No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF, *Petitioner*,
v.
LOUIS DEJOY, *Respondent*.

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

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should disapprove the more-than-*de-minimis*-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

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INTEREST OF *AMICI CURIAE*

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 22 million members and a longstanding commitment to religious liberty. The Church and its members often confront Title VII religious accommodation issues because a core tenet of their faith is that no work should be performed on the Sabbath, from sundown on Friday to sundown on Saturday. Accordingly, the Seventh-day Adventist Church has extensive nationwide experience in litigating Sabbath accommodation cases on behalf of its members and other people of faith.

The Union of Orthodox Jewish Congregations of America (Orthodox Union) is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community. The Orthodox Union is concerned that existing precedent especially perpetuates discrimination against members of minority faiths who, like Orthodox Jews, observe religious rules and rituals in nearly every facet of life.*

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* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accord with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Title VII prohibits an employer from discriminating against an employee for engaging in a religious practice "unless [the] employer demonstrates that he is unable to reasonably accommodate" "all aspects" of the employee's "religious observance or practice without undue hardship." 42 U.S.C. § 2000e(j). Congress added this protection to Title VII in 1972 "'in the spirit of religious freedom'" based on concern "for the individuals of all minority religions who are forced to choose between their religion and their livelihood.'" *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 454 n.11 (CA7 1981) (quoting 118 Cong. Rec. 705, 705–06 (1972)).

Since then, Title VII's protection for religious practice has suffered from repeated judicial efforts to narrow its reach. These judge-made barriers have departed from Title VII's text and left vulnerable the religious liberties of working Americans, especially those of minority faiths. Most notably, in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court interpreted "undue hardship" in a pre-1972 administrative guideline to mean anything more than a "*de minimis* cost." *Id.* at 84. That incorrect interpretation has been applied since in Title VII cases, with devastating harms to religious minorities who seek to live out their faith in daily life but do not share the practices implicitly accommodated in many workplaces. Because of *Hardison*, these individuals face a stark choice between their faith and their livelihood. To vindicate Title VII's promise of workplaces free of religious discrimination, this Court should grant certiorari and properly interpret "undue hardship" in accord with its ordinary and original meaning.

1. *Hardison*'s ill-effects are felt most strongly by members of non-Christian minority religions and Christian religions comprised mostly of racial minority groups. *Amici*'s experiences illustrate the point. Both Seventh-day Adventists and Orthodox Jews are part of minority religious traditions whose members make up less than one percent of the national population.[1] Adherents of both religions avoid work from sundown Friday to sundown Saturday in observance of the biblical command to "Remember the Sabbath Day, to keep it Holy." Exodus 20:8-11. Both deeply incorporate religious practices into daily life. "Seventh-day Adventists are extremely devout by traditional measures of religious observance."[2] And the essence of Orthodox Judaism is conducting one's life in accordance with *halacha*, the millennia-old body of Jewish law that governs how Jews should pray, eat, dress, conduct business, care for themselves and others, and carry out innumerable other activities of daily life. Orthodox Jews "are more than four times as likely as other Jews to participate in such religious practices as regularly lighting Sabbath candles, keeping a kosher home and avoiding handling money on the Sabbath."[3] Religious minority status often goes hand-in-hand with other minority statuses. For instance, only 37% of Seventh-day Adventists are

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[1] Pew Research Center, *America's Changing Religious Landscape* 102 (May 12, 2015), https://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf.

[2] M. Lipka, *A Closer Look at Seventh-day Adventists in America*, Pew Research Center (Nov. 3, 2015), https://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/.

[3] Pew Research Center, *A Portrait of American Orthodox Jews* 21 (Aug. 26, 2015), https://tinyurl.com/2nc7cdem.

white.[4] And Orthodox Jews are much more likely to be married with more children than other Jewish groups.[5]

Seventh-day Adventists and Orthodox Jews, like members of other minority faiths, are disproportionately subjected to religious discrimination in employment. In large part, that discrimination is because majority religious practices are accommodated by default, while minority practices—like observing the Sabbath on Saturday rather than Sunday—are not. And that is where *Hardison* hurts employees the most. Rather than accept the value that Congress saw in a religiously diverse workforce, *Hardison* concluded that any more than *de minimis* harm to the employer outweighs the benefits of religious diversity.

