GROFF V. DEJOY: THE DEATH OF THE "DE MINIMIS" TEST BREATHES LIFE BACK INTO RELIGIOUS ACCOMMODATION*

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In a unanimous decision last June, the Supreme Court in *Groff v. DeJoy* heightened the standard employers must satisfy to deny religious accommodations to their employees, clarifying a precedent that has been a thorn in the side of religious adherents for nearly 50 years.[1]

Under the 1972 amendments to Title VII of the Civil Rights Act of 1964, an employer must accommodate the religious practices of its employees unless it can demonstrate "undue hardship" on the conduct of its business.[2] In 1977, the Supreme Court in *TWA v. Hardison* defined the phrase "undue hardship" to mean "more than a de minimis cost."[3] Thereafter, the amendments that were intended by Congress to codify robust protections for religious employees for "all time"[4] were instead used to deny religious accommodations whenever an employer could cite a trivial burden. Under this low bar, the district court[5] and the Third Circuit[6] denied relief to Petitioner Gerald Groff, a devout Christian who resigned from the United States Postal Service (USPS) after it refused to accommodate his Sunday Sabbath observance.[7]

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] 143 S. Ct. 2279 (2023).

[2] 42 U.S.C. § 2000e(j).

[3] TWA v. Hardison, 432 U.S. 63, 84 (1977).

[4] 118 Cong. Rec. 705 (1972).

[5] Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *1 (E.D. Pa. Apr. 6, 2021).

[6] Groff v. DeJoy, 35 F.4th 162 (3d Cir. 2022).

[7] *Id.* at 167.

The disparity between Title VII's actual text and the "more than a de minimis cost" standard, conceded by the government[8] and even an amicus brief from Americans United for Separation of Church and State,[9] paved the way for a unified decision authored by Justice Samuel Alito. The opinion explicitly rejected the "more than a de minimis cost" test and pronounced that, under *Hardison*, "undue hardship" means that "a burden is substantial in the overall context of an employer's business."[10] This holding effectuated an about-face for religious freedom in the workplace, forbidding employers from relying on one line from *Hardison* to defeat religious accommodation requests.[11] And the Court did not need to overturn *Hardison* to get there, as "substantial costs" are referenced repeatedly throughout that opinion.[12]

Groff also addressed the extent to which burdens on fellow employees justify denying religious accommodations, since the Third Circuit had held that the imposition on Groff's co-workers, including decreased morale, constituted an "undue hardship."[13] *Groff* concluded that burdens on other employees alone are not enough; such burdens have to impact the conduct of the employer's business to constitute an undue hardship under Title VII.[14]

Both of these conclusions will fundamentally change the way employers and courts review religious accommodation requests. This article addresses these changes in theory and practice and will proceed in three parts. It begins by summarizing the *Groff* decision, including Justice Alito's comprehensive background of the "undue hardship" standard and the First Amendment issues on the Supreme Court's mind when it first encountered *Hardison*. It next sets forth employment law principles that *Groff* gave renewed emphasis, providing a primer for employers concerned about their Title VII compliance. Lastly, it explains how *Groff* changed the law. This includes its effect on cases dealing with traditional kinds of religious accommodation requests involving religious garb, absences, and speech, as well as newly emerging requests that courts are increasingly grappling with today, such as those involving preferred pronouns, vaccinations, and pharmaceutical products.

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[8] Br. for United States at 30, *Groff*, 143 S. Ct. 2279.

[9] Br. for Americans United for Separation of Church and State as Amicus Curiae at 4, *Groff*, 143 S. Ct. 2279 ("*Hardison* is wrong in too many ways to withstand scrutiny.").

[10] *Groff*, 143 S. Ct. at 2294.

[11] *Id.*

[12] *Hardison*, 432 U.S. at 83 n.14.

[13] *Groff*, 35 F.4th at 175.

[14] *Groff*, 143 S. Ct. at 2296.

I. SUMMARY OF OPINION

A. Facts

Gerald Groff is a Christian and Sunday Sabbath observer whose religious beliefs dictate that Sunday is meant for worship and rest, not "secular labor" and the "transport[ation]" of worldly "goods."[15] He began working for the USPS in 2012 but was not required to work on Sundays at that time.[16] When his post office began delivering packages for Amazon on Sundays, he transferred to a post office in Holtwood, Pennsylvania that had not yet implemented Sunday Amazon deliveries.[17] In 2017, the Holtwood post office also began delivering Amazon packages on Sundays.[18]

Since Groff would not work on Sundays due to his sincerely held religious beliefs, others on the Holtwood staff, including the postmaster, performed Sunday deliveries during peak season.[19] During non-peak season, carriers working from the regional hub were assigned Groff's shifts.[20] At least one employee filed a grievance over this arrangement, which the USPS settled.[21] Groff received repeated discipline for failing to work and, knowing termination was inevitable, resigned in January 2019.[22]

Groff sued the USPS for discriminating against him on the basis of his religion in violation of Title VII.[23] The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the USPS,[24] which the Third Circuit affirmed over Judge Thomas Hardiman's dissent.[25] Following *Hardison*'s "more than a de minimis cost" test, the panel determined there was undue hardship because accommodating Groff "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."[26] The dissent, on the other hand, emphasized that

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[15] *Id.* at 2286.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 2286 n.1.
[22] *Id.* at 2287.
[23] *Id.*
[24] *Groff*, No. 19-1879, at *1.
[25] *Groff*, 35 F.4th at 164-65.
[26] *Id.* at 175.

"impact on coworkers alone" was not enough to constitute undue hardship "without showing business harm."[27]

B. Overview of "Undue Hardship"

In an overview comprising more than half the opinion, Justice Alito thoroughly examined the Supreme Court's decision in *Hardison*, including the history of the phrase "undue hardship" and the state of the Establishment Clause at that time. This lengthy history was warranted, given it was the Court's "first opportunity in nearly 50 years to explain . . . [*Hardison*'s] contours . . . ."[28]

1. 1972 Amendments

Title VII makes it unlawful for covered employers to "fail or refuse 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."[29] The phrase "undue hardship" was not included in the original text passed in 1964. In 1967, the EEOC introduced the language, requiring employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business."[30]

Responding to lower court decisions rejecting a duty to accommodate,[31] Congress added "undue hardship" to Title VII's 1972 amendments in the definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

[27] *Id.* at 176 (Hardiman, J., dissenting).

[28] *Groff*, 143 S. Ct. at 2287.

[29] 42 U.S.C. § 2000e–2 (a)(1).

[30] *Groff*, 143 S. Ct. at 2287-88 (citing 29 CFR § 1605.1 (1968)).

[31] *Id.* at 2288 (discussing Dewey v. Reynolds Metals Co., 429 F.2d 324 (1970), *aff'd*, 402 U.S. 689 (1971)); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971). Indeed, the sponsor of the amendments, Senator Jennings Randolph—himself a Seventh Day Baptist—said the amendments were intended to "resolve by legislation" court decisions such as *Dewey* that had "clouded the matter with uncertainty." 118 Cong. Rec. 705-06 (1972). And the Chairman of the House Committee stated, "[t]he purpose of th[ese] [amendments] . . . is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as [the EEOC's 1967 guidelines] . . . challenged in Dewey . . . ." 118 Cong. Rec. 7167 (1972).

> religious observance or practice without undue hardship on the conduct of the employer's business.[32]

This definition made it clear that Title VII does not just protect employees from discrimination based on their religious beliefs, but also from discrimination based on their religious practices, including through the use of generally applicable policies.[33]

2. *TWA v. Hardison*

The *Groff* opinion next turned to *Hardison* itself, which interpreted the 1967 regulation and not the text of Title VII, since the dispute arose before the enactment of the 1972 amendments.[34]

Hardison, a clerk in the Stores Department of the Kansas City base of Trans World Airlines (TWA), underwent a religious conversion after being hired but was denied a religious accommodation for his Saturday Sabbath observance.[35] The accommodation that he sought would have overridden seniority rights granted by the relevant collective bargaining agreement, a dispositive fact in the eventual Supreme Court opinion.[36] Hardison was eventually terminated for "insubordination" and brought a lawsuit against TWA and his union, International Association of Machinists and Aerospace Workers (IAM).[37]

a. The Establishment Clause in Hardison

The Establishment Clause played a central role in the ensuing litigation, with the Eighth Circuit rejecting defendants' arguments that the statute violated it, and the Supreme Court granting TWA's petition for certiorari presenting the same issue on appeal, "particularly insofar as [the Eighth Circuit]

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[32] 42 U.S.C. § 2000e(j).

