No. 22-174

IN THE
Supreme Court of the United States

GERALD E. GROFF,
Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,
Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., Carson v. Makin*, 142 S. Ct. 1987 (2022).

The ACLJ is committed to religious liberty in the workplace, and regularly represents clients seeking Title VII's protections for employees' religious practices. Title VII's promise has been eviscerated by the non-textual pronouncement in *Trans World Airlines, Inc. v. Hardison* that the term "undue hardship" means employers need not provide accommodations that impose "more than a de minimis" cost.

SUMMARY OF THE ARGUMENT

Hardison's more-than-de-minimis standard should be repudiated or overruled. The standard does not deserve refuge in stare decisis because it is dictum pulled out of thin air. The standard is further

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*Counsel of record for the parties received notice of the intent to file this brief. Counsel for both parties filed with the Court blanket consents to the filing of amicus briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ineligible for stare decisis because it was invented without even a minimally persuasive *ratio decidendi*. Neither party in *Hardison* suggested such a standard in briefing and the Court's opinion adopted it with no regard to the ordinary meaning of either "undue" or "hardship." The Court further failed to provide even a de minimis explanation for its borderline antonymous definition of a key statutory term.

Neither does the super-stare decisis presumption save *Hardison's* non-textual standard. The presumption should be foreclosed when a barely reasoned opinion results in an outright conflict between a precedent and the statutory provision it purports to interpret. The separation of powers rationale for the presumption does not justify continued adherence to *Hardison*. A much greater violation of separation of powers results from perpetuation of an egregiously wrong standard that eviscerates Congress's goal to protect employees' religious liberty rights. To the extent Congress's silence for almost half a century means anything, it is more credibly construed as "you broke it, you fix it" than tacit approval of *Hardison*.

ARGUMENT

I. This Court Should Grant Review to Repudiate *Hardison's* Non-Textual Interpretation of "Undue Hardship."

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion. 42 U.S.C. § 2000e-2(a). The statute requires reasonable

accommodation of employees' religious practices provided that such accommodation does not cause "undue hardship" on the employer's business. 42 U.S.C. § 2000e(j). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court pronounced *ipse dixit* that undue hardship meant "anything more than a de minimis cost." *Id.* at 84. Because *Hardison* eschewed any appropriate interpretive guideposts, it is debatable whether *Hardison's* definition qualifies as statutory construction. *See, e.g., Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapur, J., joined by Kethledge, J., concurring) (possible explanation for the more-than-de-minimis standard is that the *Hardison* "majority stumbled through the looking glass and into an Alice-in-Wonderland world where words have no meaning").

But regardless of whether *Hardison* involved statutory construction or naked fiat, the more-than-de-minimis standard should be repudiated because the standard was dictum and lacks an even minimally plausible *ratio decidendi* to justify its status as precedent entitled to stare decisis. Whether *Hardison* is overruled or the Court merely repudiates the more-than-de-minimis standard,[1] the standard should be replaced with a definition of undue hardship that is grounded in the text and promotes Congress's goal of protecting religious freedom in the workplace.

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[1] *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427-28 (2022) (repudiating but not formally overruling the *Lemon* test); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2217 (2020) (Thomas, J., dissenting) (discussing Court's repeated repudiation of *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) and arguing that the case should be overruled).

A. *The More-Than-De-Minimis Standard Is Dictum and Finds No Refuge in Stare Decisis*

Hardison's more-than-de-minimis standard deserves no stare decisis protection because it is dictum. The Court is not "bound by dicta [when] more complete argument demonstrates" the dicta is wrong. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (rejecting as dicta a previous interpretation § 109 of the Copyright Act); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 443 (1987) (refusing to rely on dictum from *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227 (1964), which dealt with exercise of district judges' discretion to tax costs); *Local 82, Furniture & Piano Moving Drivers v. Crowley*, 467 U.S. 526, 549-50 & n.22 (1984) (rejecting dictum from *Dunlop v. Bachowski*, 421 U.S. 560 (1975), which related to union elections governed by 29 U.S.C. § 482).

In *Hardison*, the employee was terminated before the 1972 amendment to Title VII's definition of religion which added the "undue hardship" standard. The Court accordingly applied the EEOC guideline in effect at the time and not the amended statutory definition. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part). Because *Hardison* did not interpret the 1972 amendment defining "religion," its more-than-de-minimis standard is technically dictum. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) (a prior decision "that does not analyze the relevant statutory

provision cannot be said to have resolved the statute's meaning").