Decisions in the lower courts show that *Hardison*'s *de minimis* test is nearly impossible for an employee to overcome. Pure speculation about minimal costs all too often suffices for an employer to prevail. Thus, employers often have no legal need to offer even simple accommodations or engage in cooperative efforts with employees who are religious minorities. Far from solidifying Title VII's protection against religious discrimination, the 1972 amendment as interpretated by *Hardison* did nothing but perpetuate and in some cases increase harms to religious minorities. That is sufficient reason to revisit its analysis.

2. *Stare decisis* cannot justify retaining *Hardison*. *Hardison*'s interpretation of "undue hardship" in pre-statutory administrative guidance was dicta as applied to Title VII. No party advanced the *de minimis*

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[4] Lipka, *supra* note 2.

[5] *Portrait of American Orthodox Jews*, *supra* note 3, at 8–11.

test that this Court adopted in one conclusory sentence. Even recharacterizing *Hardison* as a statutory case, that decision departs from Title VII's plain text, has been criticized by many jurists, voids the 1972 amendment, has been eroded by subsequent decisions, makes Title VII an outlier among civil rights laws, and is applied in a way that unjustly harms workers of faith. And facile excuses that "Congress can fix it" ignore that (1) this Court's duty is to apply the law, (2) significant barriers exist to congressional fixes, especially in protecting religious minorities, and (3) Congress has repeatedly tried and failed to fix it. This Court created the problem, and this Court should fix it. *Hardison*'s anti-textual, anti-religious character makes it a clear example of judicial overreach. The Court should grant certiorari and restore the vital protections that Congress sought to provide to all employees of faith.

REASONS FOR GRANTING THE WRIT

I. *Hardison* harms religious minorities.

Four decades of experience have shown that courts find nearly any burden that an employer invokes to be more than *de minimis*. By default, the greatest harm from this misinterpretation falls on members of minority faiths that are more likely to deviate from societal norms on issues of dress, Sabbath observance, prayer, religious holidays, and all manners of other religious practices. These practices are often central to a religious person's daily living. Title VII embodies a promise that such faith-based practices should not preclude one's ability to participate in society by earning a living. *Hardison* breaks that promise and specially hurts religious minorities.

Hardison's mistreatment of those who observe the Sabbath on days other than Sunday (like *amici*) or exercise other minority beliefs highlights that decision's errors and ill effects. The "primary purpose of the [1972] amendment . . . was to protect Saturday Sabbatarians," even if "unequal treatment would result." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Congress enacted the amendment in response to judicial decisions artificially narrowing the 1964 Civil Rights Act's general prohibition on religious discrimination. See 118 Cong. Rec. at 705–31; see also K. Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362–69 (1997). As amended, "Title VII does not demand mere neutrality with regard to religious practices" but "[r]ather" "gives them favored treatment." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

Though these points are express in the legislative history, see *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting), the context of the 1972 amendment confirms them. "[I]nterpretation always depends on context," "context always includes evident purpose," and "evident purpose always includes effectiveness." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012).

"[C]ourts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc.* v. *Kempthorne*, 472 F.3d 872, 877 (CADC 2006) (Kavanaugh, J.). Yet reading "undue hardship" to mean "more than *de minimis*" practically reads the amendment out of the statute. Indeed, the Court in *Hardison* was interpreting EEOC's "defensible construction of the pre-1972 statute" and thus did not consider whether the 1972 amendment "must be applied." 432 U.S. at 77 n.11. Treating the *de minimis* test as defining the 1972 amendment makes the amended statute coterminous with the original, "render[ing] [the amendment] superfluous in all but the most unusual circumstances." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001). Put another way, the few cases that purport to find an undue hardship under the 1972 amendment would have come out the same way under *Hardison*'s construction of the pre-1972 statue. By depriving the amendment of all effect, the *de minimis* test contradicts the evident statutory purpose. Cf. *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 828 (CA6 2020) (Thapar, J., concurring) (noting the *de minimis* test's "conflict with the background legal maxim *de minimis non curat lex*": "the law does not care for trifling matters").

