotomayor also noted that respecting the language of the statute promotes both the separation of powers and judicial respect for congressional action. *Groff*, 143 S. Ct. at 2297.

159. *Id.* at 2297–98.

160. *Id.* at 2298 (emphasis added) (quoting 42 U.S.C. § 2000e(j)). Justice Sotomayor emphasized "conduct" as it appears in the statute and *Hardison*, possibly emphasizing that the majority chose to use the word "context" in the new standard for "undue hardship." *Id.* (first quoting 42 U.S.C. § 2000e(j); and then quoting Trans-World Airlines, Inc. v. Hardison, 432 U.S. 63, 79–81 (1977)).

161. *Id.*

162. *See supra* Part III.

standard for "undue hardship," *Hardison* established a "substantial" cost standard, setting a much higher bar for employers to reach in order to be excused from Title VII's affirmative accommodation requirement.[163]

IV. ANALYSIS

Despite the *Groff* Court's representations, the *Hardison* Court *did* establish a "more than a *de minimis* cost standard."[164] The *Groff* Court wished to change the standard for "undue hardship" and found a creative manner—albeit an exceptionally questionable one—to effectuate the substantive change to the law they sought.[165] By misrepresenting *Hardison*, the *Groff* Court strayed from precedent and ruled incorrectly.[166]

The *Hardison* Court ruled incorrectly as well, essentially nullifying Title VII by adopting a standard so low that nearly any accommodation became "unreasonable."[167] As a result, religious discrimination that would have otherwise been banned by Title VII continued, disproportioniately affecting those practicing minoritized religions.[168] In response, scholars suggested adopting alternative standards to temper the *de minimis* standard.[169] While the methodology of the *Groff* Court's solution is dubious, it nonetheless provides a better solution than that suggested by scholars as the Court's approach allows Title VII to stand on its own feet.[170] As such, the *Groff* ruling will facilitate religious diversity in American workplaces, accommodating increasing religiosity and strengthening the workplace.[171]

A. The Groff *Court Misrepresented the Holding of Hardison, Thus Ruling Incorrectly*

Hardison undoubtedly established a *de minimis* standard to excuse employers from providing their observant employees religious accommodations.[172] Members of the *Groff* Court understood *Hardison* to establish the *de minimis* standard for "undue hardship" under Title VII, but they disliked the standard and sought to change it.[173] Its own fairy godmother, the current Court fulfilled its wish in *Groff* by masquerading *Hardison*'s true

163. *Groff*, 143 S. Ct. at 2294.
164. *See infra* Section IV.A.1.
165. *See infra* Section IV.A.2.
166. *See infra* Section IV.A.
167. *See infra* Section IV.B.1.
168. *See infra* Section IV.B.2.
169. *See infra* Section IV.C.1.
170. *See infra* Section IV.C.2.
171. *See infra* Section IV.B.2.
172. *See infra* Section IV.A.1.
173. *See infra* Section IV.A.2.

holding for the "substantial" standard.[174] In doing so, the Court broke the principle of stare decisis, thus ruling incorrectly.[175]

1. Hardison *Established a* De Minimis *Cost Standard*

The *Hardison* Court effectively summarized its holding on the meaning of "undue hardship" in the opening sentence of its penultimate paragraph, stating "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[176] This unequivocal holding comports with textual analysis of the "substantial" standard, the opinion's emphasis on neutrality in accommodations, and the specific findings relating to the cost imposed on TWA.[177]

i. Textual Analysis of Hardison *Demonstrates That It Held for a* De Minimis *Standard*

Textual analysis of the location of the *de minimis* standard in *Hardison*, as opposed to the "significant" standard the *Groff* Court claimed *Hardison* instituted, demonstrates that *Hardison* established a *de minimis* standard.[178] Although the *Groff* Court emphasized that "substantial" appears three times in *Hardison* to support its conclusion, its analysis falls short.[179] First, the *Groff* Court failed to note that all three mentions of "substantial" in *Hardison*'s majority opinion appear in a singular footnote[180]—and nowhere else in the opinion.[181] In juxtaposition, the phrase "more than a *de minimis* cost" appears in the body of the majority opinion in *Hardison*.[182] Specifically,

174. *See infra* Section IV.A.2.

175. *See infra* Section IV.A.2.

176. Trans World Airlines, Inc. v. Hardison, 432 U.S. 62, 84 (1977).

177. *See infra* Sections IV.A.1.i—iii.

178. *See Hardison*, 432 U.S. at 83 n.14.

179. Groff v. DeJoy, 143 S. Ct. 2279, 2295 (2023) (quoting *Hardison*, 432 U.S. at 83 n.14 (1977)).

180. *Hardison*, 432 U.S. at 83 n.14 (appearing as "substantial expenditures," "substantial additional costs," and "substantial costs").

181. "[S]ubstantially" appears in footnote seven in a quotation of EEOC guidelines. *Id.* at 72 n.7 (quoting 29 C.F.R. § 1605.1 (1968)) ("[U]ndue hardship . . . may exist where the [absent Sabbatarian] employee's needed work cannot be performed by another employee of substantially similar qualifications . . . ."). Of note, the Court stated that this example was "by no means intended to be exhaustive" as to what constituted an undue hardship. *Id.* at 72 n.7. The specification that an employer could demonstrate an undue hardship in a variety of other means suggests that the Court did intend to construe "undue hardship" broadly and hold for a *de minimis* standard. *Id.*

182. *Hardison*, 432 U.S. at 84. The *de minimis* standard appears again in footnote 15, which the *Groff* Court failed to mention. *Id.* at 84 n.15 ("The dissent argues that 'the costs to TWA of either paying overtime or not replacing respondent would [not] have been more than *de minimis*.'").

the *de minimis* standard appears in the first sentence of the penultimate paragraph,[183] a weighty location.[184]

Second, the majority in *Hardison* only mentions "substantial" in a retort to Justice Marshall's dissent, rather than within the Court's own reasoning (or holding).[185] Third, the Court treated Justice Marshall's dissent unfavorably in the footnote where "substantial" was mentioned, criticizing its "hyperbole and rhetoric."[186] Fourth, the majority did not refute Justice Marshall's finding that the Court held for a *de minimis* standard, despite criticizing other conclusions of his.[187] In response, the majority neither refuted nor contradicted that the *de minimis* standard was to be used in undue hardship analysis, though it criticized some of Justice Marshall's other conclusions.[188]

ii. Hardison's *General Disposition and Emphasis on Neutrality Comport with the* De Minimis *Standard's Low Threshold*

The neutrality endorsed in *Hardison* supports the understanding that the Court established a lenient, *de minimis* standard to excuse employers from making accommodations under Title VII.[189] The Court found that requiring

183. *Id.* at 84.

184. Scholarly work and jurisprudence emphasize the weight given to holdings found in the penultimate paragraphs of opinions. *See, e.g.*, Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834, 834 n.34 (1991) (citing to the penultimate paragraph of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in its description of the Court's emphasis of its point, "as if to drive the last nail in the . . . casket"); Joshua A. Hawks-Ladds & Richard C. Robinson, *Labor Relations and Employment Law: 2001 Developments in Connecticut*, 76 CONN. BAR J. 71, 77 (2002) ("[The decision] is perhaps noteworthy for two other reasons. The first is the limiting language that the Court felt the need to insert in its penultimate paragraph . . . ."); Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 828 (2020) ("The court, in its penultimate paragraph, thus found that . . . ."); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1261 (D. Utah 2003) ("The penultimate paragraph in [the precedential case] summarizing the Court's holding makes this clear.").

185. *See Hardison*, 432 U.S. at 83 n.14 (stating "[t]he dissent is thus reduced to"). Notably, this footnote leaves the question of threshold open. *Id.* The Court specified that Title VII does not require employers to bear "substantial" costs, but this does not rule out the conclusion that Title VII does not require employers to pay *de minimis* costs—a much lower threshold—either. *Id.* Given that "substantial" is mentioned nowhere else in the opinion, but *de minimis* is, even the mentions of "substantial" can still support a *de minimis* holding if not mere dicta. *Id.*

186. *Id.* The Court dismissed Justice Marshall's claim by stating that (1) the District Court found for an undue burden on TWA (despite this case setting the standard in undue burden analysis), and (2) that TWA, such a large company, likely has multiple employees whose religious observance would include Sabbath observance so the burden would be larger. *Id.* at 84 n.15.

187. *Id.* at 92 n.6 (Marshall, J., dissenting) ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than a *de minimis* cost . . . .'"); *see supra* note 186 and accompanying text.

188. *Id.* at 83 n.14 (majority opinion).

189. *Id.* at 84.

one employee to take a shift that they did not prefer in order to accommodate a Sabbatarian employee's observance involved "unequal treatment of employees on the basis of their religion."[190] As such, the Court determined that accommodations for religious employees discriminate against their peers who do not require accommodations—and that "Title VII does not contemplate such unequal treatment."[191] The Court concluded *Hardison* on a strong, anti-accommodation note: "[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[192]

The Court's discussion of whether seniority systems must accede to Title VII accommodations likewise illustrates that the Court preferred neutrality over preferential accommodations in *Hardison*.[193] The Court found that seniority systems represent "a significant accommodation to the needs, both religious and secular, of all . . . employees" and "a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."[194] Then, the Court held that Title VII religious accommodations do not supersede the neutral accommodations of seniority systems.[195] Finally, the *Hardison* Court found that even if a seniority system results in discrimination, its operation is still lawful as long as the system was not intended to be discriminatory.[196] The *Hardison* opinion is framed through a neutrality ethos, which comports with the Court holding for a *de minimis* standard that excuses employers from most accommodations.[197]

190. *Id.* (appearing in the first sentence following the sentence containing the phrase "more than a *de minimis* cost").

191. *Id.* at 81–82 ("[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment.").

192. *Id.* at 85.

193. *Id.* at 81–83 (holding that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences").

194. *Id.* at 78.

195. *Id.* at 81–83 (finding that TWA was not required to adjust its seniority system's mechanisms to accommodate Hardison's Sabbath observance). This finding was based in an earlier finding by the Court—that Title VII protects seniority systems' operations from discrimination claims. *Id.* at 81–82 (noting that seniority systems receive "special treatment under Title VII itself" as 42 U.S.C. § 2000e–2(h) (1964) specifically allows employers to apply different standards to employees when it is pursuant to a "bona fide seniority system" (quoting Teamsters v. United States, 431 U.S. 324, 352 (1977))).

196. *Id.* at 82; *see supra* note 195.