[33] *See Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

[34] Since *Hardison* did not interpret the actual text of Title VII, Justice Clarence Thomas has argued that its reasoning is merely dicta. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 787 n.1 (2015) (Thomas, J., concurring in part and dissenting in part). Groff made the same point in this case. Br. for Pet'r at 13, *Groff*, 143 S. Ct. 2279. The *Groff* opinion addressed Justice Thomas's concerns explicitly, stating, "because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of 'undue hardship,' we need not reconcile any divergence between *Hardison* and the statutory text." *Groff*, 143 S. Ct. at 2294 n.15.

[35] *Groff*, 143 S. Ct. at 2288-89.

[36] *Id.* at 2290.

[37] *Id.* at 2289.

had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement."[38]

In its brief, TWA applied the *Lemon* test, set forth in *Lemon v. Kurtzman* six years earlier, and argued that accommodations under Title VII had "the primary purpose and effect of advancing religion and entail[ed] 'pervasive' government 'entanglement . . . in religious issues.'"[39]

Nevertheless, the Court's opinion did not even mention the Establishment Clause, causing many to believe that it "must have been based on constitutional avoidance."[40] Justice Alito said as much at oral argument.[41] Given that the Court abrogated the *Lemon* test in last term's *Kennedy v. Bremerton School District*,[42] the majority's inclusion of this context in the *Groff* opinion seems to imply a view that the constitutional concerns underlying the *Hardison* decision were unfounded.

b. Seniority Rights in Hardison

Instead of focusing on the Establishment Clause, the *Hardison* Court framed the issue as whether an employer has an obligation to violate a seniority system to accommodate the religious practices of a junior employee.[43] The only way Hardison could have been accommodated was to force senior employees to take his shifts, and the Court held that Title VII did not require TWA to go that far.[44] This was so because Title VII carves out special protections for such seniority systems,[45] and the Court had previously held that their "routine application" was not unlawful.[46]

c. Hardison*'s "More Than a De Minimis Cost"*

Although the parties did not discuss the standard of undue hardship in their briefing or oral argument, the *Hardison* Court concluded its analysis by

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[38] *Id.* at 2289, 2289 n.6 (quoting Pet. for Cert., *Hardison*, No. 75-1126, at 2-3, 17-22). The Supreme Court also granted IAM's petition, but it designated TWA as the lead petition. *Id*. at 2289.

[39] *Id.* at 2290 (quoting Br. for Pet'r at 20, *Hardison*, 432 U.S. 63).

[40] *Id.* at 2290 n.9. Other recent cases before the high Court had also considered the issue, such as *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976) (per curiam), an evenly divided affirmance upholding an accommodation despite an Establishment Clause challenge, and *Dewey v. Reynolds Metals Co*., 402 U.S. 689 (1971) (per curiam), which rejected the 1967 guidelines due to Establishment Clause avoidance. *Id.* at 2289.

[41] Tr. of Oral Argument at 19:25-20:24, Groff v. DeJoy, 22-174 (Apr. 18, 2023).

[42] 142 S. Ct. 2407, 2427 (2022).

[43] *Groff*, 143 S. Ct. at 2290.

[44] *Id.*

[45] *See* 42 U.S.C. § 2000e–2(h).

[46] *Groff*, 143 S. Ct. at 2290 (citing *Hardison*, 432 U.S. at 82).

asserting that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[47] But while "this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term 'undue hardship,' it is doubtful that it was meant to take on that larger role."[48]

Why? First, the *Hardison* majority "described the governing standard quite differently" no fewer than three times throughout the opinion, "stating . . . that an accommodation is not required when it entails 'substantial' 'costs' or 'expenditures.'"[49] "Substantial costs" is far more textually consistent with Title VII than "more than a de minimis cost."

And second, because of *Hardison*'s concern with seniority rights. Justice Thurgood Marshall proposed that TWA could have accommodated Hardison by paying employees overtime wages until Hardison could transfer to the night shift in three months.[50] The *Hardison* majority rejected this proposal, but not because of the "more than a de minimis cost" that it would entail.[51] Instead, the Court was concerned with the accommodation's impact on seniority rights, disagreeing that Hardison would have had enough seniority to work the night shift in three months, and finding that TWA would have had to pay overtime wages to Hardison's co-workers indefinitely.[52] Since it was "not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights," *Hardison*'s holding does not speak to the kinds of costs that would justify denying religious accommodations when seniority rights are not involved.[53]

d. The Legacy of Hardison*'s "More Than a De Minimis Cost" Test*

The *Groff* opinion went on to describe how lower courts have "latched on" to *Hardison*'s "de minimis" language despite its "fleeting" discussion, the multiple mentions of "substantial" costs, and the focus on seniority rights.[54] And while the *Groff* Court acknowledged the government's argument that many lower courts had gotten it right by interpreting *Hardison*'s "de

[47] *Id.* at 2291 (quoting *Hardison*, 432 U.S. at 84).

[48] *Id.* at 2291-92.

[49] *Id.* at 2292 (quoting *Hardison*, 432 U.S. at 83 n.14).

[50] *Id.* at 2291. This would have cost TWA, one of the largest airlines in the world at the time, approximately $150 per month (or $1,250 in 2022). *Id.*

[51] *Id.* at 2292.

[52] *Id.* at 2291. This would have cost TWA approximately $600 per year (or $5,000 per year in 2022). *Id.*

[53] *Id.* at 2292.

[54] *Id.*

minimis" language in light of its facts and reasoning, amicus briefs from "a bevy of diverse religious organizations," including Sikhs, Muslims, Orthodox Jews, and Seventh Day Adventists, told a different story.[55] Furthermore, though the EEOC had attempted to mitigate *Hardison*'s damage by stating that re-scheduling costs, temporary overtime pay, and voluntary shift swaps are not an undue hardship, lower courts had not always ruled that way.[56] Transitioning to the analysis portion of the opinion, the Court made one thing clear: *Hardison*'s "de minimis" language should not be taken literally.[57]

C. Analysis

1. Death of the "More Than a De Minimis Cost" Test

The Court began its analysis with the parties' common ground: the "more than a de minimis cost" test "does not suffice to establish undue hardship under Title VII."[58] Grounding its analysis in the text of Title VII, the Court provided definitions of the words "undue" and "hardship" from dictionaries contemporaneous with the 1972 amendments.[59] "Hardship" was commonly defined as "suffering" or "privation" and "under *any* definition, a hardship is more severe than a mere burden."[60] Costs on the employer must therefore constitute not only a burden, but an "undue" one, with undue defined as "excessive" or "unjustifiable."[61]

The natural and ordinary understanding of "undue hardship" when the phrase was adopted is therefore more akin to the "substantial costs" and "substantial expenditures" of *Hardison* rather than the legal definition of "de minimis": "very small or trifling."[62]

While agreeing "de minimis" had to go, the parties differed in their suggested definitions.[63] Groff proffered a "significant expense or difficulty" test, which is how "undue hardship" is defined in the Americans with Disabilities

[55] *Id.*
[56] *Id.* at 2293, 2293 n.12.
[57] *Id.* at 2293-94.
[58] *Id.* at 2294.
[59] *Id.*
[60] *Id.* (emphasis added).
[61] *Id.*
[62] *Id.* at 2295 (quoting BLACK'S LAW DICTIONARY, at 388). This was also demonstrated by the EEOC regulation that *Hardison* ratified, the EEOC's use of the phrase before the amendments were enacted, and the use of "undue hardship" in other statutes. *Id.* at 2295.
[63] *Id.*

Act.[64] The government, on the other hand, asked the Court to clarify that *Hardison*'s reference to "substantial" costs controls.[65]

Adopting the government's formulation, the Court reasoned it was 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 the particular business."[66] It stressed, however, that the "favored synonym" is not as important as the process.[67] And the process requires the employer to consider "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"[68]

The parties had another difference of position. *Groff* asked the Court to make ADA case law the polar star, while the government requested that the Court affirm all EEOC guidance on *Hardison*.[69] The Court declined to do either. It did not address the propriety of Groff's request, but the Court did explain that it would not be reasonable to "ratify *in toto* a body of EEOC interpretation" pre-dating the clarification in *Groff*, even if a "good deal" of it remains post-*Groff*.[70] Ultimately, "[w]hat is most important is that 'undue hardship' in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test."[71]