Hardison's more-than-de-minimis standard is little different than the fictitious classification of the tomato in *Kirtsaeng*, 568 U.S. at 548 ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?"). This Court is not forever constrained from repudiating *Hardison's* egregiously wrong definition of undue hardship.

B. Hardison *Is Not True Precedent Because the More-than-De-Minimis Standard Is Unmoored from the Statutory Text and Was Adopted without a Minimally Plausible* Ratio Decidendi.

Even if *Hardison's* more-than-de-minimis standard was not dictum, it is still not a candidate for stare decisis, because it does not qualify as true precedent. The more-than-de-minimis standard is bereft of even a minimally persuasive *ratio decidendi* and should therefore lack "life and effect in the disposition of future cases." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 & n.54 (2020) (citing J. Salmond, Jurisprudence §62, p. 191 (G. Williams ed., 10th ed. 1947) ("The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.")).

The parties' briefs in *Hardison* did not focus on the meaning of "undue hardship" or advocate for the "de minimis" standard, and the Court adopted the standard with almost no explanation. *Patterson v.*

Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the denial of certiorari). This Court is therefore not bound to follow *Hardison* because the meaning of undue hardship was not "fully debated." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

Pulled out of thin air, the more-than-de-minimis standard flies in the face of the Court's standard practice of "zero[ing] in on the precise statutory text." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020); *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021) ("[W]e start where we always do: with the text of the statute."). *Hardison* was a raw exercise of "freewheeling judicial policymaking," *Pereida v. Wilkinson*, 141 S. Ct. 754, 767 (2021), that effectively rewrote Title VII. *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting from denial of certiorari) (*Hardison* "undid Title VII's undue hardship test").

If the *Hardison* Court had given "undue hardship" its "ordinary, contemporary" meaning, *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014), it would never have equated the term with "more than de minimis." *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) (doubting that "simple English usage" supports the majority's reading). The contemporary meaning of hardship was "suffering," "a condition that is difficult to endure," "deprivation." *E.g., Random House Dictionary of the English Language* (1968); *Black's Law Dictionary* (5th ed. 1979). Not only must the accommodation impose hardship on the employer, but the hardship must be "undue." Contemporaneous

dictionaries defined "undue" as beyond "what is appropriate or normal," "excessive." *Black's Law Dictionary* (5th ed. 1979). To qualify as an "undue" hardship, therefore, the accommodation must impose significant unwarranted costs on the employer's business. By contrast, "de minimis" meant "very small or trifling." *Id*.

Congress has defined "undue hardship" in other statutes consistent with the ordinary meaning of both words. For example, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, requires an employer to make "reasonable accommodations" for an employee's disability unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). Congress defined undue hardship as "an action requiring significant difficulty or expense," including such considerations as a proposed accommodation's cost, an employer's financial resources, and the accommodation's impact on the employer's business. 42 U.S.C. § 12111(10); *see also* Fair Labor Standards Act, 29 U.S.C. § 207(r)(3) (undue hardship means significant difficulty or expense).

To conclude that "undue hardship" equates to any cost that is more than very small or trifling negates the term. *Hardison* lacks even a pretense of statutory interpretation or rational deliberation by the Court. It does not qualify as a true precedent with stare decisis force.

1. *Hardison* is also ineligible for the super-stare decisis presumption.

Because *Hardison* did not interpret Title VII, it should also be disqualified from the "superpowered form of stare decisis" normally accorded to cases interpreting federal statutes. *See, e.g.*, *Kimble v. Marvel Ent., LLC,* 576 U.S. 446, 456 (2015) ("[U]nlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

Hardison is nothing like the kind of statutory interpretation precedent where the Court rendered a thoroughly reasoned and explicated decision after full briefing on the issue by the parties. For example, in *Kimble,* the Court applied the super-stare decisis presumption to *Brulotte v. Thys Co.*, 379 U.S. 29 (1964). *Brulotte* devoted three full pages of analysis to the precise statutory question, and its interpretation was not facially inconsistent with the actual text of the statute.[2] Moreover, *Brulotte* was consistent with two separate lines of cases addressing corollary issues.[3]

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[2] The statute governed the expiration of patents: "Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof." 35 U.S.C. § 154. *Brulotte* read the provision to mean that, after 17 years, the patentee's rights became public property. 379 U.S. at 33.