197. *Id.* at 78 (as opposed to the substantial standard, which requires employers to show much more to be excused from Title VII's accommodation requirement).

iii. The Cost that the Hardison *Court Found to Be an Undue Hardship Was* De Minimis

The cost found to be too burdensome for TWA in *Hardison* was *de minimis*—supporting the understanding the Court did establish a *de minimis* standard.[198] While the majority failed to mention the financial cost to TWA to accommodate Hardison,[199] Justice Marshall estimated the cost of accommodating Hardison to be $150 over three months in the early 1970s—"an almost cost-free accommodation"[200]—about $1,250 in 2022's value.[201]

The *Groff* Court, relying on an assumption that Hardison would have never reached sufficient seniority,[202] argued that TWA then would have faced annual costs up to $600, totaling $5,000 per year today.[203] Even granting the *Groff* Court the benefit of the doubt that its estimation was more accurate than that of Justice Marshall or the parties themselves in *Hardison*, the cost to TWA nevertheless still would have been *de minimis*.[204] TWA was one of the nation's largest airlines at the time—it could have managed the equivalent of $5,000 annually.[205] Moreover, the *Groff* Court failed to explain how the cost would have been "substantial" in any manner to constitute an "undue hardship" to TWA.[206] The specific finding of $150 to be an "undue hardship" on TWA supports the conclusion that the *Hardison* Court established a *de minimis* standard.[207]

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198. *Id.* at 92 n.6 (Marshall, J., dissenting) (questioning how the majority purports to unite such contradictory concepts of undue hardship and *de minimis* costs).

199. Groff v. DeJoy, 143 S. Ct. 2279, 2292 (2023). The *Groff* Court claims:

> The [*Hardison*] majority did not argue that Justice Marshall's math produced considerably "more than a de minimis cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees."

Id. (quoting *Hardison*, 432 U.S. at 83 n.14).

200. *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) (describing the stipulated cost in question in the case—$150 over three months, until Hardison reached sufficient seniority again—which Hardison could have paid back to TWA, nullifying any cost to the company).

201. *Groff*, 143 S. Ct. at 2291.

202. *Id.* (claiming, without citation, that the Court in *Hardison* doubted whether Hardison could regain his seniority).

203. *Id.* (adopting the majority's comment in *Hardison* that Hardison might not have gained his seniority back and then using Justice Marshall's stipulated value to estimate $600 annually).

204. *Hardison*, 432 U.S. at 92 n.6 (1977) (Marshall, J., dissenting).

205. *Id.* at 91 (criticizing the district court's findings that anything more than TWA's attendance at a few meetings and authorization of the union representative to shift swap for Hardison would have imposed an undue burden on the company by noting that such a finding "defies both reason and common sense"); Small v. Memphis Light, Gas & Water, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring) (noting that the Court found $150 to be a *de minimis* cost to "one of the largest airlines in the world").

206. *Groff*, 143 S. Ct. at 2291.

207. *Hardison*, 432 U.S. at 85 (majority opinion).

2. The Groff Court Disliked the Hardison De Minimis *Standard and Intentionally Misrepresented* Hardison *to Change the Law While Pretending to Uphold It*

The Court's finding in *Groff* that *Hardison* held for a "substantial" standard for undue hardship analysis is a novel,[208] but unsurprising, interpretation from the Court.[209] In *Philbrook*, precedent that the *Groff* Court ignored, the Court found that *Hardison* established the *de minimis* standard.[210] Five opinions by the modern Court, of which seven members of the *Groff* Court authored or joined, have found the same.[211]

The Court began voicing its displeasure with the *de minimis* standard more recently.[212] Only three years before *Groff*, in *Patterson*, Justice Alito stated, "[W]e should reconsider the proposition, endorsed by the opinion in . . . *Hardison*, that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden."[213] However, Justice Alito agreed with the denial of certiorari, finding that *Patterson* did not serve as the proper vehicle to do so.[214] Justice Gorsuch, in *Small*, criticized the Sixth Circuit's application of the *de minimis* standard after acknowledging that it was a correct understanding of *Hardison*.[215] After lamenting the outcome for the plaintiff, Justice Gorsuch stated: "Both the district court and court of appeals rejected the argument relying expressly on *Hardison*. 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."[216] Interestingly,

208. *See supra* Section II.C.1.

209. *See Groff*, 143 S. Ct. at 2293–94 (agreeing with the Solicitor General's argument that the mention of "*de minimis*" should not compel courts to find an undue hardship when a cost is not "substantial").

210. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)) ("[A]n accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer.").

211. *See supra* Section II.C.1.

212. *See infra* notes 213–216.

213. Patterson v. Walgreen Co., 140 S. Ct. 685, 685–86 (2020) (Alito, J., concurring in the denial of certiorari) (citation omitted) (finding that the *de minimis* ruling did not embody the purpose nor text of the statute). Justices Gorsuch and Thomas joined Justice Alito's opinion. *Id.* at 685. In an asterisk, Justice Alito mentions that Justice Thomas previously clarified that *Hardison*'s holding only applies to the pre-1972 amendments version of Title VII. *Id.* at 686 (citing EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 787 n.1 (2015)) (Thomas, J., concurring in part and dissenting in part). Of note, Justice Alito wrote the majority opinion in *Groff*. 143 S. Ct. at 2286.

214. *Patterson*, 140 S. Ct. at 686.

215. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., dissenting) (criticizing the *de minimis* gloss on Title VII from *Hardison*).

216. *Id.*

the *Groff* Court mentions the *Small* and *Patterson* opinions above—but paints a more flexible, less definitive portrait of these findings.[217]

The Court's portrayal of *Hardison* in *Groff* contradicts decades of its own jurisprudence. The *Groff* Court knew *Hardison*'s true holding,[218] but cherrypicked three mentions of "substantial" in the case to substitute for the holding.[219] In doing so, the Court no longer needed to overrule *Hardison* explicitly—rather, the Court could rely on dicta to effectuate the substantive change it sought for Title VII.[220]

B. The Hardison *Court Ruled Incorrectly by Effectively Nullifying Title VII*

From the outset, the *de minimis* holding "ma[de] a mockery" of Title VII by practically nullifying the statute.[221] Not only did the Court ignore the legislative intent behind Title VII and the plain meaning of the statute,[222] the Court decided *sua sponte* in *Hardison* and embraced a fallacious neutrality ethos for accommodations.[223] Moreover, the decision in *Hardison* eliminated Title VII protections in practice, as courts began to protect employers who engaged in workplace religious discrimination, leaving employees vulnerable and unprotected.[224]

217. *See Groff*, 143 S. Ct. at 2293 ("Members of this Court have warned that, *if* the *de minimis* rule represents the holding of *Hardison*, the decision might have to be reconsidered." (emphasis added)).

218. *See supra* Section II.C.1.

219. *See Groff*, 143 S. Ct. at 2295 ("The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to 'substantial expenditures' or 'substantial additional costs.' We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." (citations omitted)). Seemingly, the Solicitor General suggested this questionable practice. *Id.*

220. *Id.*

221. Trans World Airlines v. Hardison, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting); *see also* Wendy B. Scott, Jada Akers & Amy White, *The Influence of Justice Thurgood Marshall on the Development of Title VII Jurisprudence*, 89 ST. JOHN'S L. REV. 671, 683 (2015) (noting that Justice Marshall felt that Title VII was effectively nullified by the Court's seniority system carve-outs).

222. *See supra* Section II.A. and Part III.

223. *See infra* Section IV.B.1.

224. *See infra* Section IV.B.2.

1. The Reasoning of Hardison *Undermines the Affirmative Protections Intended by Congress Through Title VII*

The Court in *Hardison* ruled incorrectly by adopting the *de minimis* standard *sua sponte*[225] and promulgating the notion that neutrality suffices in the provision of religious accommodations.[226]

i. The Court Chose the De Minimis *Standard Sua Sponte*

The *Hardison* Court adopted the *de minimis* standard on its own accord, without any explanation as to why, suggesting its disloyalty to Title VII and the parties it affects.[227] *Sua sponte* decision-making is often erroneous because it removes affected parties from the deliberative process.[228] Courts should avoid *sua sponte* decisions because they violate parties' due process and sense of fairness.[229] In *Hardison*, none of the parties involved, including the government, argued for the *de minimis* standard.[230] The parties did not even contest, much less brief, the meaning of "undue hardship."[231] In lieu of the *sua sponte* decision, the *Hardison* Court should have requested supplemental briefing from the parties regarding the meaning of "undue hardship" or only issued rulings on briefed topics.[232] Because the Court failed to do so, and because it failed to explain its rationale for the *de minimis* decision, the standard is questionable at best.[233]

225. *See infra* Section IV.B.1.i.

226. *See infra* Section IV.B.1.ii.

227. *See* Brief *Amici Curiae* of Former EEOC General Counsel and Title VII Religious Accommodation Expert in Support of Petitioner at 8, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief of Former EEOC General Counsel].

228. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 261 (2002) ("[S]ua sponte decision making can, and does, lead to erroneous decisions because it eliminates from the deliberative process the very persons who are most strongly motivated to assure its full and accurate consideration.").

229. *Id.* at 263, 284 (describing how the Court has ruled that appellate review is subject to due process guarantees, and thus *sua sponte* decisions with adverse impacts on one's life, liberty, or property remove one's constitutional rights without giving them the opportunity to advocate—which encourages distrust and a lack of faith in the adversarial process).

230. *Id.*

231. Brief for Robert P. Roesser as Amici Curiae in Support of Petitioner at 22, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for Robert P. Roesser] (arguing that the text of Title VII should be interpreted with plain meaning as the statute leaves "undue hardship" undefined, emphasizing that the Court chose the *de minimis* standard *sua sponte*).

232. Milani & Smith, *supra* note 228, at 294.

233. Brief for Robert P. Roesser, *supra* note 231, at 22. In lieu of issuing a *sua sponte* decision, the Court could have requested supplemental briefing on the definition of "undue hardship" under Title VII. Milani & Smith, *supra* note 228, at 294.

ii. Hardison's *Emphasis on Neutrality Fails to Account for the Unique Nature of Religious Accommodations*

Congress adopted the 1972 Amendments to Title VII to reject the sufficiency of neutrality accommodations and mandate special treatment for observant employees.[234] Yet, a neutrality rationale undergirds the *Hardison* decision.[235] Generally, neutrality reasoning in the context of accommodations is "unreasonable on its face" as an oxymoronic theory.[236] Neutral rules are not accommodations—neutral rules create the need for accommodations.[237] Such can be seen in *Hardison* and *Groff*, where both plaintiffs sued after being required to work the Sabbath under religiously neutral policies.[238] Because of the issues that arise with neutral treatments of diverse groups, Congress crafted Title VII's accommodation requirement to guarantee equality in the workplace, specifically mandating special, non-neutral treatment for employees.[239] But *Hardison*'s *de minimis* ruling, inspired by its neutral ethos,[240] "sacrifice[d] accommodation (and religious minorities) on the collective altar and reverses Congress's Title VII amendment."[241]

Neutrality is especially inappropriate for religious accommodations.[242] "Religion," as it appears in Title VII, incorporates not only one's status as a

234. *See supra* Section II.A.2.

235. *See* Loren F. Selznick, *Mangers and Turbans: Nonverbal Religious Expression in a Diverse Workplace*, 49 U. BALT. L. REV. 183, 189 (2020) (arguing that treating all employees equally does not excuse an employer from making an accommodation).