2. Burdens on Co-Workers

The Court then addressed the second question presented, adopting many of the government's arguments in the process. It began by noting that the parties agreed that accommodations must be evaluated in light of their impact on "the conduct of the employer's business," which is required by the statute.[72] Hence, courts may only examine the accommodation's impacts on co-workers—which the Third Circuit had found dispositive—if they affect the conduct of the business.[73] Moreover, as the government stressed, some

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* (quoting Br. for United States at 40, *Groff*, 143 S. Ct. 2279 (internal quotation marks omitted)).
[69] *Id.*
[70] *Id.* at 2296.
[71] *Id.*
[72] *Id.*
[73] *Id.*

impacts on co-workers are not legally cognizable even if they affect the conduct of the business, including bias or hostility to a particular religion, religion in general, or the idea that religion should be accommodated.[74] Considering such burdens would make Title VII "at war with itself."[75]

The Court next clarified that Title VII requires accommodation, not just an evaluation of the reasonableness of a given accommodation, proffered by the employee or otherwise.[76] It would therefore be insufficient for the USPS to determine that compelling Groff's co-workers to work overtime would constitute an undue hardship without also considering other possible accommodations such as volunteer shift swaps.[77]

In conclusion, the Court noted that in following the "de minimis" test, the Third Circuit may have failed to consider certain accommodations such as incentive pay or coordinating with other stations employing more people.[78] Acknowledging that the government might still prevail, it vacated and remanded.[79]

D. Concurrence

The concurrence, authored by Justice Sonia Sotomayor and joined by Justice Ketanji Brown Jackson, also acknowledged that "de minimis" was "loose language" and that "[t]he statutory standard is undue hardship, not trivial cost."[80] *Hardison*'s value lay not in one misconceived line, however, but in its facts and reasoning.[81]

An undue hardship existed in *Hardison* because accommodating the employee would have deprived other employees of seniority rights under the collective bargaining agreement or caused substantial costs to the business, such as higher wages and lost efficiency.[82] In the concurrence's view and as advanced by the Solicitor General at oral argument,[83] the EEOC under seven

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2297.
[78] *Id.*
[79] *Id.*
[80] *Id.* (Sotomayor, J., concurring).
[81] *Id.*
[82] *Id.*
[83] Tr. of Oral Argument at 56:7-10, Groff v. DeJoy, 22-174 (Apr. 18, 2023).

presidential administrations from Reagan to Biden had properly interpreted *Hardison* within these broader parameters.[84]

The concurrence next applauded the Court for clarifying that "undue hardship" under *Hardison* means "substantial costs," rather than overruling the case in favor of the ADA's "significant difficulty or expense" standard.[85] It explained that stare decisis has the most force in statutory interpretation cases and that Congress had both "spurned" several attempts to reverse *Hardison* and amended Title VII in response to other Supreme Court decisions.[86] The opinion thus preserved the separation of powers by preventing interested parties from circumventing the legislative process to achieve their preferred policies.[87]

Finally, the concurrence addressed the second issue presented. Groff had asked the Court to say that undue hardship can only be met by showing burdens on the business.[88] But the concurrence explained that the text of the statute requires the showing of undue hardship on the "*conduct* of the employer's business," which includes burdens on the functioning and control of the business's employees.[89] After all, even *Hardison* turned on other employees' seniority rights.[90] The concurrence nonetheless acknowledged that some burdens on co-workers will not rise to the level of undue hardship, such as hostility towards a protected group or managing voluntary shift swaps.[91]

II. THE AFTERMATH OF *GROFF*: WHAT STAYS THE SAME?

Several key employment law principles continue in full force after *Groff*. They are worth mentioning given their fresh emphasis in the opinion and the tendency of employers to overlook or contravene them.

First, *Hardison* is still good law, but it is most applicable to cases involving its "principal issue": seniority rights.[92] Such rights are given special protection in Title VII and, regardless of any undue hardship inquiry, employers are

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[84] *Groff*, 143 S. Ct. at 2297 (Sotomayor, J., concurring). Even so, the majority pointed out that decisions taking into account *Hardison*'s facts and reasoning still lack the clarification of the Court's decision in *Groff*. *Groff*, 143 S. Ct. at 2296.

[85] *Id.* at 2297.

[86] *Id.* at 2297-98.

[87] *Id.* at 2297.

[88] *Id.*

[89] *Id.* (emphasis added).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 2290-92.

never required to transgress them to accommodate the religious beliefs and practices of their employees.[93]

Second, the burden is on the employer to demonstrate undue hardship. Indeed, "*[t]he 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."[94] "Undue hardship" is therefore not a trump card to be used in conclusory fashion. Rather it must be supported by direct evidence of "substantial costs" in the "overall context" of the employer's business, taking into account "all relevant factors . . . , including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."[95]

Third, some evidence of undue hardship is simply "off the table" and always has been.[96] As the Court asserted, "[t]o the extent that this was not previously clear," an employer cannot deny an accommodation because of "animosity to a particular religion, to religion in general, or to the very notion of accommodation religious practice[.]"[97] The reasoning of cases like *EEOC v. Sambo's of Georgia, Inc.*—in which a restaurant failed to hire a Sikh man for a managerial position, citing the public's "aversion to, or discomfort in dealing with, bearded people" as an undue hardship—is therefore completely untenable.[98]

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[93] *Id.* at 2292-94.

[94] *Id.* at 2295 (citing *Hardison*, 432 U.S. at 83 n.14) (emphasis added).

[95] *Id.* at 2294-95. As the government argued in its brief, "the EEOC has emphasized that the . . . burden remains on the employer to 'demonstrate how much cost or disruption the employee's proposed accommodation would involve' with 'objective information'—not reliance on 'hypothetical hardship.'" Br. for United States at 30, *Groff*, 143 S. Ct. 2279 (quoting EEOC, Compliance Manual § 12-IV(B)(1)). This puts to bed reasoning used in numerous cases decided before *Groff*. *E.g.*, Weber v. Roadway Exp., Inc., 199 F.3d 270, 274-75 (5th Cir. 2000) ("Roadway's hypotheticals regarding the effects of accommodation on other workers are not too remote or unlikely to accurately reflect the cost of accommodation."); Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1293 (S.D. Tex. 1996) (rejecting argument that under Title VII, employers could "deny requests [for religious accommodations] only when they were certain in advance that the requested absence would cause an undue hardship"); Decls. of Krista O'Dea, New Yorkers for Religious Liberty v. City of New York, 1:22-cv-00752, ECF Nos. 15 and 53 (E.D.N.Y. Sept. 6, 2022) (allowing discharge of paramedic for religious objections to vaccination due to "the potential for undue hardship"), appeal argued, 22-1801 (2d. Cir. Feb. 8, 2023).

[96] *Groff*, 143 S. Ct. at 2296.

[97] *Id.*

[98] 530 F. Supp. 86, 89 (N.D. Ga. 1981), abrogated by *Groff*, 143 S. Ct. at 2296; *see also* Camara v. Epps Air Service, Inc., 292 F. Supp. 3d 1314, 1318-19 (N.D. Ga. 2017) (finding that permitting a Muslim customer service representative to wear her hijab would constitute more than a de minimis hardship because it would "adversely affect the image that [the employer] seeks to present to the

Fourth, Title VII requires an employer to make an affirmative effort to accommodate an employee. This means it cannot stop at evaluating and dismissing one possible accommodation.[99] It must consider reasonable alternatives.[100] Therefore, employers faced with religious absence requests cannot just conclude that compelling their other employees to work overtime would constitute an undue hardship; they must also consider asking for volunteers to swap their shifts, among other alternatives.[101]

Fifth, "a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by [the] clarifying decision [in *Groff*]."[102] This includes the EEOC's caution "against extending [undue hardship] to cover such things as the 'administrative costs' involved in reworking schedules, the 'infrequent' or temporary 'payment of premium wages for a substitute,' and 'voluntary substitutes and swaps' when they are not contrary to a 'bona fide seniority system.'"[103] It also includes accommodations that "the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences."[104] While some courts and employers paid little heed to this guidance prior to *Groff*,[105] it was impermissible then, and there is no excuse to ignore it now, with the caveat that the Court understandably could not "ratify *in toto*" all pre-*Groff* guidance.[106] It would not be surprising if the EEOC soon promulgates new guidance further delineating the new standard.

