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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an individual "because of such individual's * * * religion." 42 U.S.C. § 2000e-2(a)(1), (2). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court stated that an employer suffers an "undue hardship" in accommodating an employee's religious exercise whenever doing so would require the employer "to bear more than a de minimis cost." *Id.* at 84.

The questions presented are:

1. 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).

2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Gerald E. Groff was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Louis DeJoy, Postmaster General, United States Postal Service, was the defendant in the district court and the appellee in the court of appeals. Megan J. Brennan, Postmaster General, United States Postal Service, was the defendant in the district court until Respondent was substituted in her place.

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BRIEF FOR PETITIONER

Petitioner Gerald E. Groff respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-32a) is reported at 35 F.4th 162. The district court's opinion (Pet. App. 33a-60a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May 25, 2022. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides in relevant part:

> It shall be an unlawful employment practice for an employer 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j) provides:

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

PRELIMINARY STATEMENT

Gerald Groff believes it is his sacred obligation to "[r]emember the Sabbath day, to keep it holy" and to follow the commandment "[s]ix days you shall labor, and do all your work, but the seventh day is a Sabbath to the Lord your God." Exodus 20:8-10 (ESV). American law and culture have long respected the idea of taking a weekly day of rest from work. See *McGowan* v. *Maryland*, 366 U.S. 420, 431-440 (1961) (describing religious and secular origins and justifications for Sunday closing laws). Indeed, the Constitution itself reflects the Sunday Sabbath, granting the President "ten Days (Sundays excepted)" in which to decide whether to sign or veto a bill. U.S. Const. art. I, § 7, cl. 2. But when a conflict arose between Groff's duties as a mail carrier for the United States Postal Service ("USPS") and his observance of the Sunday Sabbath, USPS claimed that respecting Groff's belief was too onerous and refused to offer an accommodation that would allow him to serve both his employer and his God.

Recognizing that no American should be forced to choose between making a living or freely exercising his religious beliefs, Congress amended Title VII of the Civil Rights Act of 1964 a half-century ago. The amendment requires employers to reasonably accommodate employees' religious practices unless doing so would inflict an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). On its face, the statute provides robust protections for religious employees. After all, "undue hardship" suggests that an employer must incur significant difficulty or expense before it is excused from offering an accommodation.

But Congress's efforts to safeguard the Constitution's first liberty were soon thwarted. Just a handful of years later, this Court gutted Title VII's vital protections in dicta utterly divorced from the statutory text, declaring that employers could deny religious accommodations that impose "more than a de minimis cost." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977). *Hardison*'s de minimis standard "effectively nullif[ies]" the statute's promise of a workplace free from religious discrimination and "makes a mockery" of Title VII. *Id.* at 88-89 (Marshall, J., dissenting). Lower courts, following this Court's dicta, have embraced *Hardison*'s de minimis rule and, as a result, virtually always side with employers whenever an accommodation would impose any burden.

This case presents a prime example. Even though USPS contemporaneously acknowledged that exempting Groff from Sunday delivery would impose no meaningful burden on USPS, the court of appeals still concluded that USPS had satisfied the de minimis test. Pet. App. 24a-25a. In doing so, the court of appeals also defied Title VII's command that an employer must demonstrate "undue hardship on the conduct of *the employer's business*" and instead accepted a showing that the requested accommodation would burden *the employee's co-workers*. *Id.* at

22a-24a (emphasis added). This atextual rule further dilutes what little remains of Title VII's religious protections after *Hardison* and "effectively subject[s] Title VII religious accommodation to a heckler's veto by disgruntled employees." *Id.* at 28a (Hardiman, J., dissenting).

Three current Justices, distinguished lower-court judges, leading scholars, and even the United States have all recognized *Hardison*'s egregious and consequential error. "[I]t is past time for the Court to correct it." *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., dissenting from denial of certiorari); accord *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 685, 686 n.* (2020) (Alito, J., concurring in denial of certiorari) (Court should "reconsider" *Hardison*'s dicta). Bereft of any textual support and incompatible with this Nation's founding promises, *Hardison*'s wrong must be righted.