The case results bear out this contradiction and underscore the harms of the *de minimis* test on religious minorities like *amici*. Instead of "favored treatment," *Abercrombie*, 575 U.S. at 775, employees—most of whom are members of religious minorities—overwhelmingly lose cases involving religious accommodations (as other *amici* here prove). Under *Hardison*, "little more than virtual identical treatment of religious employees [is] required." D. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. Law & Pol. 107, 122 (2015). Such equal treatment offers little protection to employees, since it allows the employer to deny an accommodation to everyone if it can show a more than *de minimis* hardship. And that showing will be all too easy for religious practices that are not already ingrained to some degree in U.S. culture. See, *e.g.*, *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 63–64 (1986) (addressing how standard employment contract had "annual leave for observance of mandatory religious holidays").

Thus, an employer can often extract large burdens from employees as the price of living their religion—or simply fire them. Employees who are religious minorities are presented with what then-Judge Alito and Justice Marshall called the "'cruel choice' between religion and employment"—a choice Congress sought to prevent with Title VII. See *Abramson* v. *William Paterson Coll. of N.J.*, 260 F.3d 265, 290 (CA3 2001) (Alito, J., concurring); *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting); see, *e.g.*, *Yott* v. *N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (CA9 1979) ("[A] standard less difficult to satisfy than the 'de minimus' standard for demonstrating undue hardship expressed

in *Hardison* is difficult to imagine."). For instance, in one infamous case, Sears refused to hire or terminated Orthodox Jewish and Seventh-day Adventist technicians for refusing to do repairs on Saturdays—even though they volunteered to do extra work Sundays or evenings. Under *Hardison*'s *de minimis* standard, the company felt that it could impose this blanket rule solely on its belief that Saturdays were its busiest repair day. Actually, Tuesdays were, and it took an official state investigation to vindicate employees' rights. See D. Kaminer, *When Businesses and Employees' Religion Clash*, N.Y.L.J., July 21, 2000, at 28, col. 6 (citing *Spitzer* v. *Sears, Roebuck and Co.*, Agreed Final Judgment, N.Y. Sup. Ct. Kings County (April 4, 2000)).

In short, *Hardison* virtually eliminates Congress's accommodation requirement for most employees of faith—especially members of minority faiths. Rather than encouraging employers to compromise, *Hardison* tells them an employee has no claim for accommodation if there is more than *de minimis* cost, including even a risk of harm. And if the employer has no potential legal obligation, there is little incentive to engage in the "bilateral cooperation" that this Court urged in *Ansonia*, 479 U.S. at 69. The harm to religious minorities faced with a choice between their livelihood and their faith is immense. This exceptionally significant problem warrants this Court's review.

II. Statutory *stare decisis* does not justify retaining *Hardison*.

Statutory *stare decisis* does not eliminate the need for this Court's review. Even if statutory *stare decisis* applied to *Hardison*'s interpretation of a pre-statute agency handbook, the relevant *stare decisis* factors

cannot come close to justifying this Court's retention of *Hardison*.

A. Statutory *stare decisis* does not apply to *Hardison*.

Though sometimes this Court applies a heightened form of statutory *stare decisis*, such protection could not extend "to decisions that do not actually interpret a statute." *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 471 (2015) (Alito, J., dissenting). *Hardison* did not interpret a statute. "Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an 'undue hardship' defense—not the amended statutory definition." *Abercrombie*, 575 U.S. at 787 n.* (Thomas, J., concurring in part and dissenting in part). Thus, *Hardison*'s discussion of Title VII was dicta. See also *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 n.* (2020) (Alito, J., concurring in denial of certiorari).