III. THE AFTERMATH OF *GROFF*: WHAT CHANGES?

Groff effectuated two fundamental changes for religious accommodations in the workplace. First, while *Hardison* is still good law, the "more than a de

public through a uniform policy and potentially cost it business if some customers go elsewhere"); Birdi v. UAL Corp., No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002) (finding that providing Sikh ticket agent with alternative non-customer-facing positions was a reasonable accommodation when his turban violated the grooming policy).

[99] *Groff*, 143 S. Ct. at 2296-97.

[100] *Id.*

[101] *Id.* at 2297.

[102] *Id.* at 2296.

[103] *Id.* at 2293 (citing §§1605.2(e)(1), (2)).

[104] *Id.*

[105] *E.g.*, EEOC v. Walmart Stores East, L.P., 992 F.3d 656, 659-60 (7th Cir. 2021) (finding undue hardship for employer to facilitate voluntary shift swapping); Logan v. Organic Harvest, LLC, 2:18-cv-00362, 2020 WL 1547985, at *5 (N.D. Ala. Apr. 1, 2020) (holding the employer was not required "even to assist the plaintiff in finding someone to swap shifts with him").

[106] *Groff*, 143 S. Ct. at 2296.

minimis cost" definition of undue hardship that courts previously took *Hardison* to espouse is not.[107] Instead, an undue hardship has to be substantial in the overall context of the employer's business.[108] This better comports with the text of Title VII and the reasoning of *Hardison*, which dealt with seniority rights. Accordingly, evaluating undue hardship is a commonsense, fact-specific inquiry that considers all relevant factors about the employer including its size, nature, and operating costs.[109]

And second, burdens on co-workers can only constitute an undue hardship if they impact the conduct of the business.[110]

These principles fundamentally affect the employment landscape because employers must now meet a greater burden of proof to avoid making religious accommodations. How this plays out in the lower courts will depend on the factors the Supreme Court discussed, as well as the specific types of accommodations requested. Such requests range from traditional ones like religious garb, religious absences, and religious speech—all of which were mentioned at oral argument—to newly emergent requests involving preferred pronouns, vaccination, and pharmaceutical products. Ultimately, the death of the de minimis test will make the inquiry more stringent in all cases.

A. Three Buckets of Traditional Accommodation Requests

At oral argument, the Solicitor General mentioned three common categories or "buckets" of requests in which she claimed that employers were already regularly granting accommodations, despite lower courts' reliance on *Hardison*.[111] These three categories are requests for exemptions from dress or grooming policies, requests for religious absences, and requests related to religious expression in the workplace.[112] Despite the Solicitor General's optimism, individuals in each of these types of cases have long dealt with denials of their accommodation requests under the "de minimis" standard, as amicus briefs and cases cited within the *Groff* opinion established.[113] *Groff* increases the likelihood that such cases will be resolved in favor of the religious employee, although the answer may not always be as clear when courts confront competing rights, particularly in speech cases.

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[107] *Id.* at 2294.
[108] *Id.*
[109] *Id.* at 2295.
[110] *Id.* at 2296.
[111] Tr. of Oral Argument at 77:22-79:15, Groff v. DeJoy, 22-174 (Apr. 18, 2023).
[112] *Id.* at 78:4-6, 21-22; 79:5-9.
[113] *E.g.*, *Groff*, 143 S. Ct. at 2292, 2293 nn.12-13, 2296.

1. Religious Garb

With respect to dress/grooming cases, *Groff*'s potential impact is well illustrated in the case of *Litzman v. New York City Police Department*. There, the Southern District of New York found that the NYPD was not required to accommodate an Orthodox Jewish police officer's request to wear a one-inch beard under *Hardison*'s "more than a de minimis cost" standard, but that it was required to accommodate him pursuant to the more exacting definition of "undue hardship" set forth in the New York City Human Rights Law (NYCHRL).[114] The latter is more akin to the clarified rule under *Groff*.

Litzman was denied a religious accommodation because the NYPD required its officers to be certified to use a respirator as part of its Chemical Ordinance, Biological and Radiological Awareness Training Program (CBRN), which is impossible to do with facial hair.[115] While the Department's decreased efficiency due to plaintiff's lack of CBRN certification constituted "more than a de minimis cost," it failed to satisfy the NYCHRL's more "rigorous definition of an employer's 'undue hardship' as 'an accommodation requiring significant expense or difficulty[.]'"[116] This was because the employer had not provided "details about the costs of accommodation and other individuals who may seek a similar accommodation," and the court could not "conclude that Defendants would accrue significant expense or difficulty if Plaintiff joined the 30% of NYPD officers who are not CBRN certified or those who qualify for a medical exemption . . . ."[117] This case demonstrates how *Groff* will make it easier for an employee to obtain a religious accommodation under the undue hardship standard.

While *Litzman* still resulted in the employee being accommodated due to the more demanding standard in the NYCHRL, such accommodations are the exception and not the rule in pre-*Groff* jurisprudence. For example, in 2013, the Fifth Circuit upheld an undue hardship defense against a Sikh federal employee's request to wear a three-inch dulled kirpan blade to work at the Internal Revenue Service.[118] The court was unpersuaded by the fact that other objects in the workplace such as scissors and box cutters were sharper than the kirpan, and it instead focused on the minimal daily burden on the security officers who would have to determine whether the blade was sharp

[114] No. 12 CIV. 4681 HB, 2013 WL 6049066, at *6-7 (S.D.N.Y. Nov. 15, 2013).
[115] *Id.* at *2.
[116] *Id.* at *6-7 (citing N.Y.C. Admin Code Section 8—107(3)(b)).
[117] *Id.* at *7.
[118] Tagore v. United States, 735 F.3d 324, 329-30 (5th Cir. 2013).

or dull.[119] While the Religious Freedom Restoration Act (RFRA) would have permitted the kirpan, the court said, Title VII's gutted standard contained no such requirement.[120] The reasoning of this and similar cases fails under *Groff*.[121]

A pending garb case to watch in which *Groff*'s elevated undue hardship standard may be dispositive is *Brown v. Delaware Department of Services for Children*. There, the employer terminated three Muslim youth rehabilitation counselors and caused another to resign because of their religiously required hijabs.[122] This was despite the fact that visitors, contractors, and other employees in the facility were permitted to wear hijabs, and the women had volunteered to wear numerous alternative hijabs that would have eliminated their employer's safety concerns.[123] Under *Groff*'s undue hardship analysis, the employer cannot ignore these factors. A summary judgment motion in the case is still pending.[124]

2. Religious Absences

In religious absence cases, courts have denied accommodations for a wide variety of improper reasons, including de minimis economic burdens,[125] the inconvenience of finding other employees to cover shifts,[126] the necessity of

[119] *Id.* at 326, 330.

[120] *Id.* at 330; *see also* EEOC v. GEO Grp., Inc., 616 F.3d 265, 269 (3d Cir. 2010) (concluding that it was an undue hardship to permit Muslim prison employees to wear their khimars because it would require the prison to expend "*some* additional time and resources") (emphasis added); *Camara*, 292 F. Supp. 3d at 1331-32 (finding undue hardship because the sight of a woman wearing a hijab might harm the business in light of "negative stereotypes and perceptions about Muslims"); Webb v. City of Philadelphia, 562 F.3d 256, 260-62 (3d Cir. 2009) (finding undue hardship to permit police officer to wear hijab on the job because it would threaten public perception of police department's religious neutrality).

[121] *Groff*, 143 S. Ct. at 2289-90, 2293 nn.13-14, 2294.

[122] Brown v. Del. Dep't of Servs. for Child., 1:20-cv-01048, ECF No. 57 at 4, 9, 7 (D. Del. Jan. 9, 2023).

[123] *Id.* at 3, 11-12.

[124] *Id.* at ECF Nos. 50 and 55.

[125] Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (concluding that it constituted an undue hardship for Chrysler Corporation to pay $1,500 annually for a reduced benefit package to permit Seventh Day Adventist to observe the Sabbath).