STATEMENT

I. BACKGROUND

A. Legal Background

Under Title VII of the Civil Rights Act of 1964, employers may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. § 2000e-2(a)(1). As originally enacted, Title VII did not explicitly require employers to accommodate employees' religious practices. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701, 703(a)(1), 78 Stat. 241, 253-255 (1964). In 1972, Congress amended the statute to do so by adding a definition of "religion" to Title VII. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (1972). Title VII now defines "religion" to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Title VII extends these protections to federal employees, including USPS employees. See *Loeffler* v. *Frank*, 486 U.S. 549, 558-559 (1988) (citing 42 U.S.C. § 2000e-16(a)).

A reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices," *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70 (1986), but the employer need not "choose any particular reasonable accommodation," much less the employee's preferred accommodation, *id.* at 68. An employer discriminates on the basis of religion if it fails "to make reasonable accommodations, short of undue hardship, for the religious practices of his employees." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

In *Hardison*, the Court rejected an employee's request for an accommodation that would allow him to abstain from Sabbath work. *Id.* at 67-68. The Court primarily addressed whether Title VII required accommodations that would force employers to violate seniority systems created by collective-bargaining agreements. *Id.* at 78-83; see 42 U.S.C. § 2000e-2(h) (application of "a bona fide seniority * * * system" is not "an unlawful employment practice").

After concluding that such an accommodation is not required, the Court also declared that an employer's business suffers an "undue hardship" whenever accommodating an employee's religious exercise would require the employer "to bear more than a de minimis cost." *Hardison*, 432 U.S. at 84. Because the events underlying the claim occurred before the 1972 amendment to Title VII, the Court's statement did not interpret the statute, but only an Equal Employment Opportunity Commission ("EEOC") guideline that likewise required accommodation absent "undue hardship on the conduct of the

employer's business." *Id.* at 72, 76 & n.11.

Justice Marshall, joined by Justice Brennan, dissented. He "question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost,'" *id.* at 92 n.6, and insisted that the majority's decision "makes a mockery" of Title VII and "effectively nullif[ies]" the statute's promise of a workplace free from religious discrimination, *id.* at 88-89.

B. Factual Background

Petitioner Gerald Groff is an Evangelical Christian who observes a Sunday Sabbath, believing that day is meant for worship and rest. J.A. 143, 157-158.

Groff began his employment with USPS in 2012 and became a Rural Carrier Associate ("RCA") later that year. *Id.* at 143. An RCA is a non-career employee who provides coverage for career employees whenever they are absent. *Id.* at 144. USPS also employs Assistant Rural Carriers ("ARCs") who are hired to work only on Sundays and holidays. *Id.* at 35. In 2014, Groff began work at the Quarryville, Pennsylvania Post Office, and he remained there until he transferred to the Holtwood, Pennsylvania Post Office in August 2016. *Id.* at 160, 297.

When Groff began to work for USPS, RCAs were not required to deliver mail on Sundays. *Id.* at 205. This changed when USPS signed a contract in 2013 to deliver packages for Amazon.com, Inc. *Id.* at 4, 324. In 2016, USPS and the National Rural Letter Carriers' Association ("Union") entered into a Memorandum of Understanding ("MOU") that established the process for scheduling employees for Sunday and holiday Amazon delivery. *Id.* at 144. Under the MOU, USPS generated a list of RCAs and other part-time flexible carriers and asked these employees whether they wanted to work on Sundays and holidays. *Ibid.* Based on their responses, USPS created two lists: volunteers and non-volunteers. *Ibid.* Each

list was alphabetized by last name, without regard to seniority, classification, or assigned office. *Id.* at 310. For Sundays and holidays, management first scheduled ARCs. *Id.* at 145. If this was insufficient to meet demand, management then scheduled from the volunteer list on a rotating basis. *Ibid.* If more coverage was needed, management would schedule from the non-volunteer list on a rotating basis. *Ibid.*

The MOU created separate scheduling arrangements for "peak" and "non-peak" seasons. *Id.* at 150. During peak season (mid-November through early January), each post office was responsible for scheduling its own carriers and delivering its packages on Sundays and holidays. *Id.* at 150-151. During non-peak season (early January through mid-November), individual post offices became part of a regional hub, from which all Sunday and holiday mail was delivered. *Ibid.* The Quarryville and Holtwood Post Offices are part of the Lancaster Annex hub. *Id.* at 144, 150. All scheduled carriers thus reported to the Lancaster Annex for non-peak Sunday or holiday delivery. *Id.* at 150-151.