236. Small v. Memphis Light, Gas & Water, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring) (analogizing *Hardison*'s religious accommodation logic to the ADA's accommodations—emphasizing that "[n]o right-minded person would call such accommodations [for employees covered by the ADA] a form of impermissible discrimination against *non*-disabled employees").

237. *See* Brief for Robert P. Roesser, *supra* note 231, at 11 (referring to neutral policies as "*trigger[s]*" that necessitate religious accommodations); *see also* Trans World Airlines v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee.").

238. *See* Groff v. DeJoy, 143 S. Ct. 2279, 2286 (2023) (detailing the agreement, pertaining to Sunday deliveries between USPS and the relevant union, that applied to all employees evenly, and the troubles Groff experienced as a result); *see also Hardison*, 432 U.S. at 69, 78 (finding seniority systems to be a neutral accommodation, with Hardison suing after being assigned Saturday shifts).

239. *See* Selznick, *supra* note 235, at 189 n.62 (citing *Abercrombie*'s assertion that Title VII does not mandate neutrality but rather was crafted in response to neutral policies).

240. *See* Brief of Robert P. Roesser, *supra* note 231, at 22 (commenting that the centering of neutrality as non-discrimination in *Hardison* comports with the case holding for the *de minimis* standard).

241. *Id.* at 4.

242. Rachel M. Birnbach, Note, *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, 1339 (2009) ("[N]ondiscrimination based on religion requires an employer to treat employees differently in order to accommodate their religious needs . . . .").

practitioner, but also "all aspects of religious observance and practice."[243] While other protected classes under Title VII may be accommodated with similar treatment (e.g., no differential treatment for individuals of different races), this approach does not work for employees seeking religious accommodations for their unique practices.[244] Religious accommodations seek an exception from the general rules of the workplace, while other Title VII accommodations seek uniform application of the general rules no matter which protected group an employee may fall in.[245] Thus, the neutrality embraced by *Hardison* fails to consider the unique needs of observant employees, rendering the decision shortsighted.[246] In fact, the Court in *EEOC v. Abercrombie & Fitch Stores*[247] found that Title VII requires "favored treatment," further demonstrating the issues with *Hardison*'s neutrality reasoning.[248]

2. Hardison's De Minimis *Standard Allowed Religious Discrimination in the Workplace to Continue in Manners that Would Have Otherwise Been Banned by Title VII*

The 1972 amendments to Title VII inspired hopes of workplace equality for many religious Americans—only for it to be quashed by the holding of *Hardison*.[249] Lower courts' application of the *de minimis* standard led to a per se rule against employees claiming a violation of Title VII, rendering the statute null.[250] In response, employers excused themselves from making

243. 42 U.S.C. § 2000e(j) (Supp. II 1970).

244. Birnbach, *supra* note 242, at 1339.

245. *See* 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, 516–17 (2010) ("Instead, [employees who seek religious accommodations] wish not to work a particular day or shift; or they wish to wear a particular piece of religious clothing that does not conform to company policy; or they wish to groom themselves in ways that meet a religious obligation but that conflict with a workplace rule. [They] want to be treated differently—or 'accommodated'—so that they can meet both their religious and work obligations.").

246. Trans World Airlines v. Hardison, 432 U.S. 63, 78 (1977) (finding that seniority systems are neutral accommodations and implying that because of such, they are better than non-neutral alternatives that some propose under Title VII).

247. 575 U.S. 768 (2015).

248. *Id.* at 775 ("But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.'" (quoting 42 U.S.C. § 2000e(j))).

249. *See* Brief *Amicus Curiae* of the Union of Orthodox Jewish Congregations of America in Support of Petitioner at 13–14, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for the Union of Orthodox Jewish Congregations of America] (describing how Orthodox Jews anticipated increased employment opportunity from the accommodation requirement in the amended Title VII, which *Hardison*'s holding then eliminated with its *de minimis* standard).

250. *See infra* Section IV.B.2.i.

accommodations, and employees with claims struggled to find representation.[251] The impact of the *de minimis* standard disproportionately affected those practicing minoritized religions and blue-collar workers practicing minoritized religions.[252]

i. Lower Courts Treated the De Minimis *Standard as a Per Se Rule Against Observant Employees, Shattering the Protections Title VII Intended to Create*

Lower courts applied *Hardison* as a per se rule against employees.[253] The circuit courts continually, and universally, found nearly any cost, direct or indirect—even trivial—to excuse an employer from making an accommodation that would have been required under the plain meaning of "undue hardship."[254] Even a Sabbath accommodation for an Assistant Manager at one Walmart, the nation's largest private employer with annual profits surpassing $11 billion, sufficed as an "undue hardship" per the Seventh Circuit.[255] In comparison, the observant employee at a small non-profit or a medium-sized local restaurant chain stands little to no chance at succeeding in court under Title VII. Moreover, the incredibly low *de minimis* standard for showing an undue hardship effectively eliminated all other concerns from religious accommodation analysis, such as the reasonableness of the accommodation request.[256]

Because the *de minimis* standard gave employers such leniency in refusing to make accommodations, employers then subsequently felt empowered to ignore even the most reasonable religious accommodation

251. *Id.*

252. *See infra* Section IV.B.2.ii.

253. *See* Brief for Robert P. Roesser, *supra* note 231, at 26 (describing a series of lower court decisions wherein any cost sufficed to establish an undue hardship, inspired by the small cost found to be an undue hardship to TWA in *Hardison*).

254. *See supra* Section II.C.3.; *see also* J. Alex Touchet & Bradley J. Lingo, *Failure to Accommodate: Assessing the Legacy of* Trans World Airlines, Inc. v. Hardison *on Working-Class People of Faith*, 31 GEO. MASON L. REV. 1, 4 (2023) ("Courts today uniformly interpret 'undue hardship' in Title VII as anything more than a de minimis cost.").

255. *See supra* note 131 and accompanying text; *see also Groff*, 143 S. Ct. at 2293 n.12 ("[T]wo years ago, the Seventh Circuit told the EEOC that it would be an undue hardship on Wal-Mart (the Nation's largest private employer, with annual profits of over $11 billion) to be required to facilitate voluntary shift-trading to accommodate a prospective assistant manager's observance of the Sabbath.").

256. *See* Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1675 (2020) (describing courts' trend to read the reasonableness requirement out of Title VII by: "(1) conflating reasonableness and undue hardship so that an accommodation's reasonableness depends solely on whether it causes the employer undue hardship, (2) setting the bar for reasonableness so low it is practically meaningless, or (3) ignoring the requirement altogether").

requests.[257] Employers and employees are often not even aware of the duty to accommodate under Title VII.[258] Observant employees report choosing not to apply for jobs where employers would not allow them time to pray throughout the day.[259]

For employees who knew of Title VII's accommodation requirement, bringing a case against an employer who did not provide an accommodation became substantially more difficult after *Hardison*.[260] Before *Hardison*, religious employees did not struggle with finding employment lawyers to represent them, whereas after, these lawyers often turned comparable individuals away.[261] The "chilling effect" of *Hardison* for religious employees searching for representation likely stemmed from lawyers' pessimism surrounding the outcome of the case, especially considering the contingency fees most employment lawyers charge.[262] With lower courts' application of a per se rule to a legal requirement of which many were unaware, the *de minimis* standard eviscerated the meaningful protection that Title VII was passed to create for religious employees in the workplace.[263]

ii. The Negative Impacts of Hardison *Disproportionately Affected Those Practicing Minoritized Religions and Those Working Low-Paying Jobs*

A disproportionate burden of requesting accommodations falls on practicing members of minoritized faiths as compared to their majority Christian coworkers.[264] Accommodating minoritized religions costs employers more than accommodating those practicing majority religions,

257. *See* Brief of Former EEOC General Counsel, *supra* note 227, at 1 (noting that under *Hardison*, "employers will feel safe to ignore religious accommodation requests because employers can easily demonstrate a cost that is slightly more than *de minimis*" and judges are compelled to affirm such denials).

258. *See* Kade Allred, *Giving* Hardison *the Hook: Restoring Title VII's Undue Hardship Standard*, 36 BYU J. PUB. L. 263, 279 (2022) (citing a Department of Justice report finding that many employers and employees do not know about the accommodation requirement, likely leading to underreporting); U.S. DEP'T OF JUST., COMBATING RELIGIOUS DISCRIMINATION TODAY: FINAL REPORT 17 (2016).

259. U.S. DEP'T OF JUST., *supra* note 258, at 17.

260. *See* Brief of Asma T. Uddin & Steven T. Collis as Amici Curiae in Support of Petitioner at 2, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for Uddin & Collis] (citing religious leaders' complaints, beginning soon after *Hardison*, that they could not find representation).

261. *Id.*

262. *Id.* (citing objective studies that chart the correlation between the likelihood that a contingency fee lawyer takes a case and how successful they believe the case will be).

263. *See supra* Section II.A.

264. Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)*, 2007 U. ILL. L. REV. 497, 520 (describing how the United States's largely Christian history and sociocultural structure lead to disproportionate impacts of religious discrimination claims for individuals practicing minoritized religions).

leading to more employers claiming that an accommodation would impose an "undue hardship" on their business.[265] In conjunction with the *de minimis* standard, it became "nearly impossible" for employees practicing minoritized religions to receive meaningful workplace accommodations.[266]

Employers disproportionately refuse to accommodate minoritized religious groups as opposed to majority Christian adherents.[267] Schedule-wise, when most businesses are closed on majority Christian holidays, no accommodation is needed, eliminating conflict for those who celebrate holidays such as Christmas.[268] If the work schedule does not automatically accommodate the majority religious holiday, the cultural norm of the holiday facilitates an understanding leading to an accommodation.[269] The same is not true for those celebrating non-majoritarian holidays, such as Passover or Diwali, who meet resistance from lack of understanding.[270] Uniform-wise, employers enforce uniform policies disproportionately against Muslim or Sikh men, despite other individuals wearing similar forbidden headwear, such as baseball caps.[271] Employers find it easier to terminate employment of employees with minoritized religious beliefs than to accommodate them.[272] If the employer had not (yet) terminated the employee's employment, they often quit anyways, forced to choose between employment and religious belief.[273] *Hardison*'s *de minimis* standard undermined Title VII by allowing employers to escape their requirement to accommodate employees' religious beliefs, negatively impacting Americans of all religious backgrounds, but especially those of minority beliefs.[274]

265. *Id.*

266. *Id.* at 519.

267. *See* Zaheer, *supra* note 264, at 519 (describing the advantage Christians have in the American workplace due to work schedules and popular culture reflecting their beliefs).

268. *See id.* (describing the advantage that Christian employees benefit from in the United States, wherein there exists less of a need for them to be accommodated from cultural norms favoring Christian tradition).

269. Brief for the American Hindu Coalition, *supra* note 278, at 14.

270. *Id.*

271. *See id.* at 17–18 (describing a case wherein the New York Police Department transferred Muslim and Sikh people to non-public facing roles due to their religious headwear, despite allowing other employees to violate the uniform policy with baseball caps).