That *Hardison*'s passing sentence about the *de minimis* test was dicta is confirmed by the briefing in the case. The consolidated brief in opposition (at 4) shows that two issues were presented: the interplay between the 1964 Civil Rights Act's "reasonable accommodation" requirement and seniority systems, and whether accommodating religious employees violates the Establishment Clause. 1975 WL 173838. Outside of quoting the statute, the EEOC guideline, and the decision below, the BIO never *mentioned* "undue hardship." (The same was true of TWA's reply in support of certiorari. 1976 WL 181637.)

The parties' merits briefing appears to contain a single reference to "*de minimis*," with the union

petitioners conceding (at 47) that the statutory language should "be construed to require *some* attempt to facilitate a religious practitioner's efforts to avoid conflicts between his work and his religion." 1977 WL 189767. Even that construction—proposed to avoid perceived Establishment Clause problems—is stronger than the *de minimis* standard now applied. TWA's briefing, for its part, centered on its lead argument (at 19) that "[t]he religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment" and its secondary argument about the lower court's application of Rule 52(a). 1977 WL 189766. Given all this, it cannot be said that the Court in *Hardison* issued any sort of reasoned, binding opinion after full briefing on a question of statutory interpretation that was irrelevant even if any party had raised it—and none did.

Thus, *stare decisis* does not apply, for *Hardison* does not interpret the relevant statutory language. "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and "[i]f they go beyond the case," they "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821); see *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) ("*Stare decisis* is a doctrine of preservation, not transformation").

At a minimum, *Hardison*'s *de minimis* test was never "advanced" by a "party in that case" and "the Court did not explain [its] basis." *Patterson*, 140 S. Ct.

at 686 (Alito, J., concurring in denial of certiorari). And this Court is "less constrained to follow precedent where, as here, the opinion [on an issue] was rendered without full briefing or argument." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). That later opinions assumed *Hardison*'s analysis, *e.g.*, *Ansonia*, 479 U.S. at 67, does not change this result. Cf. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.").

Because interpreting Title VII's "undue hardship" standard to mean "more than *de minimis*" was neither briefed nor requisite to the decision in *Hardison*, that interpretation is not entitled to *stare decisis* effect. *Hardison*'s flaws cannot be avoided on stare decisis grounds. See *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring) ("[W]e cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").

B. *Hardison* could not survive any *stare decisis* standard.

Even assuming statutory *stare decisis* applies here, it would not justify sticking with *Hardison*'s grievously wrong interpretation of Title VII. As a general matter, *stare decisis* can "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). But "the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court

should *never* overrule erroneous precedent." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring). Otherwise, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring). In other words, "*stare decisis* is not an end in itself" and instead "serve[s] a constitutional ideal—the rule of law." *Id.* at 378. "[W]hen fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, [the Court] must be more willing to depart from that precedent." *Ibid.*

On occasion, the Court has said that "[i]n statutory cases, *stare decisis* is comparatively strict." *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring) (collecting cases). The reason typically given for heightened statutory *stare decisis* is that "Congress and the President can alter a statutory precedent by enacting new legislation." *Ibid.*; see, *e.g.*, *Kimble*, 576 U.S. at 456 ("Congress can correct any mistake it sees.").

But practical justifications for heightened statutory *stare decisis* have little relation to any legal or constitutional grounding of *stare decisis*. After all, the Constitution makes both itself "and the laws of the United States" "the supreme law of the land." U.S. Const. art. VI, cl. 2. The Court's "judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change." *Gamble* v. *United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

Further, "to the extent the Court has justified statutory *stare decisis* based on legislative inaction,

this view is based on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Ibid.*; see *Bostock* v. *Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1747 (2020) ("Arguments based on subsequent legislative history should not be taken seriously." (cleaned up)). It is "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson* v. *Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). After all, "enacting new legislation" is "far more difficult than the Court's cases sometimes seem to assume." *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring); see U.S. Const., art. I, § 7; F. Easterbrook, *Stability & Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 427 (1988) ("Today's Congress may leave in place an interpretation of a law simply because today's coalitions are different. The failure of a different body to act hardly shows that the interpretation of what an earlier one did is 'right.'"); cf. W. Eskridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1392 (1988) (noting selective invocations of "strong" statutory *stare decisis* that appear to represent "judicial hide-and-go-seek").