[126] *Walmart Stores East, L.P.*, 992 F.3d at 659-60 (concluding that it would be an undue hardship for America's largest private employer to facilitate voluntary shift trading to accommodate Sabbath observance of Seventh Day Adventist).

paying a minimal amount of overtime,[127] and bias against accommodation.[128] None of these constitutes an undue hardship under *Groff*.[129]

Another common pre-*Groff* reason for finding "undue hardship" in religious absence cases was employee morale.[130] For example, in *Aron v. Quest Diagnostics*, the Third Circuit affirmed the district court's grant of summary judgment to an employer that failed to accommodate an Orthodox Jew's request to be exempt from Saturday work requirements because it would "negatively affect employee morale."[131] And in *EEOC v. JBS USA, LLC*, the District of Colorado concluded that the employer met its burden of demonstrating it would be a de minimis cost to accommodate Muslim employees' request for a meal break coinciding with sunset during Ramadan because of the possible effect on employee morale when the employees' coworkers preferred a "late break" and became "more tired and hungry" when they had an earlier break.[132] Under *Groff*, such impacts are insufficient without any accompanying substantial cost on the business. Even the Solicitor General agreed at oral argument that impacts on co-workers' morale alone are not enough to constitute undue hardship.[133]

Pending religious absence cases to watch in which the heightened undue hardship standard may be dispositive include *Podell v. Whitworth* and *Cassell v. SkyWest*. In *Podell*, a Jewish applicant for a police officer position who could not attend pre-employment processing due to his Sabbath observance was denied an alternative date by the U.S. Department of Defense and

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[127] El-Amin v. First Transit, Inc., No. 1:04-cv-72, 2005 WL 1118175, at *8 (S.D. Ohio May 11, 2005) (finding that paying an employee two hours of overtime to accommodate a religious practice exceeded a de minimis cost).

[128] Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 143-44 (5th Cir. 1982) (denying Orthodox Jew's request to change shifts because accommodation would deprive other employees of "their shift preference at least partly because they do not adhere to the same religion as [plaintiff]").

[129] *Groff*, 143 S. Ct. at 2295-96.

[130] EEOC v. JBS USA, LLC, No. 10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013) (finding that modifying Muslim employees' break schedule to permit daily prayer constituted undue hardship because, inter alia, the "extra breaks could have a negative impact on employee morale"); *Weber*, 199 F.3d at 274 ("The mere possibility of an adverse impact on co-workers" constituted undue hardship when truck driver's religious beliefs prevented him from being accompanied by female employee).

[131] 174 F. App'x 82, 83 (3d Cir. 2006).

[132] 339 F. Supp. 3d 1135, 1182 (D. Colo. 2018).

[133] Tr. of Oral Argument at 102:4-13, Groff v. DeJoy, 22-174 (Apr. 18, 2023) ("Mere coworker grumbling or resentment that someone else is getting an exemption from a neutral policy is not sufficient and cannot factor into the analysis of undue hardship. That's equally true for actual actions like quitting or transferring if it's motivated by just being unhappy that there's a religious accommodation requirement out there or by actual religious animus.").

eventually refused employment.[134] The action is currently stayed while the parties engage in settlement talks.[135]

Cassell v. SkyWest is a Title VII case arising from a Seventh Day Adventist pilot's claim that an airline refused to hire him because of his Sabbath observance.[136] While the parties are currently in settlement talks, the court is poised to open discovery for a limited period on the topic of whether accommodating the pilot would impose substantial costs on the airline in light of *Groff*.[137]

3. Religious Speech

While the Solicitor General mentioned religious speech as the third bucket of common accommodation requests, the oral argument, briefing, and eventual opinion in *Groff* focused less on this category and contained little analysis of whether decisions in this area constituted a major casualty of *Hardison*, were appropriately decided, or both. This may be because a smaller percentage of religious accommodation claims prior to *Groff* involved speech. It may also be because religious speech by its nature directly implicates the rights of others in the workplace, making it a tougher needle to thread for employers and courts, regardless of the standard used to determine undue hardship.

For example, in *Peterson v. Hewlett-Packard Company*, a Christian employee was fired after he refused to remove from his cubicle Scripture condemning homosexuality.[138] He had posted the verses in response to his employer's display of diversity posters, including one that said "Gay."[139] The Ninth Circuit concluded that accommodating the employee's religious speech by permitting him to continue to display the Scripture would be an undue hardship for the employer because the speech constituted harassment of the employee's co-workers.[140] Moreover, the court found that the employee's other requested accommodation—Hewlett-Packard removing its diversity poster—would also be an undue hardship, as it would infringe on the

[134] Second Amended Compl., Podell v. Whitworth, 2:22-cv-03505, ECF No. 21 (E.D. Pa. Nov. 29, 2022).

[135] Order Staying Action Pending Settlement Discussions, Podell v. Whitworth, 1:23-cv-01025, ECF No. 63 (E.D. Va. Sept. 22, 2023).

[136] Cassell v. SkyWest, 2:19-cv-00149 (D. Utah filed Mar. 4, 2019).

[137] *Id.* at ECF No. 144.

[138] 358 F.3d 599, 602 (9th Cir. 2004).

[139] *Id.*

[140] *Id.* at 608.

employer's ability to promote diversity and encourage goodwill among its employees.[141]

While *Groff* certainly heightens the standard for employers to deny religious accommodations to employees with religious speech claims, the impact it will have on cases in which the speech is potentially harassing or violative of another workplace policy is uncertain. The factual question of whether the impact is mere grumbling by fellow employees or customers or something more substantial will certainly play a role. Also pertinent will be the tendency of courts to find undue hardship when an accommodation could expose employers to liability under other statutes, as discussed in the next section on newer types of accommodation requests.[142] Employees may seek recovery under other theories of liability if a competing workplace policy or law or the

[141] *Id.*; *see also* Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000) (holding that allowing employee to uncover his religiously inspired KKK "Firey Cross" tattoo constituted an undue hardship as violative of the employer's racial harassment policy); Ervington v. LTD Commodities, LLC, 555 Fed. App'x 615, 618 (7th Cir. 2014) (finding employer "was not required to accommodate [the employee's] religion by permitting her to distribute pamphlets offensive to other employees"); Mitchell v. Univ. Med. Ctr., Inc., 2010 U.S. Dist. LEXIS 80194, at *22-23 (W.D. Ky. Aug. 9, 2010) (holding that allowing employee to have religious conversations with co-workers about the end of the world and the Antichrist would impose an undue hardship as violative of the workplace harassment policy); Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996) (determining that employer was not required to accommodate employee's religious need to send harassing letters to co-workers accusing them of immoral behavior); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339-40 (8th Cir. 1995) (finding employer offered pro-life employee reasonable accommodations by asking her to cover button depicting fetus while at work, only wear it in her cubicle, or wear a similar button without a fetus, when other employees found button disturbing and there was a 40 percent decline in productivity); Knight v. Conn. Dep't of Public Health, 75 F.3d 156, 164 (2d Cir. 2001) (holding that permitting state sign language interpreter and nurse consultant to evangelize while servicing clients "would jeopardize the state's ability to provide services in a religion-neutral matter"). *But see* Hickey v. State Univ. of N.Y. at Stony Brook Hosp., No. 10-CV-1282, 2012 WL 3064170, at *9 (E.D.N.Y. July 27, 2012) (finding no undue hardship in permitting employee to wear "I <3 Jesus" lanyard because Title VII's religious accommodation provision does not violate the Establishment Clause); Banks v. Serv. Am. Corp., 952 F. Supp. 703, 705, 709, 710 (D. Kan. 1996) (holding there was no undue hardship in allowing food service workers to say "God bless you" to their patrons because undue hardship requires more than mere grumblings, customers could choose to avoid plaintiffs, and there was no evidence that a boycott by objectors would have any impact on the profitability of the business).