[3] *Brulotte* was part of a series of cases also guarding that 17-year cut-off date and another series of cases holding that private contract provisions limiting free use of such inventions past the cut-off date were unenforceable. *Kimble*, 576 U.S. at 452-53.

Similarly, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), the Court applied the presumption to *Runyon v. McCrary,* 427 U.S. 160 (1976), in which the "language and history of the statute were examined and discussed with great care."

By contrast, *Hardison* provided little analysis or explanation for its newly minted standard. 140 S. Ct. at 686 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the denial of certiorari) (the *Hardison* Court did not "explain the basis" for the "more-than-de-minimis" standard). *Hardison* is an isolated decision with no support from any of this Court's subsequent decisions. To the contrary, *Hardison* is inconsistent with *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) (Title VII requires "favored treatment" of employees' religious practices, not mere neutrality) and other cases emphasizing the First Amendment's preferential treatment of religion. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (stating that the "First Amendment itself, . . . gives special solicitude to the rights of religious organizations"); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.").

"[S]tare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos*, 140 S. Ct. at 1405. The super-stare decisis presumption should be foreclosed when a barely reasoned opinion results in an outright conflict

between a precedent and the statutory provision it purports to interpret.

2. Congress is not responsible for fixing *Hardison's* antonymous definition of undue hardship.

The separation of powers doctrine supplies the justification for the super stare decisis presumption. The theory goes that an initial interpretation of a statute is necessary as part of judicial review, but that subsequent reinterpretations would usurp legislative authority to amend statutes. *See, e.g., Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357-60 (1953). In other words, wrong statutory interpretations are "balls tossed into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U.S. at 456.

As a preliminary matter, that theory begs the question: "Why should an errant initial interpretation of legislative expectations be considered acceptable judicial lawmaking, and a later, corrective interpretation be considered usurpation?" William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1399 (1988). For the textualist, what a later Congress might think, or have the will to do, has no probative value to the meaning of a statute enacted a half century earlier.

But assuming the theory has any continuing validity, it should be inapplicable where, as here, the Court fabricated a standard with no basis in the statutory language. In fact, continued adherence to the Court's fiat violates separation of powers because it perpetuates an egregiously wrong precedent that

"makes a mockery" of Congress's goal to protect employees' religious liberty rights. *Hardison*, 432 U.S. at 88-89 (Marshall, J., dissenting). *See also* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1063 (2003). ("A broad power to trump statutory text with erroneous gloss would remove the line between judicial interpretation and legislation.").

It is also true that, where the Court engages in true statutory construction, a corollary justification for the super stare decisis presumption is that Congress's failure to amend a statute in response to judicial interpretation reflects tacit approval. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). But almost five decades of Congressional silence on *Hardison's* non-interpretative judicial gloss should not be read as approval. *See Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *Helvering v. Hallock*, 309 U.S. 106, 119 (1939) ("It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.").

In any event, the Congressional acquiescence theory is based on the "false premise" that the correctness of statutory construction is to be measured by what later Congresses want, "rather than by what the law as enacted meant." *Gamble v. United States,* 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring) (quotations omitted). Additionally, as Justice Barrett has pointed out, Congressional approval through silence "circumvents the constitutional limits on the

legislative process" because laws must be passed through bicameralism and presentment, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 339 (2005).

> Silence cannot satisfy the requirement of bicameralism. Without a vote, it is impossible to tell whether a majority of both houses supports a measure. And even assuming that silence could somehow satisfy the requirement of bicameralism, ratification by inaction circumvents the requirement of presentment. If Congress's silence is given legal effect, Congress effectively can amend an existing statute without ever giving the President the opportunity to veto the amendment.

Id.

Hardison's more-than-de-minimis standard is a judicial invention unmoored from anything that Congress has enacted. The Court "cannot properly place on the shoulders of Congress the entire burden of correcting the Court's own error." *Kimble*, 576 U.S. at 471 (Alito, J., joined by Roberts, C.J. and Thomas, J., dissenting) (cleaned up).

CONCLUSION

Amicus respectfully requests this Court to grant review.

Respectfully submitted,

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