272. *See* Brief for LDS Church et al., *supra* note 284, at 18 (describing how an employer's unfamiliarity with a religion may make it easier to dismiss the employee than accommodate them).

273. *See* Brief for Uddin & Collis, *supra* note 260, at 2 (noting that after the MOU that led to Groff filing suit, most other rural mail carriers quit their jobs rather than attempting an accommodation as Groff did).

274. *See id.* at 7 ("*Hardison*'s application in the lower courts has allowed employers to escape liability and avoid, in many instances, any need whatsoever to accommodate the religious needs of their employees.").

Courts routinely upheld Sabbath discrimination, "severely restrict[ing]" a Sabbatarian's employment opportunities.[275] Courts permitted companies to refuse to even hire Orthodox Jewish individuals if the employer claimed the slightest inconvenience to their business or the individual's possible coworkers for a Sabbath accommodation.[276] The *de minimis* standard also enabled courts to uphold discrimination based on one's appearance.[277] Courts continually elevated the employer's hypothesized preferences of their customers over their employees' religious mandates regarding their

275. *See* Brief of the Former EEOC General Counsel, *supra* note 227, at 3; *see also, e.g.*, Williams v. U.S. Steel Corp., 40 F. Supp. 3d 1055, 1067 (N.D. Ind. 2014) (finding an undue hardship when accommodating the plaintiff's Sabbath observance would require her steel mill employer to have one less employee on a shift or pay another employee overtime to work plaintiff's scheduled shift and risk decreased employee morale); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 142, 146–47 (5th Cir. 1982) (finding that all three of the plaintiff's suggested accommodations—from shift swaps to operating without him on the shift—were analagous to the accommodations dismissed by the *Hardison* Court under the *de minimis* standard); EEOC v. Thompson Contracting, Grading, Paving, & Utils. Co., 499 F. App'x 275, 283–84 (4th Cir. 2012) (finding an undue hardship when accommodating the plaintiff's Sabbath observance would require the employer to insure other employees who already had their commercial driver's license or to hire contractor-drivers on occasional Saturday shifts); Groff v. DeJoy, 35 F.4th 162, 175 (3d Cir. 2022) (finding that Groff's proposed accommodation of being exempted from work on Sundays "caused more than a de minimis cost" to his employer), *vacated and remanded* 143 S. Ct. 2279 (2023); Trans-World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (applying the *de minimis* standard and finding an undue hardship on TWA when it would need to pay overtime to one of Hardison's coworkers for a limited period of time to accommodate his Sabbath observance). Sabbath discrimination appears to be universal across Sabbatarian faiths—all of the plaintiffs in these cases ascribed to different faiths that observe the Sabbath, encountered Sabbath discrimination, and lost their case under the *de minimis* standard. *See Williams*, 40 F. Supp. 3d at 1059; *Brener*, 671 F.2d at 142; *Thompson Contracting*, 499 F. App'x at 277; Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *1 (E.D. Pa. Apr. 6, 2021); *Hardison*, 432 U.S. at 67.

276. *See* Brief for the Union of Orthodox Jewish Congregations of America, *supra* note 249, at 16 (describing a series of cases wherein the *de minimis* holding from *Hardison* quashed Orthodox Jews' claims of workplace discrimination in refusing to accommodate their Sabbath observance); *see also, e.g.*, Litzman v. New York City Police Dep't, No. 12 Civ. 4681(HB), 2013 WL 6049066, at *2–3, *5–6 (S.D.N.Y. Nov. 15, 2013) (finding an undue hardship on the employer police force from the plaintiff's one-inch-long beard, as the employer would have a more difficult time reaching an *eventual* goal that its entire team have a specific certification that requires a test wherein a respirator mask must be worn on a clean shaven face, despite the fact that the force offered medical exceptions excusing trainees from the requirement); Aron v. Quest Diagnostics, Inc., No. Civ.A.03–2581 JSH, 2005 WL 1541060, at *6–9 (D.N.J. June 30, 2005) (finding an undue hardship on the employer, who required its phlebotomists to work two Saturdays per month, when accommodating plaintiff's Sabbath observance had the "potential" to decrease employee morale, require the company to incur occasional additional costs, and affect speediness of patient test results); EEOC v. Walmart Stores Eastern, L.P., 992 F.3d 656, 658–60 (7th Cir. 2021) (finding an undue hardship on Walmart when accommodating *one* potential assistant manager's Sabbath observance would require changing the existing rotating scheduling for assistant managers).

277. *See* Sadia Aslam, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221, 222 (2011) (arguing that the current Title VII jurisprudence fails to provide sufficient protection for individuals who wear religious dress or whose appearance reflects their religious beliefs).

appearance.[278] Orthodox Jews routinely experienced judicially sanctioned discrimination for aspects of their appearance that comport with their religious beliefs—from their hair and beards, to their yarmulkes and skirts.[279] Similarly, Courts have mandated that Sikh men's beards and turbans,[280] Muslim women's khimars and hijab,[281] and Muslim men's beards all must give way to the hypothesized customer preference.[282] Finally, the *de minimis* standard enabled Courts to uphold discrimination against observant employees who pray throughout the day per religious dictate as it might pose scheduling difficulties or interrupt workflow.[283]

Statistics provide further evidence of the disproportionate rates of workplace religious discrimination suffered by minoritized practitioners under the *de minimis* standard.[284] For instance, Seventh Day Adventists comprise 0.5% of the American population, but make up 21.5% of all

278. *See* Brief for the American Hindu Coalition as Amicus Curiae Supporting Petitioner at 16–17, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for the American Hindu Coalition] (describing employers' repeated calls to what customers "might" feel in response to an aspect of the employee's appearance that correlates with their religious beliefs); *see also* Brief for the Sikh Coalition, Muslim Advocates, and the Islam and Religious Freedom Action Team as Amici Curiae in Support of Petitioner at 13, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for the Sikh Coalition et al.] (quoting EEOC v. Sambo's of Georgia, 530 F. Supp. 86, 89 (N.D. Ga. 1981)) (describing one court's findings that the employer restaurant's belief in the public's "aversion to, or discomfort in dealing with, *bearded people*" sufficed to establish an undue hardship (emphasis in quoting source but not in quoted source)).

279. *See* Brief for the Union of Orthodox Jewish Congregations of America, *supra* note 249, at 17 (describing two specific cases, one wherein a court could not determine if allowing a man to keep his beard or wear a yarmulke imposed an "undue hardship" on the police department that employed him, and another wherein a hospital fired a nurse who wished to wear a skirt to work per her modesty beliefs).

280. *See* Brief for the Sikh Coalition et al., *supra* note 278, at 12–13 (describing cases in which courts upheld employer discrimination against Sikh employees whose appearance reflected their beliefs, as their appearance might adversely affect the public image of the employer).

281. *See* Aslam, *supra* note 277, at 234 (describing how some circuits "continue to adhere to the earlier established standards" allowing discrimination for religious aspects of appearance); *see also* Nathan K. Bader, *Hats off to Them: Muslim Women Stand Against Workplace Religious Discrimination in* Geo Group, 56 ST. LOUIS U. L.J. 261, 280 (2011) (describing *Webb v. City of Phila.*, 562 F.3d 256 (3d Cir. 2009)).

282. *See* Bader, *supra* note 281, at 277–78 (describing two cases wherein men's beard lengths—a sign of piety—led to dismissal or disputes with their employers, which the courts the upheld, giving special deference to police departments and correctional institutions).

283. *See* Brief for the Union of Orthodox Jewish Congregations of America, *supra* note 249, at 17 (describing *EEOC v. JBS USA, LLC*, No. 8:10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013)); Brief for the American Hindu Coalition, *supra* note 278, at 15 (describing the issue for the employee in *Roy v. Board of Community College Trustees of Montgomery Community College*, No. CBD-13-2956, 2015 WL 5553716 (D. Md. Sept. 18, 2015)).

284. *See* Brief for the Church of Jesus Christ of Latter-Day Saints et al. as *Amici Curiae* Supporting Petitioner at 18, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) [hereinafter Brief for LDS Church et al.] (comparing specific statistics of rates of discrimination as opposed to population makeup).

religious accommodation claims.[285] Jehovah's Witnesses make up 0.8% of Americans but represent 4.9% of its religious accommodation claims.[286] A combination of Jews, Hebrew Israelites, Rastafarians, Sikhs, and those practicing indigenous African religions comprise 3% of the United States' population but 13.7% of religious accommodation claims.[287] Muslims make up 1.1% of the American population but 25% of all its religious accommodation claims[288]—with a 250% increase in claims after 9/11.[289]

Middle- and lower-class Americans suffer from religious discrimination in the workplace disproportionately under the *de minimis* standard.[290] Between 2000 and 2023, over 80% of Title VII religious discrimination claims were filed by individuals who worked jobs requiring "little" to "medium" preparation.[291] Individuals working jobs requiring "little" or "some" preparation filed over 60% of all Title VII religious discrimination claims.[292] The *de minimis* standard fueled these results as blue-collar workers are relatively easier and cheaper to replace than white-collar employees, providing little incentive to employers to accommodate.[293] The impact on working class Americans practicing minoritized religions is even more disparate under the *de minimis* standard.[294]

C. The Court's Manipulation of Title VII Case Law in Groff *Provides a Better Solution than Popular Alternatives Suggested by Scholars*

Scholars rightly began criticizing the *de minimis* standard soon after its announcement in *Hardison*.[295] In their criticisms, scholars offered

285. *Id.*

286. *Id.*

287. *Id.*

288. Allred, *supra* note 258, at 280.

289. Brief for the American Hindu Coalition, *supra* note 278, at 18.

290. *See* Touchet & Lingo, *supra* note 254, at 10 ("[L]itigants are overwhelmingly likely to be working-class Americans—the ones who need Title VII's protection most.").

291. *See id.* at 11 (describing "little" to "some" preparation jobs as those which require about "a high school diploma and up to a year of experience (e.g., receptionists, cashiers, and correctional officers)," and "medium" preparation jobs as requiring about "two years of experience and vocational school, on-the-job experience, or an associate's degree (e.g., police officers, automotive mechanics, and nurses)").

292. *See id.*

293. *See id.* at 14.

294. *See id.* at 15 ("Thus, '[b]ecause facially or formally neutral workplace policies by nature reflect the perspective of the cultural majority, they will disproportionately come into conflict with the practices of religious minorities.' Thus, it is no surprise that minority faiths are overrepresented in religious accommodation claims but underrepresented in wins on appeal." (quoting Brief of Amicus Curiae the General Conference of Seventh-Day Adventists Supporting Petitioner at 29, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174))).