[142] *E.g.*, Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 363 (6th Cir. 2015) ("[E]very circuit to consider the issue" has held "that Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute.") (citing cases).

denial of the accommodation itself involves a violation of the Constitution or RFRA.[143]

One case to watch in this area is the appeal in *Carter v. Transport Workers Union of America Local 556*. The plaintiff, a Southwest Airlines employee, secured a jury verdict in her favor in a Title VII accommodation case over her religious speech last year.[144] The flight attendant was fired for posting pro-life messages on her personal Facebook page and sending them to her union president.[145] While acknowledging the "de minimis" test in the jury instruction, the court in *Groff*-like fashion stated that undue hardship requires more than just demonstrating "any cost or any disruption or inconvenience to the business."[146] Over the defendant's objection, it also declined to adopt an instruction about the role of employee morale and said that undue hardship must be "either in terms of financial costs or disruption of the business."[147] The court later denied the defendant's motion for a new trial,[148] and the defendant appealed from the court's entry of the verdict.[149] Undue hardship will likely be a focus of the appeal, and Southwest and TWU will have to fight an uphill battle to justify the flight attendant's termination. Nevertheless, Southwest may highlight the trial court's failure to acknowledge that employee morale may be considered under *Groff* if it impacts the conduct of the business. Southwest's brief in the appeal is due in October.[150]

B. Newly Emerging Accommodation Requests

Groff also has implications for other kinds of religious accommodation requests that are less reflected in the current body of case law and that often involve sensitive and controversial issues in today's workplace. Such

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[143] Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2017) (holding it would be an undue hardship to accommodate plaintiff football coach's request to offer private prayers at 50-yard line following games due to Establishment Clause violation and affirming denial of summary judgment on free speech and free exercise claims), rev'd, 142 S. Ct. 2407 (2022) (holding that preventing employee's prayer violated the First Amendment).

[144] Jury Verdict, Carter v. Transp. Workers Union of Am. Local 556, 3:17-cv-02278, ECF No. 348 (N.D. Tex. July 14, 2022).

[145] Carter v. Transp. Workers Union of Am. Local 556, 353 F. Supp. 3d 556, 565 (N.D. Tex. 2019).

[146] Jury Instructions at 17-18, Carter v. Transp. Workers Union of Am. Local 556, 3:17-cv-00278, ECF No. 343 (N.D. Tex. July 14, 2022).

[147] *Id.*

[148] Order Denying Mot. for a New Trial, Carter v. Transp. Workers Union of America Local 556, 3:17-cv-00278, ECF No. 409 (Apr. 24, 2023).

[149] Carter v. Local 556, appeal filed, 23-10008 (5th Cir. Jan. 5, 2023).

[150] *Id.* at ECF No. 82.

requests—involving the use of preferred pronouns, vaccination mandates, and the provision of pharmaceutical products—are becoming more common and are no less included within Title VII's protections than the traditional requests. *Groff*'s directives regarding the higher standard and impacts on co-workers are likely to play a crucial role in these contexts. Employers' competing obligations under other valid federal and state laws, however, may limit *Groff*'s applicability in some cases.

1. Pronouns

Religious employees are increasingly seeking religious exemptions from requirements that they use the preferred pronouns of other individuals in their workplaces. This area is an offshoot of the religious speech bucket. No court has yet ruled on this issue under *Groff*'s standard, but in July, the Seventh Circuit vacated its opinion and judgment in one such case and remanded for the district court to apply the clarified standard to the religious accommodation claim.[151]

In *Kluge v. Brownsburg Community School Corporation*, a Christian high school music teacher in Indiana requested an accommodation to refer to his students by their last names only due to his religious objection to the use of students' preferred pronouns where they did not correspond to their sex.[152] After initially granting him the accommodation, the school later rescinded it, citing complaints from students and faculty.[153] Kluge was forced to resign and sued under Title VII.[154]

The district court asserted that "refusing to affirm transgender students in their identity can cause emotional harm" and that such harm causes the defendant to incur "a more than de minimis cost to its mission to provide adequate public education that is equally open to all."[155] It further held that "the law [did] not require" the school to "propose an alternative accommodation, or to engage in further discussions" with Kluge, and that the threat of a Title IX lawsuit brought by a transgender student also constituted an undue hardship.[156] The Seventh Circuit affirmed,[157] but then vacated its opinion

[151] Order Vacating Op. and Remanding to District Ct., Kluge v. Brownsburg Cmty. School Corp., 21-2475, ECF No. 83 (7th Cir. July 28, 2023).

[152] Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021).

[153] *Id.* at 823, 829, 835.

[154] *Id.* at 831.

[155] *Id.* at 845-46.

[156] *Id.* at 839-40, 846.

[157] Kluge v. Brownsburg Cmty. School Corp., 64 F.4th 861 (2023).

after *Groff* came out. On remand, the district court's decision may turn on whether the affected students' alleged emotional harms substantially impact the "overall context" of the school's "business," whether bias towards Kluge's beliefs or religious accommodation in general motivated the failure to accommodate, and the actual threat of Title IX liability. The court's assertion that the school had no duty to explore other possible accommodations is no longer viable under *Groff*.[158]

A similar fact pattern but different outcome occurred in the case of *Meriwether v. Hartop* in 2021. There, the Sixth Circuit denied a public college's motion to dismiss in the case of a Christian professor who also used a last-names-only policy with respect to his transgender students.[159] While *Meriwether* was a First Amendment case and involved different legal standards, it is still instructive in this context since both free speech and Title VII accommodation claims require courts to engage in a balancing inquiry that analyzes the employer interests at stake. In contrast to the district court in *Kluge*, however, the Sixth Circuit found that the teacher's use of one transgender student's last name did not "inhibit[] his duties in the classroom," "hamper[] the operation of the school," or deny the transgender student "any educational benefits."[160] Had *Meriwether* been a Title VII case, it is doubtful the court would have found undue hardship, even under the de minimis standard.

Another line of reasoning in *Meriwether* concerned neutrality. Neutrality is part of the free exercise inquiry, since laws that burden religious exercise must be neutral and generally applicable or pass strict scrutiny to be valid.[161] Neutrality is also pertinent to religious accommodation requests under *Groff*, since bias or hostility towards religious beliefs cannot constitute undue hardship as a matter of law.[162] The *Meriwether* court found the professor's neutrality allegations to be sufficiently pled, as evidenced by statements from university officials (including that religion "oppresses students," that Christian professors like plaintiff "should be banned" from teaching Christianity courses, and that plaintiff's beliefs were akin to "religiously motivated racism or sexism").[163] The court also inferred potential hostility from the university's

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[158] *Groff*, 143 S. Ct. at 2296.
[159] Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).
[160] *Id.* at 511.
[161] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877-78 (1990).
[162] *Groff*, 143 S. Ct. at 2296.
[163] *Meriwether*, 992 F.3d at 512-13.

rescission of its last-names-only accommodation.[164] Under this reasoning, Kluge's rescinded accommodation could become relevant to the undue hardship inquiry on remand.

In another pronoun case from earlier this year, the plaintiff's failure to accommodate claim under Title VII survived a motion to dismiss over her employer's undue hardship defense, even prior to the Supreme Court's decision in *Groff*.[165] The defendant argued that it would pose an undue hardship to permit the Christian plaintiff to decline to refer to her co-workers by their preferred pronouns because it would expose it to Title VII liability.[166] The court nonetheless found that "the complaint alone does not demonstrate that Defendant could not reasonably accommodate Plaintiff's beliefs without undue hardship."[167] This aligns with *Groff*'s reasoning that employers cannot automatically reject proposed accommodations when other anti-discrimination laws and regulations are implicated; they must still try to accommodate.[168] Defendants in that case continued to assert an undue hardship in their answer,[169] and a trial is currently set for April 2024.[170]

2. Vaccination

One area in which *Groff* could have a substantial effect is in litigation related to vaccination requirements. During the Covid-19 pandemic, these cases proliferated across the country as religious adherents of all kinds sought and were often denied religious exemptions to employer vaccine mandates. While many of these mandates are no longer in effect due to the pandemic's conclusion, the litigation continues as terminated employees seek damages and reinstatement from their lost employment.

One court has already ruled in favor of an employee under *Groff*'s higher bar. In *Payne v. St. Charles Health System*, the District of Oregon held that it would not be an undue hardship to allow plaintiff, a Christian facilities supervisor with religious objections to his hospital employer's vaccine mandate,

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[164] *Id.* at 515.

[165] Haskins v. Bio Blood Components, 1:22-cv-586, 2023 WL 2071483, at *3 (W.D. Mich. 2023).

[166] *Id.* at *2.

[167] *Id.* at *3.

[168] *Groff*, 143 S. Ct. at 2296.

[169] Answer, Haskins v. Bio Blood Components, 1:22-cv-586, ECF No. 24 (W.D. Mich. Mar. 3, 2023).