This case implicates several of these erroneous assumptions underlying heightened statutory *stare decisis*. The present reality is that Congress and the President can rarely pass legislation of any significance. See J. Weisman, *Congress Ends 'Horrible Year' with Divisions as Bitter as Ever*, N.Y. Times (Jan.

4, 2022), https://tinyurl.com/bdhhysh4. Hence their joint reliance on the capacious administrative state to update and change legal regimes. See *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring) (noting "the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus"). The obstacles to passing legislation are especially stark in the context of religious freedom legislation. See*, e.g.*, B. Migdon, *Religious freedom bill dies in Virginia Senate*, The Hill (Feb. 24, 2022), https://tinyurl.com/534mstak. While past legislation like the federal Religious Freedom Restoration Act passed overwhelmingly on a bipartisan basis, the current political climate makes even copycat state religious freedom acts extremely controversial. See P. Baumgardner & B. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 Alb. L. Rev. 1385, 1393–96 (2019) (describing shift from early, bipartisan religious freedom efforts to the recent "fragmented partisan stage" where "successful [state] RFRAs are hard to come by").

More, by now it is clear that Congress—which has had over forty years to address *Hardison*'s error—will not fix it. While many bills to overturn *Hardison* have been introduced, only a handful even received a committee or subcommittee hearing. See Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong. (2007); Workplace Religious Freedom Act of 2005, H.R. 1445, 109th Cong. (2005); Workplace Religious Freedom Act of 1997, S. 1124, 105th Cong. (1997). For these reasons, the Court should adhere to the course it has taken before in cases involving civil rights and not

"place on the shoulders of Congress the burden of the Court's own error." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978).

In all events, no matter what level of *stare decisis* might apply, this Court should adopt a proper interpretation of Title VII's undue hardship requirement. All *stare decisis* factors support overruling *Hardison*. As Justice Marshall forewarned in dissent, *Hardison* violated Title VII's ordinary meaning, "effectively nullif[ied]" its protections, and "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86, 89, 92 n.6.

1. *Hardison* is egregiously wrong.

Hardison is "not just wrong," but "egregiously wrong." *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). As discussed, *Hardison* flatly misinterpreted Title VII's "undue hardship" standard without the benefit of briefing. "[I]t's just an implacable fact that the [decision] spent almost no time grappling with the historical [or ordinary] meaning of the" "undue hardship" requirement, instead subjecting EEOC's guideline "to an incomplete functionalist analysis of [the Court's] own creation for which it spared" "a single sentence." *Id.* at 1405 (majority op.) (first two quotations); *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari) (third quotation); see *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning.").

"The *Hardison* majority never purported to justify its test as a matter of ordinary meaning. And how could it?" *Small*, 952 F.3d at 828 (Thapar, J., concurring). As Petitioner fully explains, *Hardison*'s interpretation cannot be squared with "the ordinary public meaning of Title VII's command." *Bostock*, 140 S. Ct. at 1738; see Pet. 14–19. "By definition, de minimis costs are not hardships (much less 'undue' hardships)." M. Storslee, *Religious Accommodation, The Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 936 (2019). *Hardison* is egregiously wrong.

2. *Hardison* has negative ramifications.

Hardison has "caused significant negative jurisprudential or real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring). Start with its "real-world effects on the citizenry." *Ibid.* As shown above, *Hardison* fails to ensure fairness to individual employees or to facilitate religious diversity in the workforce. It specially punishes members of minority faiths. And it has created needless conflicts between employers and employees.