295. *See, e.g.*, Diane E. Tebelius, *Title VII—Religious Discrimination—Employer Need Not Bear More Than a* De Minimus *Cost to Reasonably Accommodate an Employee's Religious Beliefs—*

alternatives to the *de minimis* standard that they believed better comported with the spirit of Title VII, including the adoption of the "significant difficulty or expense" language used elsewhere in the U.S. Code and other alternatives that would substantively change the meaning of "undue hardship."[296] While the *Groff* Court should have been more transparent about the actual holding of *Hardison*, the Court nonetheless took a superior approach than that offered in popular scholarship.[297]

1. In the Decades Following Hardison, Scholars Proposed Redefining "Undue Hardship" as it Appears in Title VII

After the Court decided *Hardison*, Congress began defining "undue hardship" in new antidiscrimination laws, beginning with the Americans with Disabilities Act of 1990 ("ADA").[298] Congress subsequently utilized the ADA standard for "undue hardship" in other antidiscrimination legislation, and the majority of Title VII scholars began advocating for Title VII to do the same.[299]

Bona Fide Seniority Systems Protected Under Title VII and Prevail over Religious Discrimination—Trans World Airlines, Inc. v. Hardison, *432 U.S. 63 (1977)*, 1 WHITTIER L. REV. 57, 62 (1978) ("Though there are a number of methods of [religious] accommodation[s] which would be reasonable, most would involve more than a *de minimus* cost. By broadly defining undue hardship, the Court may have effectively restricted any manner of accommodation."); Elizabeth L. Moore, *Civil Rights—Title VII and the Religious Employee:* Trans World Airlines, Inc. v. Hardison *Retrenches on the Reasonable Accommodation Requirement*, 56 N.C. L. REV. 356, 369–70 (1978) ("*Hardison* leaves impotent the congressional mandate in section 701(j) . . . . The amendment's significance . . . was the recognition of the discrimination . . . when a uniform work rule has a greater impact on employees with certain strongly held religious beliefs . . . . In so circumscribing the [*de minimis* standard], the Court nearly proclaims the amendment a nullity."); David E. Retter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 COLUM. HUM. RTS. L. REV. 63, 86 (1979) ("For the moment the reasonable accommodation requirement appears all but defunct. . . . The imposition of such a choice [between following the precepts of one's religion or abandoning them to accept work], remarked the *Hardison* dissent, leaves '[a]ll Americans . . . a little poorer.'" (quoting Trans-World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 (1977) (Marshall, J., dissenting))).

296. *See infra* Section IV.C.1.

297. *See infra* Section IV.C.2.

298. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213).

299. *See* Allred, *supra* note 258, at 284 ("[O]nly two solutions have enough gumption to give *Hardison* the hook: legislation or Supreme Court action."); Aslam, *supra* note 277, at 236 ("Because Congress took the time to define the terms in the context of employment law, albeit discrimination for disabilities rather than the criteria listed under Title VII, courts should adopt this 'significant difficulty or expense' standard to evaluate religious discrimination suits . . . ."); Blair, *supra* note 245, at 556 ("The ADA has provided a guide on how to strengthen reasonable accommodations given to employees. The ADA model offers greater balance in the analysis of what accommodations are reasonable and how much of a burden is required of employees."); Christoper M. Fournier, *Faith in the Workplace: Striking a Balance Between Market Productivity and Modern Religiosity*, 15 SEATTLE J. SOC. JUST. 229, 231 (2016) ("These materials would inform employees and employers that . . . the employer will have the burden of showing a substantial cost . . . . This new, stricter

i. The Majority Approach Amongst Scholars: The "Significant Difficulty or Expense" Standard

Before the Court's decision in *Groff*, the majority of Title VII scholars suggested that the *de minimis* standard should be replaced with the "significant difficulty or expense" language originally used to define "undue hardship" in the ADA.[300] In doing so, the standard for an undue hardship under Title VII would become more stringent, meaning more employers would be required to reasonably accommodate the religious observance of their employees.[301] However, scholars disagreed on how to best effectuate this change.[302] One scholar proposed that the "significant difficulty or expense" language needed to be established either by a congressional amendment to Title VII or through a ruling by the Court,[303] before ultimately suggesting that the Court provided the best avenue for change.[304] Another scholar believed legislation was the best route to redefine "undue hardship" because Congress has already amended language in the ADA after problematic Court rulings narrowed the law's scope.[305] Another scholar thought regulations by the EEOC provided the best solution.[306] Through whatever means scholars suggest to redefine Title VII, the consensus amongst the majority of scholars was clear: The "significant difficulty or expense" language should define "undue hardship" for workplace religious discrimination claims.[307]

a. The Standard Appears Three Times in Other Current Employment Legislation, Though Scholars Relied on Its

standard would be analogous to the current undue hardship standard called for under the [ADA], which will be discussed later in the article.").

300. *See* Allred, *supra* note 258, at 288.

301. *See infra* Section IV.C.1.i.a.

302. *See infra* notes 303–305 and accompanying text.

303. *See* Allred, *supra* note 258, at 284 ("[O]nly two solutions have enough gumption to give *Hardison* the hook: legislation or Supreme Court action.")

304. *See id.* at 284–87 (arguing that a change in the standard would be best effectuated by the Court, especially given the Court's recent expressions of dissatisfaction with *Hardison* and Congress' inability to pass legislation defining "undue hardship" in Title VII).

305. Aslam, *supra* note 277, at 237 (describing how Congress passed the ADA Amendments Act of 2008 ("ADAAA") in order to redefine "disability" after the Supreme Court had been narrowing the scope of the ADA for the preceding ten years).

306. Fournier, *supra* note 299, at 231 (advocating that the EEOC should "create and promulgate a memorandum and regulatory materials" that would redefine "undue hardship" with a substantial standard "analogous to the current undue hardship standard called for under the [ADA]").

307. *See supra* note 299.

Appearance in the ADA to Signal Congressional Disapproval of the De Minimis *Standard*

Scholars have argued that the congressional history of the newer standard signaled both legislative approval of the "significant difficulty or expense" language and congressional disapproval of the *de minimis* standard.[308] In their analysis, scholars primarily rely upon and refer to the standard in its initial appearance in the ADA, though the standard has appeared four times since in employment law, as the subsequent laws call back to the ADA.[309]

Congress passed the ADA in 1990.[310] Title I of the ADA specifically addresses employment discrimination, prohibiting all forms of employment discrimination based on one's ability.[311] Congress provided an exception for employers—excusing employers when a reasonable accommodation imposes an undue hardship on their business.[312] In order for an accommodation to cause an undue hardship, Congress stated that the reasonable accommodation must impose a "significant difficulty or expense" on the employer.[313]

308. *See infra* Section IV.C.1.i.c.

309. *See infra* Section IV.C.1.i.a.

310. Sondra M. Lopez-Aguado, *The Americans with Disabilities Act: The Undue Hardship Defense and Insurance Costs*, 12 REV. LITIG. 249, 250 (1992).

311. *Id.* at 250–51 (describing employment discrimination against people with disabilities as "widespread" before the Act, with over half of young disabled people experiencing joblessness unwillingly).

312. *Id.* at 252; *see also* 42 U.S.C. § 12111(9) (stating that reasonable accommodations may include "(A) making existing facilities used by employees readily accessible . . . ; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters").

313. Lopez-Aguado, *supra* note 310, at 252; *see also* 42 U.S.C. § 12111(10)(A) ("The term 'undue hardship' means an action requiring *significant difficulty or expense*, when considering in light of the factors set forth in subparagraph (B)." (emphasis added)). Subparagraph (B) provides the following guidelines:

> In order to determine whether an accommodation would impose an undue hardship on an employer, the ADA sets forth four factors: 1) the nature and cost of the accommodation; 2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of employees at the facility, the effect on expenses and resources, or the impact of such an accommodation on the operation of the facility; 3) the overall financial resources of the employer, the overall size of the business with respect to the number of its employees, the number, type, and location of its facilities; and, 4) the type of operation of the employer, including the composition, structure, and functions of the workforce, the geographic separateness, administrative, or fiscal relationship of the facilities to the employer.

Jason Zarin, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof Under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDISC. L.J. 511, 514–15 (1998); *see also* 42 U.S.C. § 12111(10)(B).

The standard also appears in the Uniformed Services Employment and Reemployment Rights Act ("USERRA"),[314] which Congress passed in 1994.[315] Under the Act, employers are required to make "reasonable efforts" to train and reintegrate veterans into the civilian workforce, unless doing so would impose an "undue hardship" on the employer.[316] The USERRA borrowed language from the ADA, including the definition of "undue hardship."[317]

The Pregnant Workers Fairness Act ("PWFA")[318] requires covered employers to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[319] The PWFA explicitly adopted the "undue hardship" standard from the ADA, stating, "the terms 'reasonable accommodation' and 'undue hardship' have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act."[320] Likewise, in the same session law, the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act")[321] required that covered employers provide accommodations for nursing workers by providing a space (separate

314. Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. § 101).

315. *See* Aaron Gingrande, *The Import of "Undue Hardship" from the ADA to USERRA: Useful Guideline or Trojan Horse?*, 15 U. PA. J. BUS. L. 1111, 1115 (2013) (providing a history of the USERRA and the purpose behind the legislation).

316. *See id.* at 1113 (warning that it is likely that the case law surrounding "undue hardship" from the ADA will be applied to the USERRA—because of the similar language—and that if this happens, protections for veterans will be smaller than Congress intended). Under the USERRA, employers must make "reasonable efforts" to help employees become requalified for the "essential tasks" of the position. *Id.* at 1116; *see also* 38 U.S.C. § 4313(a)(1)(B), 4313(a)(2)(B), 4313(a)(3), 4313(a)(3)(A), 4313(a)(4), 4313(b)(2)(B) (detailing different scenarios under which an employer is required to make reasonable efforts to accommodate a veteran re-entering the workforce). Congress borrowed the "essential tasks" language from the ADA. Gingrande, *supra* note 315, at 1116, n.25 (noting that under the ADA, factors that might make a function "essential" include whether "(1) the position exists to perform the function; (2) there are a limited number of employees to perform the job function; and/or (3) the incumbent is hired specifically for his or her ability to perform the function because it requires a high level of expertise").

317. *See* Gingrande, *supra* note 315, at 1116. An employer establishes an "undue hardship" under the USERRA by demonstrating a "significant difficulty or expense," in light of "(1) the nature and cost of the action; (2) the overall financial resources required to take the action; and (3) the action's effect on the expenses, resources, and operations of the facility when measured against the employer's overall size." *Id.* at 1117; *see also* 38 U.S.C. § 4303(16).

318. Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 6084 (2022) (codified at 42 U.S.C. §§ 2000gg to 2000gg-6).

319. *Id.* § 103(1); 42 U.S.C. § 2000gg-1(1).