[170] Second Am. Case Management Order, 1:22-cv-586, at ECF No. 29 (W.D. Mich. May 18, 2023).

to wear an N-95 mask and engage in antibody testing in lieu of vaccination.[171] The court rejected the employer's argument that monitoring plaintiff's compliance with such accommodations would have constituted more than a de minimis hardship, due to *Groff*'s more exacting standard.[172]

New Yorkers for Religious Liberty v. City of New York (*NYFRL*), consolidated with *Kane v. de Blasio*, was pending before the Second Circuit when the Supreme Court issued its decision in *Groff*. The case challenged the process by which the City of New York denied thousands of city employees' requests for religious accommodations to its vaccination mandate.[173] The employers' "undue hardship" findings in that case were particularly puzzling. For example, one Seventh Day Adventist plaintiff already held a remote teaching position instructing medically fragile students via an online classroom before the vaccine mandate even went into effect.[174] Nevertheless, she was repeatedly denied the accommodation of remote work, provided to other teachers whose religious exemption requests were granted, because of a conclusory finding of "undue hardship."[175] She was eventually terminated.[176] Another plaintiff was a paramedic who worked unvaccinated through the worst of the pandemic (including performing lifesaving procedures on a cardiac victim) and was discharged for her religious objections to the vaccine during a staffing shortage because of "the potential for undue hardship."[177] This does not satisfy the de minimis standard, let alone *Groff*'s.

NYFRL was brought as a First Amendment case, but Title VII became relevant when the Second Circuit struck down the standards that the City of New York used to assess accommodation requests as violative of the First Amendment and instructed it to reassess all plaintiffs' requests under the standards set forth in Title VII.[178] Thereafter, a Citywide Panel denied most requests under the "more than a de minimis cost" standard, despite the

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[171] No. 6:22 CV 01998-MK, 2023 WL 4711095, at *3 (D. Or. July 6, 2023).

[172] *Id.*

[173] New Yorkers for Religious Liberty v. City of New York, 22-1801 (2d Cir. argued Feb. 8, 2022).

[174] Consolidated Am. Compl. ¶¶ 690-731, Keil v. City of New York, 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022) (1:21-cv-07863), appeal argued sub nom. New Yorkers for Religious Liberty v. City of New York, 22-1801 (2d Cir. Feb. 8, 2023).

[175] *Id.*

[176] *Id.*

[177] Decls. of Krista O'Dea, New Yorkers for Religious Liberty v. City of New York, 1:22-cv-00752, ECF Nos. 15 and 53 (E.D.N.Y. Sept. 6, 2022), appeal argued, 22-1801 (2d. Cir. Feb. 8, 2023).

[178] Kane v. de Blasio, 19 F.4th 152, 176-77 (2d Cir. 2021).

architect of the Citywide Panel admitting that none of the City's departments provided any individualized assessment of undue hardship.[179] Oral argument in *NYFRL* occurred in February, and the Second Circuit has yet to rule.

In *Leigh v. Artis-Naples, Inc.*, Artis-Naples fired three musicians from their tenured positions with the Naples Philharmonic after denying their requests for religious exemptions from its vaccination mandate.[180] The employees had regularly tested and masked with all other Philharmonic members during the 2020-2021 performance season when there was no mandate in place.[181] In the subsequent Title VII suit, the district court found that plaintiffs made a prima facie case of discrimination but denied their motion for a preliminary injunction under Title VII because "the undue hardship test is 'not a difficult threshold to pass.'"[182] Artis-Naples had "met its minimal burden" of establishing undue hardship, and plaintiffs had not submitted enough evidence to show they could overcome the defense.[183] An amended complaint[184] and answer[185] have been filed in this case, and *Groff*'s tightened standard will likely influence the next stages of the litigation given the way the district court analyzed undue hardship.

For vaccination cases in which religious exemptions were denied pursuant to valid state laws, *Groff* may be less relevant. For example, in *Cagle v. Weill Cornell Medicine*, decided just one day after *Groff*, the Southern District of New York considered a Title VII claim of religious discrimination brought by a healthcare employee subject to a statewide healthcare employee vaccination mandate.[186] The mandate, which was challenged and upheld under the First Amendment in *We the Patriots USA v. Hochul*,[187] provided for medical but not religious exemptions.[188] The court found that requiring the employer to provide a religious accommodation constituted an undue hardship even under *Groff* because it would violate state law.[189] It is likely that other employers or courts considering religious accommodations under valid state

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[179] Br. & Special App., New Yorkers for Religious Liberty v. City of New York, 22-1801, ECF No. 114 at 11, 13, 54 (2d Cir. argued Feb. 8, 2023).

[180] No. 2:22-cv-606-JLB, 2022 WL 18027780, at *1 (M.D. Fla. 2022).

[181] *Id.* at *10.

[182] *Id.* at *8 (quoting *Webb*, 562 F.3d at 260).

[183] *Id.*

[184] Amended Compl., No. 2:22-cv-606, ECF No. 67 (M.D. Fla. Apr. 21, 2023).

[185] Answer, No. 2:22-cv-606, at ECF No. 73 (M.D. Fla. June 23, 2023).

[186] No. 22-CV-6951 (LJL), 2023 WL 4296119, at *4 (S.D.N.Y. June 30, 2023).

[187] 17 F.4th 266 (2d Cir. 2021), cert. denied sub nom. Dr. A. v. Hochul, 142 S. Ct. 2569 (2022).

[188] *Id.* at *1.

[189] *Id.* at *4 n.2.

mandates will reach a similar result, regardless of *Groff*'s higher standard. This is because, as discussed earlier, courts generally agree that requiring an employer to violate federal or state law to accommodate an employee is an undue hardship.[190]

3. Pharmaceutical Products

Religious objections to the provision of various pharmaceutical products, including but not limited to contraceptives and gender-reassignment drugs, is one area of accommodation not included in the traditional buckets that has become increasingly common and perhaps even more acrimonious in the aftermath of the 2022 decision in *Dobbs v. Jackson Women's Health Organization*.[191]

One case to watch is *Kloosterman v. Metropolitan Hospital*, which alleges both First Amendment and Title VII violations for a hospital's failure to accommodate a Christian physician assistant's religious objection to providing gender-reassignment drugs when accommodations were given to other employees for secular reasons.[192] *Groff*'s higher standard and the Supreme Court's instruction that antipathy towards religion cannot be an undue hardship may be implicated in this case. This is because the plaintiff alleges that the hospital showed hostility towards her request and that it could have accommodated her without even a de minimis cost.[193] The hospital argues that undue hardship exists because accommodating the plaintiff would violate Section 1557 of the Patient Protection and Affordable Care Act preventing discrimination on the basis of sex, including gender identity.[194] The plaintiff responds that the operative version of Section 1557 at the time of her termination protected religious healthcare providers and did not threaten any penalties on healthcare facilities that accommodated religious objections to

[190] *E.g.*, *Yeager*, 777 F.3d at 363; Weber v. Leaseway Dedicated Logistics, Inc., No. 98-3172, 1999 WL 5111, at *1 (10th Cir. Jan. 7, 1999); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830-31 (9th Cir. 1999); United States v. Bd. of Educ., 911 F.2d 882, 891 (3d Cir. 1990); Baltgalvis v. Newport News Shipbuilding Inc., 132 F. Supp. 2d 414, 419 (E.D. Va. 2001); Does 1-2 v. Hochul, No. 21-CV-5067 (AMD) (TAM), 2022 WL 4637843, at *15 (E.D.N.Y. Sept. 30, 2022).

[191] 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*).

[192] Compl., Kloosterman v. Metro. Hosp., 1:22-cv-00944-JMB-SJB, ECF No. 1 at 2 (W.D. Mich. Oct. 11, 2022).

[193] *Id.* at 2-3, 143.