Next consider Hardison's "consistency and coherence with other decisions." *Ibid. Hardison* makes Title VII "an outlier among" civil rights laws. *Janus*, 138 S. Ct. at 2482. The Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Act of 1994, and the Fair Labor Standards Act each defines "undue hardship" to mean hardship causing "significant difficulty or expense," not just a smidgen more than *de minimis* harm. 42 U.S.C. § 12111(10)(A); 38 U.S.C. § 4303(15); 29 U.S.C. § 207(r)(3). Even where Congress has not specifically defined "undue hardship," such as in the Bankruptcy

Code, the courts have rejected any attempt to constrain it with the "*de minimis*" test. *Small*, 952 F.3d at 827 (Thapar, J., concurring) (collecting cases). Thus, "Title VII's right to religious exercise has become the odd man out." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting from denial of certiorari).

Hardison is a standout in another respect. Its motivating principle seemed to be concern about Establishment Clause implications of "unequal treatment of employees" because of "their religion." 432 U.S. at 84. But later decisions of this Court eliminated that concern. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, this Court held that Title VII's religious protections do not violate the Establishment Clause. 483 U.S. 327, 338–39 (1987) (evaluating 42 U.S.C. § 2000e-l(a)); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (approving "appropriately balanced" religious accommodations). And this Court in *Abercrombie* recognized Congress' intent to give religious employees not merely equal treatment but "favored treatment." 135 S. Ct. at 2034. These later decisions refute any Establishment concern. See *Kimble*, 576 U.S. at 458 (pointing out that statutory reconsideration is appropriate after "subsequent legal developments" like "the growth of judicial doctrine").

Nor is *Hardison* meaningfully "workable." True, it means that the employee almost always loses, but workability means more than just "easy to apply." The question instead is whether a rule of decision workably accounts for the relevant interests. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, 546 (1985) (overruling precedent that had sought to serve "federalism principles" where that precedent could not "be faithful to the role of federalism in a

democratic society"). *Hardison*'s rule—that the employee loses nearly by default—is the opposite of the workable balance of interests that Congress sought to protect in Title VII.

3. *Hardison* does not implicate significant reliance interests.

Overruling *Hardison* would not "unduly upset reliance interests." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring). First, any claim of "reasonabl[e] reli[ance]" (*ibid.*) would be fatally undercut by the fact that employers "have been on notice for years" from prior certiorari petitions—supported by the United States and with opinions by multiple Justices—that *Hardison* may not be long for the Court's jurisprudence. *Janus*, 138 S. Ct. at 2484; accord *Knick* v. *Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019) (overruling a decision that had "come in for repeated criticism over the years from Justices of this Court and many respected commentators").

Next, there are no sunk costs or irretrievable investments to be lost here, and no barrier to revising religious-accommodation policies going forward. Any additional "cost in accommodating these employees . . . would be balanced by the benefit of having a workplace that respects religious pluralism." K. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 Ark. L. Rev. 515, 537 (2010).

Last, significant reliance interests are not implicated because, as properly interpreted, Title VII prevents employers from suffering any "undue hardship" when offering a religious accommodation. "Title VII calls for reasonable rather than absolute

accommodation," *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring), and does not give employees an "unqualified right" to override workplace demands, *id.* at 709 (majority op.). Perhaps that explains why no *amicus*, employer or otherwise, supported the respondents in the recent cases asking this Court to reconsider *Hardison*. Though under a proper test employers must try to accommodate the religious beliefs and practices of their employees, those efforts will not rise to the level of undue hardship on the employer. Accord *Small*, 952 F.3d at 829 (Thapar, J., concurring). Continuing to allow employers to discriminate against religious employees "in perpetuity" "to preserve" *Hardison*'s elimination of even minimal efforts "would be unconscionable." *Janus*, 138 S. Ct. at 2484.

CONCLUSION

An employer's refusal to properly accommodate an employee's legitimate religious need violates Title VII's statutory text. This Court should grant the petition and restore that statutory protection to Mr. Groff and the many other workers of faith who will continue to suffer a similar fate if *Hardison* stands.

Respectfully submitted,

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