320. Pregnant Workers Fairness Act § 102(7); 42 U.S.C. § 2000gg(7).

321. Pub. L. No. 117-328, 136 Stat. 6093 (2022).

from bathrooms) to express breast milk while at work.[322] In doing so, Congress adopted the "significant difficulty or expense" language from the ADA to excuse covered employers from the accommodation requirement.[323] By 2023, Congress had repurposed the "significant difficulty or expense" language from 1990 in four subsequent acts mandating employment accommodations—but had not done so for the *de minimis* standard since 1977.[324]

The foundation for scholars' arguments for the "significant difficulty or expense" standard lay in their (accurately) perceived disapproval of the *de minimis* standard, as signaled by subsequent congressional action.[325] Scholars note that in passing the ADA, Congress went "out of its way" to avoid the *Hardison* treatment for subsequent "undue hardship" legislation in the employment space.[326] First, Congress defined "undue hardship," something it had not done in Title VII, which allowed the *Hardison* ruling.[327] Second, scholars note that when discussing the legislation, Congress went a step further by specifying that the "significant difficulty or expense" standard in

322. *See id.* §§ 102(a)(1)–(2); 29 U.S.C. §§ 218d(a)(1)–(2), 218d(c) ("An employer that employs less than 50 employees shall not be subject to the requirements of this section, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."). The Patient Protection and Affordable Care Act ("ACA") also used the term "undue hardship" with the "significant difficulty or expense" language when mandating that nursing parents be given the reasonable break times. Pub. L. No. 111-148, § 4207(3), 124 Stat. 119, 577 (2010). The provision was repealed in 2022 by the PUMP Act, which replaced the ADA's langauge with the near-identical provision in the first parenthetical of this footnote. 29 U.S.C. § 207(r)(3) (2020), *repealed by* PUMP Act, Pub. L. No. 117-328, §§ 102(a)(1)–(2), 136 Stat. 6093 (2022). The new law covers approximately nine million more workers of childbearing age than the previous provision requiring accommodations for nursing. *See* Alisha Haridasani Gupta & Catherine Pearson, *A New Breast Pumping Law Has Gone Into Effect. Here's What It Means.*, N.Y. TIMES (May 3, 2023), https://www.nytimes.com/2023/05/03/well/family/pump-act-breastfeeding.html (discussing how the PWFA covers all employees, with minor exceptions for some common carriers, as opposed to the ACA, which did not cover any workers who did not qualify for overtime pay).

323. Pub. L. No. 117-328, § 102(a)(2), 136 Stat. 6093 (2022); 29 U.S.C. § 218d(c).

324. *See supra* notes 314–323 and accompanying text.

325. *See* Allred, *supra* note 258, at 285 ("Congress has in a way already responded to *Hardison* by how it devised other statutes involving undue hardships.")

326. *Id.* at 295; *see* Steven 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. 391, 424 (1995) (describing the legislative history behind the "undue hardship" provision in the ADA and the congressionally-defined standard for courts to apply); Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 114–115 (2015) (detailing the meaningful difference between the traditional association of antidiscrimination with formal equality, the ethos adopted in *Hardison*, as opposed to the true equality provided by accommodations).

327. *See* Kaminer, *supra* note 326, at 114–15 ("In enacting the ADA, Congress explicitly rejected § 701(j)'s *de minimis* standard, determining instead that 'undue hardship' is an 'action requiring significant difficulty or expense.'" (quoting H.R. REP. NO. 101-485, pt. 2, at 68 (1990))).

the ADA was "significantly higher . . . than that articulated in *Hardison*."[328] Given Congress's explicit differentiation between the two standards, scholars argue that Congress has already redefined "undue hardship" in the employment context and that the new definition should be extrapolated to Title VII.[329]

b. Scholars Argue that the Similarities Between Title VII and the ADA Make the "Significant Difficulty or Expense" a Fitting Replacement for the De Minimis *Standard*

Scholars find the adoption of the standard from the ADA to be particularly fitting given the similarity between workplace accommodations for people with disabilities and observant individuals.[330] Remediating discrimination against both groups in the workplace requires a solution that is unique amongst other forms of workplace discrimination: accommodations.[331] The other protected groups under Title VII—sex, race, and color—are protected through neutral treatment, wherein one is not treated differently from their peers based on their status.[332] But similar treatment creates the need for accommodations for disabled and observant individuals.[333] Moreover, scholars emphasize that until 2010, only disabled

328. *Id.* at 115 n.40 (citing H.R. REP. NO. 101-485, pt. 2, at 68 (1990)). In its report, Congress stated:

> The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimus* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*. This higher standard is necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.

H.R. REP. NO. 101-485, pt. 2, at 68 (1990).

329. Aslam, *supra* note 277, at 236 ("Because Congress took the time to define the terms in the context of employment law, albeit discrimination for disabilities rather than the criteria listed under Title VII, courts should adopt this 'significant difficulty or expense' standard to evaluate religious discrimination suits when employers fail or refuse to accommodate religiously mandated dress or appearance.").

330. *See* Blair, *supra* note 245, at 530–31 (describing how the forms of discrimination are undergirded by the same employer motivations and both require differential treatment, as opposed to other forms of workplace discrimination); Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 803 (1997) ("[T]he very fact that these are the only two forms of discrimination that private employers are required to accommodate invites a comparison.").

331. *See* Blair, *supra* note 245, at 531.

332. *Id.*

333. *See* Blair, *supra* note 245, at 531; *see also infra* Section III.B.1.ii.

and observant employees were protected by accommodations.[334] Because of the unique need for differential accommodations between the groups, scholars emphasize that importing the "significant difficulty or hardship" standard from the ADA is an appropriate fit to excuse employers from making accommodations under Title VII.[335]

Scholars also find the ADA standard fitting for Title VII because discrimination against both groups is generally founded in the same two complaints from their employers—economic concerns and workplace harmony.[336] Accommodations require differential treatment, which likely involves some minor cost to the employer, who will then balk.[337] Similarly, an employee's coworkers may resent the employee who receives differential treatment through accommodations, leading to disharmony in the workplace, which employers also wish to avoid.[338] Given the analogous resistance in accommodating disabilities and religion, scholars find that the adoption of the "significant difficulty or expense" standard to be fitting.[339]

Lastly, scholars emphasize that the similarities between Title VII and the ADA themselves justify their approach.[340] The policy undergirding both acts reflects the same valuation by Congress: Some cost to employers is acceptable for the benefit of society and the workplace through inclusion.[341] Moreover, scholars emphasize that the ADA's broad coverage aligns with the broad, remedial intent of Title VII.[342] The adoption of the broader protection from the ADA's definition of "undue hardship," not only comports with the intent of Title VII, but will also lead to more accommodations according to scholars.[343]

c. The "Significant Difficulty or Expense" as a Route to More Accommodations for Observant Employees

Scholars argue that the adoption of the "significant difficulty or expense" standard will "even [the] playing field" between employees and

334. *See* Miller, *supra* note 330, at 803. In 2010, the ACA required accommodations to counteract pregnancy discrimination in the workplace. *See supra* note 322. Now pregnant and nursing employees are protected from discrimination by accommodation requirements. *See supra* notes 318–323 and accompanying text.

335. *See* Blair, *supra* note 245, at 530–31.

336. *Id.* at 530.

337. *Id.*

338. *Id.*

339. *See* Blair, *supra* note 245, at 531–32.

340. *See infra* notes 341–343 and accompanying text.

341. *See* Blair, *supra* note 245, at 531.

342. Aslam, *supra* note 277, at 237.

343. *See infra* Section IV.C.1.c.

employers.[344] This assertion is based on their finding that under the ADA's higher "undue hardship" standard, employers are required to provide accommodations more often.[345] Under the *de minimis* standard, an employer merely needs to gesture to some minor cost to be excused from an accommodation, but the "significant difficulty or expense" standard requires more.[346] Because the *de minimis* standard requires so little to find in favor of employers, scholars emphasize that there is significant room for managerial discretion in deciding whether to grant an accommodation.[347] Discretion indulges the implicit or explicit biases of managers, especially against minoritized religious groups.[348] A higher "undue hardship" standard would force more uniformity in employer decisions and justifications in denying accommodations, as well as in the courts' enforcement of the proper grounds of an "undue hardship."[349]

The higher standard also will redirect attention from non-monetary costs of "undue hardships" and remove some of the burden on employees trying to be accommodated, scholars argue.[350] The low bar of the *de minimis* standard often leads to employers overemphasizing non-monetary costs of granting an accommodation, leading to denial of accommodations.[351] Options such as shift-swapping, mandated breaks, or transfer of duties are then found to be *de minimis* by the courts.[352] Scholars argue that under the "significant difficulty or expense" standard, this will no longer be the case.[353] Similarily, scholars argue, because the suggested standard requires more from employers, some of the burden of attempting to be accommodated will be displaced from employees onto employers, who are better equipped to handle the cost.[354]

Requiring more from employers to demonstrate an undue hardship will result in fewer exceptions to Title VII's accommodation requirement, leading

344. *See* Blair, *supra* note 245, at 539.

345. *See id.* at 537.

346. *See id.* at 535 ("Under the ADA regime, although an employer may present credible evidence that moving the employee to a new position would have been a hardship, that is not the end of the analysis. Under Title VII, the analysis stops when the employer is able to prove that the accommodation would have presented more than a *de minimis* burden."); Aslam, *supra* note 277, at 236.

347. Fournier, *supra* note 299, at 238.

348. *Id.* at 239.

349. *Id.* at 239–41.

350. *See infra* notes 351–354 and accompanying text.

351. *See* Blair, *supra* note 245, at 538.

352. *Id.*

353. *Id.*

354. *See id.* at 556 ("Creating a more equal balance when evaluating whether an accommodation is reasonable will help provide the respect and protection that employees deserve.").

to more protections for employees.[355] Some scholars even believe this effect could be compounded through the addition of case law.[356] The case law from ADA rulings on "significant difficulty or expense" could be used to interpret Title VII case law, adding to the protections that would benefit employees under the new standard.[357] One scholar went as far as analyzing the facts of *Hardison* under the "significant difficulty or expense" standard and argued that under that standard, the Court would have found for Hardison and required the TWA to accommodate his Sabbath observance.[358]

ii. Minority Alternative Perspectives Reccomending Tempered Standards

Though most scholars argued that the *de minimis* standard should be replaced with the adoption of the "significant difficulty or expense" standard,[359] in advance of *Groff*, a minority of scholars suggested various other approaches.[360] Most of these approaches emphasized finding a middle ground between the interests of employees and employers in granting accommodations, rather than swinging from an anti-employee *de minimis* standard to the anti-employer "significant difficulty or expense" standard.[361] To accomplish this, one scholar suggested adopting a different provision from Title I of the ADA—the "essential functions" provision—thereby

355. *See* Aslam, *supra* note 277, at 236.

356. *Id.* at 236–37.

357. *Id.*

358. *See* Blair, *supra* note 245, at 537. This scholar stated:

> Had the ADA standard been applied in Hardison, the result would almost certainly have been different. Had TWA accommodated Hardison in his preferred way, it would have incurred a cost of $150 per month for three months. It is unlikely that $150 would have been considered a "significant difficulty or expense," and Hardison would have been accommodated.

Id.

359. *See supra* Section IV.C.1.i.

360. *See infra* notes 361–368 and accompanying text.