[194] Br. in Support of Def. U. Michigan Health West's Mot. to Dismiss Pl.'s Corrected First Amended Compl., Kloosterman v. Metro. Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 37 at 11-12 (W.D. Mich. Feb. 20, 2023).

gender-transition drugs and procedures.[195] The district court recently denied the hospital's motion to dismiss plaintiff's disparate treatment claims under Title VII, holding that Kloosterman sufficiently alleged that her employer failed to accommodate her and asserting that whether the employer had an "undue hardship" should be resolved at summary judgment.[196]

CVS is facing lawsuits in Texas, Kansas, and Virginia over its new religious accommodation policy with respect to the prescription of contraceptives—at least two of which may hinge on *Groff*. All three were filed by Christian nurse practitioners whose sincerely held religious beliefs prevent them from prescribing contraceptive and abortifacient drugs.[197] CVS had previously accommodated each plaintiff, for six and a half, ten, and three years, respectively—permitting them to refer patients seeking these prescriptions to another provider—until it implemented a new policy denying all religious exemption requests.[198] CVS's change in policy came after it deemed treatment for pregnancy prevention an "essential" service.[199] In all three cases, the plaintiffs were terminated after they refused to abandon their sincerely held religious beliefs,[200] and in two of them, CVS claimed undue hardship as an affirmative defense and argued that accommodating the plaintiff would cause it more than a de minimis burden.[201]

Groff's new standard will likely figure prominently in the ensuing motions practice and trials, especially since plaintiffs claim there was no undue hardship for the years they were accommodated,[202] and CVS now deems the provision of pregnancy prevention treatment to be imperative to the functioning of its business, no exceptions. CVS's automatic revocation of each plaintiff's accommodation appears to violate *Groff*'s prohibition of discrimination

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[195] Br. in Opp'n to Defs. Pai, Booker, Cole, Pierce, and Smith's Mot. to Dismiss Pls.' Corrected First Amended Compl., Kloosterman v. Metro. Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 55 at 33 (W.D. Mich. May 9, 2023).

[196] Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss, Kloosterman v. Metro Hosp., No. 1:22-cv-00944-JMB-SJB, ECF No. 68 (W.D. Mich. Sept. 20, 2023).

[197] Compl., Strader v. CVS Health Corp., 4:23-cv-00038-P, ECF No. 1 (N.D. Tex. Jan. 11, 2023) ("Strader"); Compl., Schuler v. MinuteClinic Diagnostic of Kan., P.A., 2:22-cv-02415-KHV-KGG, ECF No. 4 (D. Kan. Oct. 13, 2022) ("Schuler"); Am. Compl., Casey v. MinuteClinic Diagnostic of Va., LLC, 1:22-cv-01127-PTG-WEF, ECF No. 48 (E.D. Va. May 18, 2023) ("Casey").

[198] Strader at 1; Schuler at 7, 9; Casey at 1, 6-7.

[199] Strader at 7; Schuler at 8.

[200] Strader at 2; Schuler at 9; Casey at 1.

[201] Answer, *Strader*, 4:23-cv-00038-P, ECF No. 25 at 19-20 (N.D. Tex. Apr. 7, 2023); Answer, *Schuler*, 2:22-cv-02415-KHV-KGG, ECF No. 7 at 18-19, 22, 24 (D. Kan. Nov. 21, 2022).

[202] *E.g.*, Strader at 11.

against accommodation.[203] These denials require a more fulsome explanation of substantial costs to be viable under *Groff*.

Some states have regulations that require pharmacies to sell certain pharmaceuticals, or that compel the expedited provision of certain pharmaceuticals. To the extent such laws are valid, religious employees' ability to secure accommodations in such jurisdictions will depend on the cost to the employer of compliance with the law. *Groff*'s increased standard will certainly help plaintiffs in these kinds of cases, but the strictness of state laws will be highly relevant to the outcome.

For example, in 2007, the state of Washington implemented a health regulation requiring all pharmacies in the state to carry the emergency contraceptive drug Plan B and prohibiting any conscience-based referrals.[204] A Christian family that owned a pharmacy and several pharmacists brought suit challenging the regulation on First Amendment grounds in *Stormans v. Wiesman*.[205] While the district court found that the regulation violated the First Amendment,[206] the Ninth Circuit upheld the regulation,[207] and the Supreme Court denied certiorari.[208]

In his dissent from the denial of certiorari, Justice Alito highlighted the predicament of employees with religious objections to dispensing Plan B.[209] While the regulation did not require pharmacists themselves to provide contraceptives in violation of their beliefs, "if a pharmacy wishes to employ a pharmacist who objects to dispensing a drug for religious reasons, the pharmacy must keep on duty at all times a second pharmacist who can dispense those drugs," which was an expense "few pharmacies are likely to be willing to bear."[210] Indeed, courts have found this to be an undue hardship under *Hardison*'s standard.[211] Whether this constitutes an undue hardship under

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[203] *Groff*, 143 S. Ct. at 2296.

[204] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015).

[205] 854 F. Supp. 2d 925 (W.D. Wash. 2012).

[206] *Id*. at 975.

[207] *Stormans*, 794 F.3d at 1071.

[208] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016).

[209] *Id*. at 2436 (Alito, J., dissenting).

[210] *Id.* (quoting Br. for National and State Pharmacists' Associations as Amici Curiae in Stormans, Inc. v. Wiesman, at 23-24, 136 S. Ct. 2433 (2016)).

[211] *E.g.*, *Brener*, 671 F.2d at 146 (finding that "hiring a substitute pharmacist, plainly would involve more than a de minimus [sic] cost"); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1365 (S.D. Fla. 1999) (finding that the need to hire an additional worker would constitute an undue hardship).

Groff's standard will likely depend on the size and operating costs of the pharmacy.

At the time of the litigation in *Stormans*, Washington was the only state in the country implementing such a strict regulation. Other state rules provide for more leeway, which eases the predicament for religious employees. For example, in *Vandersand v. Wal-Mart Stores, Inc.*, Wal-Mart defended its failure to accommodate a Christian pharmacist with religious objections to dispensing contraceptives by pointing to a state regulation requiring pharmacies in Illinois to dispense emergency contraceptives without delay.[212] In denying Wal-Mart's motion to dismiss, the court noted that the law did not require individual pharmacists to deliver contraceptives without delay and noted that it may have been possible for Wal-Mart to fulfill its regulatory duty "by other means," such as permitting another pharmacist to fill the relevant prescriptions.[213] Accordingly, while employers must take their obligations under all state and federal laws seriously, simply assuming without investigation that a competing statute forecloses accommodation violates *Groff*'s mandate to explore all possible accommodations.

IV. CONCLUSION

Groff radically changed the way that employers and courts will review religious accommodation requests under Title VII. It did away with the "more than a de minimis cost" test of *Hardison*, while still keeping the precedent intact by replacing "de minimis" with a "substantial costs" standard discussed elsewhere in the same opinion. Besides being more stringent, this new rule also means that impacts on co-workers cannot be an undue hardship unless they also affect the business.

Groff also reinforced principles that have been in force since the inception of Title VII: antipathy to religion or to accommodation cannot form the basis for an undue hardship defense, the burden is on the employer to demonstrate its substantial costs, and employers must do more than just deny an employee's proffered accommodation.

Ultimately, *Groff* has the potential to affect numerous cases pending before the federal district and appellate courts, in traditional areas of religious garb, absences, and speech, and in less traditional areas of pronouns,

[212] 525 F. Supp. 2d 1052, 1056 (C.D. Ill. 2007).
[213] *Id.*

vaccinations, and pharmaceuticals. The lower courts will continue to flesh out *Groff*'s contours, particularly with respect to how impacts on co-workers affect the conduct of the business and the intersection of religious accommodation requests and other state and federal laws. One thing is certain: undue hardship means what it says, and employers can no longer use it to shirk their responsibilities to religious employees under Title VII.

Other Views:

- Brief for Freedom from Religion Foundation as Amicus Curiae in Support of Respondent, Groff v. DeJoy, 143 S. Ct. 2279 (2023), *available at* https://ffrf.org/uploads/legal/22-174Brief.pdf.
- Brief for Americans United for Separation of Church and State and Lambda Legal Defense and Education Fund as Amici Curiae in Support of Respondent, Groff v. DeJoy, 143 S. Ct. 2279 (2023), *available at* https://www.au.org/wp-content/uploads/2023/04/AU-Amicus-Brief-Groff-v.-DeJoy-SCOTUS-3.30.23.pdf.
- *Supreme Court Goes Postal: A Rapid Response to Groff v. DeJoy*, ABA (July 18, 2023), *available at* https://www.americanbar.org/groups/crsj/events_cle/recent/supreme-court-goes-postal/.
- Ian Millhiser, *The other big decision handed down by the Supreme Court today, explained*, VOX, June 29, 2023, https://www.vox.com/scotus/2023/6/29/23778728/supreme-court-samuel-alito-groff-dejoy-religion-accomodations-workplace.
- Kenneth C. Broodo & John R. FitzGerald, *Religious Accommodation for Employees: The Potential Impact and Likely (Unintended) Consequences of SCOTUS' Groff v. DeJoy Decision*, FOLEY INSIGHTS, July 17, 2023, https://www.foley.com/en/insights/publications/2023/07/religious-accommodation-employees-scotus.