361. *See, e.g.*, Laura E. Watson, *(Un)Reasonable Religious Accommodation: The Argument for an Essential Functions Provision under Title VII*, 90 S. CAL. L. REV. 47, 54–55, 82–83 (2016) (arguing that Title VII's "undue hardship" jurisprudence is now swinging too far in the opposite direction of *Hardison*, and thus the "essential functions" provision should be incorporated into Title VII to protect employers and their business's functionality); 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, 763–64 (1998) (noting that Congress found that discrimination against people with disabilities was worse than religious employees, leading to the proposition that "undue hardship" under Title VII not be as stringent as under the ADA); Zaheer, *supra* note 264, at 522 ("Rather than allowing employers to reject accommodations that result in more than a de minimis cost, thereby eliminating virtually all religious accommodations, courts should require employers to accommodate all religious practices deemed 'central' to the employee's faith, unless accommodation of those practices would result in an undue (i.e., *significant*) hardship to the employer.").

allowing employers to refuse to hire or dismiss employees whose religious observance prevents them from performing the essential functions of their position.[362] Another suggested that "courts analyze Title VII cases as falling somewhere on a continuum, with one end requiring reasonable accommodation and the other end constituting undue hardship."[363] In their analysis, the scholar suggests that courts should mainly consider "the individual's statutory right to exercise religion freely . . . balanced against the employer's statutory right to be free of accommodation requirements that unduly burden its business."[364]

Another scholar posits that to find balance between employee and employer interests, Title VII's language should be changed to require accommodations of only for the "central" aspects of an employee's religious practices.[365] Some scholars suggest finding a balanced approach through EEOC regulations. [366] One recommended that the "interactive" approach to accommodations, read into the ADA by the EEOC, likewise be read into Title VII, facilitating good-faith employee-employer collaboration.[367] Another recommended changing the Title VII standard by amendment or case law to explicitly mandate the consideration of the size of the employer in determining whether an "undue hardship" is *de minimis*—previously only required by regulatory authority—mandating more accommodations from larger employers.[368]

362. *See* Watson, *supra* note 361, at 54–55, 82–83.

363. Huma T. Yunus, Note, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 682 (2004).

364. *Id.* at 683 (quoting Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 FORDHAM L. REV. 839, 857 (1985)).

365. Zaheer, *supra* note 264, at 522 ("Rather than allowing employers to reject accommodations that result in more than a de minimis cost, thereby eliminating virtually all religious accommodations, courts should require employers to accommodate all religious practices deemed 'central' to the employee's faith, unless accommodation of those practices would result in an undue (i.e., *significant*) hardship to the employer.").

366. *See infra* notes 367–368 and accompanying text.

367. Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67, 68, 71 (2019) ("Given the benefits of the interactive process to employees and employers alike, this Article argues that courts should extend the interactive-process requirement to religious accommodations. This is consistent with Title VII's aim of helping employees avoid having to choose between their jobs and their religious beliefs.").

368. *See* Miller, *supra* note 330, at 791, 803–04 ("In the balancing of interests, it becomes immediately clear that what is 'fair to ask of one employer is not necessarily fair to ask of another employer . . . .'" (quoting Epstein, *supra* note 326, at 446–47)).

2. Groff *Provided a Better Solution by Allowing Title VII to Stand on its Own Feet Through Judicial Action*

Though the *Groff* Court's means are questionable at best, the Court ultimately provided a better solution than those offered by popular scholarship when it refused to rely on any legislation outside of Title VII.[369] By relying on Title VII alone, the Court's solution to the *de minimis* problem provides employees with security that would have been impossible had the *Groff* holding been based on the "significant difficulty or expense" standard from the ADA.[370] Moreover, Congress's inability to amend § 701(j) necessitated judicial action, making the *Groff* Court's solution a better alternative than popular scholarly suggestions.[371]

i. The Ruling in Groff Allows Title VII to Stand on its Own Feet

Abercrombie outrightly dismissed the neutrality logic undergirding *Hardison*'s interpretation of Title VII, and as such, only one more thing was needed to fix *Hardison*'s error: a reinterpretation of the *de minimis* standard.[372] Relying on the ADA to do so would jeopardize the future of religious accommodation claims and ignore congressional intent in passing both the ADA and Title VII.[373] While Congress could have amended Title VII to eliminate the *de minimis* standard, the Court's action was necessary given the historical ineffectiveness of legislation aimed at doing just that.[374]

a. The Meaning of "Undue Hardship" Under Title VII Will Not Be Vulnerable to Changes in Other Legislation or Its Case Law Under the Groff *Court's Ruling*

While the ADA marked definite progress for the rights of people with disabilities, the statute is largely "ineffective."[375] If the meaning of "undue hardship" under Title VII were dependent on the ADA, observant workers' rights would be jeopardized by the flaws in current ADA law and any changes thereof.[376] By allowing Title VII to stand on its own legs, the *Groff* Court insulated the legislation from the problems of other imperfect acts.[377]

369. *See* Section IV.C.2; *see supra* note 145 and accompanying text.

370. *See infra* Section IV.C.2.i.

371. *See infra* Section IV.C.1.ii.

372. *See* Allred, *supra* note 258, at 264.

373. *See* Section IV.C.2.i.

374. *See infra* Section IV.C.2.ii.

375. *See* Note, *Finally Protected: Analyzing the Potential of the Pregnant Workers Fairness Act*, 137 HARV. L. REV. 662, 672 (2023) [hereinafter *Finally Protected*] (arguing that the PWFA provides better protections for pregnant workers than the ADA, largely due to the flaws present in the ADA and its case law that Congress accounted for in the creation of the PWFA).

376. *See* Section IV.C.2.i.a.

377. *See supra* note 145 and accompanying text.

Put succinctly, "[l]egal scholarship tends to view the ADA as a failure for plaintiffs."[378] The Act itself has been criticized by scholars for being "vague and confusing" and lacking in "useful guidance [for] employers."[379] While it is undoubtedly better to have a definition for "undue hardship" in the ADA itself, the provided definition nonetheless causes confusion in the courts,[380] leading to many courts consistently construing the standard against employees.[381] The vague terms facilitate the import of biases against disabled workers, wherein courts overemphasize the cost of accommodation and downplay less concrete social benefits of diversity in the workplace.[382] Relevant statistics regarding ADA case law bring this problem to life; over 90% of defendants at the trial level win cases under the ADA.[383] Appellate outcomes do not provide any more promise as 60% of appeals result in pro-defendant reversals, with pro-plaintiff reversals in only 21% of cases.[384] These trends are not solely due to a lack of relevant case law— even where there is precedent,[385] it is "severely underdeveloped" and "in a state of chaos."[386]

ADA case law has disappointed a large number of disability advocates with its ineffectiveness.[387] If Title VII were to be opened up to this can of worms, as some scholars suggest, [388] observant employees could likewise face the poor outcomes that disabled workers face under the ADA.[389] The

378. Charlotte L. Lanvers, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & PUB. POL'Y 381, 387 (2007).

379. *See* Zarin, *supra* note 313, at 512.

380. *See Finally Protected*, *supra* note 375, at 674 (referring to the ADA "undue hardship" definition as "loosely defined").

381. *Id.* at 675–76.

382. *Id.*

383. *See* Lanvers, *supra* note 378, at 387 (describing such as a "windfall," but going on to argue that this rate is due to narrow-minded conceptions as to what constitutes a "disability" under the statute).

384. *Id.* at 390 ("Colker reviewed 720 appellate cases filed after January of 2000 and found that ADA cases resulted in pro-defendant reversals in 60% of cases and pro-plaintiff reversals in only 21% of cases. In contrast, of the Title VII claims filed during the same period, 34% received pro-plaintiff reversals and 41% resulted in pro-defendant reversals.").

385. Little precedent exists due to the fact-intensiveness of reasonableness inquiries for accommodations. *See Finally Protected*, *supra* note 375, at 676.

386. *Id.* (quoting Jeannette Cox, *Reasonable Accommodations and the ADA Amendments' Overlooked Potential*, 24 GEO. MASON L. REV. 147, 147 (2016)).

387. *Id.* at 663 (comparing the ADA with the PWFA, stating, "[a]t the same time, a curious dissonance exists: the [ADA], the statute that the PWFA's text largely mirrors, has been widely criticized as ineffective for employees and described as one of the least plaintiff-friendly civil rights statutes").

388. *See supra* note 356 and accompanying text.

389. *See Finally Protected*, *supra* note 375, at 663.

Groff Court was correct in its assertion that "it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[390]

b. Interpreting a New Definition Within the Statute of Title VII Respects Legislative Intent Behind Title VII

Importing the "significant difficulty or expense" standard from the ADA into Title VII differs from Congress's previous incorporation of the standard into other areas of employment law.[391] The other Acts that adopted the "significant difficulty or expense" standard all did so with congressional action—showing congressional approval—after the ADA was passed.[392] Adopting the standard into Title VII through judicial action differs from past adoptions of the "significant difficulty or expense" standard in two respects. First, and more obviously, Title VII was passed and amended years before the ADA was passed.[393] If the Court were to import the ADA's standard into Title VII, it would be projecting a meaning that Congress did not necessarily intend in the original 1964 legislation or the 1972 Amendments.[394] By doing so, the Court would be intruding on the legislature's authority and violating the separation of powers.[395] Through its adoption of a "significant" standard based in the text of Title VII alone, the Court restored the intent of Congress in passing Title VII and the 1972 amendments without imputing any meaning that Congress did not intend.[396]

ii. Legislative Approaches Have Historically Failed, Necessitating a Judicial Solution

Decades of congressional inaction rendered a ruling by the Court necessary.[397] Only two months after *Hardison*, Congress first proposed amending Title VII to overrule the *de minimis* standard.[398] By the time the Court decided *Groff*, almost fifty years later, Congress had not yet passed an

390. Groff v. DeJoy, 143 S. Ct. 2279, 2295 (2023).

391. *See supra* Section IV.C.1.i.a.

392. *See supra* Section IV.C.1.i.a.

393. *See supra* Section II.A.

394. *Groff*, 143 S. Ct. at 2295.

395. *See supra* note 158 and accompanying text.

396. *See supra* notes 145, 158 and accompanying text.

397. Allred, *supra* note 258, at 285.

398. *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 (2005) ("In August 1977, New York Congressman Stephen J. Solarz introduced legislation to amend section 701(j) of title VII by replacing undue hardship with 'severe material hardship.'" (quoting H.R. 8670, 95th Cong. (1st Sess, 1977))).

amendment to section 701(j) regarding the meaning of "undue hardship."[399] Interestingly, the Workplace Religious Freedom Act, which proposes the introduction of the "significant difficulty or expense" standard into Title VII, was introduced annually for nearly 20 years and did not pass.[400] Given the ineffectiveness of congressional proposals, the *Groff* Court correctly acted when it replaced the *de minimis* standard with the significant standard.[401]

D. The Court's Holding in Groff *Should Positively Affect American Workplaces by Facilitating Increased Religious Diversity*

The biggest asset of this country and its workplaces is diversity.[402] Diversity invites collaboration, discussion, and growth.[403] Religious diversity is growing in the United States, and religious expression is increasing in the workplace.[404] With more employees expressing religiosity in the workplace, there is a greater need for protection, which the *Groff* Court addressed by raising the standard under which employers may be excused from the accommodation requirement of Title VII.[405] More employees' observances should be protected in the workplace, which should lead to positive impacts on all religious employees, especially those from minoritized faiths who suffer disproportionate rates of religious discrimination in the workplace.[406]

1. Religiosity and Religious Diversity Are the Biggest Assets of the United States and Its Workplaces and Are Increasing Nationally

An increasingly religious and religiously diverse nation will benefit from the protections offered by a reinvigorated Title VII.[407] The American workforce is also increasing in religious diversity, with more minority religions present in the workplace,[408] alongside more religious observance

399. *Id.*; Allred, *supra* note 258, at 285.

400. *See* Caplen, *supra* note 398, at 587–88; Zaheer, *supra* note 264, at 509. From 1994 to 2012, Congress failed to pass the Act. *See* Dallan H. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 709–10 (2015) (describing how the last bill, proposed in late 2012, died in committee).

401. *See supra* notes 397–400 and accompanying text; Groff v. DeJoy, 143 S. Ct. 2279, 2294 (2023).

402. *See infra* Section IV.D.1.

403. *See infra* Section IV.D.1.

404. *See infra* Section IV.D.1.

405. *See infra* Section IV.D.1.

406. *See supra* Section IV.B.2.ii.

407. *See infra* note 413 and accompanying text.

408. *See* Sonia Ghumann et al., *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. & PSYCH. 439, 448 (2013) (describing the decreasing prevalence of Christians in the workplace and increased presence of religious minorities).

and expression in the workplace.[409] The number of white Christians in the American workplace has decreased from 81% in 1976 to 43% in 2016.[410] In the same amount of time, the number of people unaffiliated with a religion increased to 24%, tripling from 1976.[411] Likewise, since the 1970s, the number of Hindu, Buddhist, and Muslim congregations in the United States tripled.[412] Given the growing number of Americans practicing religion, and practicing minority religions in the workplace, the resurrection of Title VII in *Groff* will allow them to substantively protect their right to work and be accommodated.[413]

Diversity is the United States's biggest asset.[414] We are the "melting pot" of thoughts, cultures, and beliefs—and our country is better for it.[415] The inclusion of religious individuals, especially those from varying religious backgrounds, contributes to meaningful conversations and the growth of the nation.[416] Diversity is not only an asset to the United States as a whole, but also to each and every workplace in the country.[417] Congress recognized such in the passing of the Civil Rights Act of 1964 and the 1972 Amendments to Title VII.[418] Congress's specific inclusion of religious individuals as a protected group shows the high value it placed on not just diversity alone, but also on the religious diversity of the American workplace.[419]

A "significant" threshold for "undue hardship" will excuse less employers from making accommodations than a *de minimis* standard.[420] Every accommodation costs the employer something, thereby allowing employers to easily demonstrate a cost and excuse themselves under the *de minimis* standard.[421] The *de minimis* standard thus "poses an almost insurmountable burden on religious employees, while imposing no burden on

409. *See* Selznick, *supra* note 235, at 183 (noting the increased religious expression and religious conflicts in the workplace).

410. *See id.* at 185.

411. *See id.* at 185–86.

412. *See id.* at 186.

413. *See* Flake, *supra* note 256, at 1677–78 (describing the growing pressure on employers to accommodate more religious observances, and more forms thereof, which will lead to increased litigation under Title VII).

414. Blair, *supra* note 245, at 517.

415. *Id.*

416. *Id.*

417. *Id.*

418. *See supra* Section II.A.

419. *See supra* Section II.A; Blair, *supra* note 245, at 517.

420. Zaheer, *supra* note 264, at 520.

421. *Id.*

employers."[422] However, by requiring significant costs to be excused from the accommodation requirement, more employees will be accommodated.[423]

2. The Groff *Decision Affords More Religious Protection in the Workplace—But Leaves Important Questions Unanswered*

While *Groff* leaves a lot of promise for future religious accommodation, it nonetheless leaves a bit of a sour taste in the mouth.[424] Two questions ring out: First, what should we make of the Court's deceptive decision-making process? Second, what kind of religious practice will be protected under the new "significant" standard?

One could speculate about the reasons as to why the Court did not explicitly overrule or abrogate *Hardison*. Whatever the reason may be—whether it be that the Court fears public backlash similar to that sparked by *Dobbs v. Jackson Women's Health*,[425] or accusations of another *Lochner* era[426]—it bodes ominously on the integrity of the Court and our judicial process, especially considering that the Court appears to be making a habit of this deceptive form of judicial policy-making.[427]

422. *Id.*

423. *Id.*

424. *See supra* Section IV.C.2.i.

425. 142 S. Ct. 2228 (2022). For more information on the backlash that followed *Dobbs*, see Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Approval and Legitimacy in a Post-Dobbs World*, 10 SCIENCE ADVANCES 1, 1 (2024) (noting that the Court's "special status has evapotrated," as evidenced by the 20% drop in trust in 2022, with no increase in trust in 2023); Mark Sherman & Emily Swanson, *Trust in Supreme Court Fell to Lowest Point in 50 Years After Abortion Decision, Poll Shows*, ASSOCIATED PRESS (May 17, 2023, 3:05 PM), https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1 (descrbing a poll conducted shortly after the *Dobbs* decision wherein 36% of indiviudals reporting having "hardly any" faith in the court, a rise from the previous year's rate of 21%).

426. *See, e.g.*, Marc Spindelman, Dobbs*' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 153 (2023) (accusing the Court of "[d]ancing with *Lochner*'s ghost" with its the *Dobbs* decision by treading on the economic rights of people who may become pregnant); Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. AM. ACAD. MATRIMONIAL LAW 623, 645 (2023) (concluding with a warning that "such a Court [that restores the pre-New Deal era conservative Constitution] may come to live in infamy—an infamy that may surpass even that of its prior incarnation, the *Lochner* Court"); James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions?*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html (relying on the Court's decision in *Dobbs* and *West Virginia v. Environmental Protection Agency* in finding that "the foundation has been laid for, if not an outright resurrection of *Lochner*, at least a serious reappraisal").

427. This Note does not ponder such questions outside of this footnote. The scope of this Note is much more limited and focuses on one positive policy outcome that should follow this decision. However, those (rightfully) interested in and concerned with the Court's methodology should review the arguments posited by some academics who suggest that the nullification present in *Groff* is not unique and warn of what it could mean for Supreme Court jurisprudence. *See, e.g.*, Jeffrey L. Fisher, *The Other Way the Supreme Court is Nullifying Precedent*, POLITICO (Sept. 16, 2022, 04:30

In *Groff*, the Court failed to elaborate upon the definition of "religion" in Title VII.[428] It begs the questions: What religious practices will be protected under the newly invigorated Title VII? Will Courts only protect individualized practice of religion, or will they also protect offensive conduct that under the guise of religion?[429]

CONCLUSION

The Court intentionally misrepresented the holding of *Hardison* in *Groff v. DeJoy* when it claimed that the precedential case did not establish a *de*

AM), https://www.politico.com/news/magazine/2022/09/16/supreme-court-cases-precedent-00056689 (referring to the Court's tactic as "barricading precedent," an ethos similar to Justice Kavanaugh's statement: "[a]ccept it, but don't extend it").

428. *See generally*, Groff v. DeJoy, 143 S. Ct. 2279 (2023).

429. I believe that, generally, religious expression in the workplace falls into two categories: defensive and offensive (practices protected by conscience clauses are set aside during this discussion, due to the excessive nuance outside the scope of this Note). Defensive religious practice refers to observance wherein individuals who merely wish to abide by their own beliefs without projecting them onto others—such as wearing religious garments, refraining from work on the Sabbath, or taking prayer breaks throughout the day. For examples that I would consider to be "defensive" religious practice, *see supra* notes 275–283 and accompanying text. Inevitably, some coworkers will experience annoyance with accomodations, perceiving them to be unfair under a neutrality ethos (such as that embodied in *Hardison*) or because of their own bias. I would argue, however, much like the *Groff* Court stated, that "a coworker's dislike of 'religious practice and expression in the workplace' or 'the mere fact [of] an accommodation' is not 'cognizable [as a] factor . . ..'" Groff v. DeJoy, 143 S. Ct. 2279, 2296 (2023). Offensive religious practice refers to observance that actively treads upon another's freedom, posing an "undue hardship" on another, if you will. Justice Sotomayor seemed to allude to such practices in her concurrence. *Id.* at 2297–98 (Sotomayor, J., concurring) (emphasizing the importance of undue harships on an observant employee's coworkers still constitutes an undue hardship on the overall context of the employer's business). Examples of offensive religious expression in the workplace include deadnaming and misgendering others, denying marriage licenses to same-sex couples, or generally discriminating against others in the name of religion. *See* Kluge v. Brownsburg Community School Corp., 64 F.4th 861, 865 (7th Cir. 2023) (describing the case of a teacher who refused to call trans children by their true name, refusing to "encourage them in sin," and whose request to rescind his resignation was refused after his accommodation to only refer to the children by their last names left them feeling "alienated, upset, and dehumanized" and failed to prevent his continued misgendering and deadnaming of students); Christine Hauser, *Kentucky Clerk Who Denied Same-Sex Marriage Licenses Must Pay $260,000 in Legal Fees*, N.Y. TIMES (Jan. 4, 2024), https://www.nytimes.com/2024/01/04/us/kim-davis-marriage-licenses-legal-fees.html (describing a recent update in the case of Kim Davis, who gained notoriety in 2015 after she refused to issue a marriage license to a same-sex couple because it conflicted with her religious beliefs); Lawrence D. Rosenthal, *Title VII's Unintended Beneficiaries: How Some White Supremacist Groups Will be Able to Use Title VII to Gain Protection from Discrimination in the Workplace*, 84 TEMP. L. REV. 443, 474–75, 477 (2012) (describing how the broad definition of "religion" under Title VII allows white supremacist groups to formulate their teachings to specifically gain Title VII protections as a "religion"). Notably, the plaintiff from *Kluge* submitted an amicus curaie brief to the Court for *Groff*, encouraging the Court to overrule *Hardison*, stating "*stare decisis* is no impediment." Brief for John Kluge as Amici Curiae in Support of Petitioner at 23, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174).

minimis standard.[430] However, by holding in *Groff* that an employer may only establish an "undue hardship" through demonstration of a *substantial* burden on an employer in the overall context of their business,[431] the Court returned Title VII to its full potency.[432] By doing so, the Court's decision in *Groff* should result in greater workplace protections for observant Americans, especially those of minoritized faiths.[433]

430. *See supra* Section IV.A.
431. Groff, 143 S. Ct. at 2294.
432. *See infra supra* Section IV.B.
433. *See supra* Section IV.D.