When Quarryville began Sunday Amazon deliveries in 2015, its Postmaster exempted Groff from Sunday work so long as he covered other shifts throughout the week, which he was more than willing to do. *Id.* at 6-7, 197, 296, 324. But after the MOU went into effect, the Postmaster informed Groff that he would have to begin delivering packages on Sundays. *Id.* at 167-168. To avoid a conflict between work and faith, Groff transferred to Holtwood, which had not yet implemented Sunday Amazon deliveries. *Id.* at 146.

In 2017, Holtwood began delivering on Sundays. *Ibid.* Groff informed Holtwood's Postmaster that he would not report to work on his scheduled Sundays due to his religious beliefs but pledged his willingness to work extra shifts—including on Saturdays and holidays—to avoid

working Sundays. *Ibid.*; C.A. App. 217, 248. The Postmaster refused to exempt Groff from Sunday delivery, believing that "it would be showing favoritism to allow [Groff] to avoid Sundays." C.A. App. 217. However, the Postmaster offered to send emails each time Groff was scheduled on Sunday asking for volunteers to cover his shifts. J.A. 31, 147. The Postmaster described the success of these shift-swapping efforts as "kind of arbitrary," as he and Groff's other supervisors were not always able to locate another RCA to volunteer for Groff's Sunday shifts. *Id.* at 31-32. This ad hoc approach failed to consistently accommodate Groff throughout two years of peak and non-peak seasons. *Id.* at 147, 149-150.

For a time, however, USPS effectively accommodated Groff by skipping him on the Sunday schedule or scheduling in advance an extra RCA at the Lancaster Annex on Sundays for which Groff was scheduled. *Id.* at 34-35, 213, 303, 316-317; C.A. App. 623. When the Holtwood Postmaster learned of these practices, he emailed the Lancaster Annex scheduling supervisors to express his concern. J.A. 316-317. He explained that USPS could discipline Groff only if his "refusing to work is causing an undue hardship/burden on the USPS." *Id.* at 316. For the Postmaster, that created a "dilemma" because scheduling the extra RCA "does not show a hardship/burden to the USPS." *Id.* at 317. Accordingly, USPS had two choices: it could continue accommodating Groff but not discipline him or it could cease the accommodation and thereby manufacture an undue hardship and a justification for disciplinary action against Groff. *Ibid.*

USPS chose the latter course and ended its accommodation of skipping Groff in the Sunday rotation or automatically scheduling an extra RCA in his place. *Id.* at 52, 315; C.A. App. 623. From then on, when no volunteer replacement could be found for Sundays that Groff was

scheduled, Groff honored his religious obligation and did not report for work. J.A. 147.

Consistent with the Holtwood Postmaster's contemporaneous email, USPS's corporate representative conceded that USPS would suffer no negative consequences if an extra RCA were scheduled in place of Groff. *Id.* at 266-268. She thus agreed that any burdens arose from USPS's *suspension* of its accommodation and its decision to schedule Groff for Sunday delivery with no backup plan. *Ibid.*

Groff's absences had a minimal impact on USPS's business, if any. USPS fulfilled its contract with Amazon, and no packages went undelivered due to Groff's absences. *Id.* at 43-44, 92. While USPS's corporate representative alleged that accommodating Groff would have resulted in payment of overtime to other RCAs, later delivery times, and safety issues, she could not identify any evidence that those concerns ever materialized. *Id.* at 258-260.

USPS argued that Groff's absences affected his coworkers. During the six-week peak season, other RCAs had to work more Sundays. Pet. App. 8a. On three occasions during peak season, the Holtwood Postmaster delivered mail on Sundays when the assigned RCA unexpectedly became unavailable. *Ibid.*; J.A. 66-68. Likewise, during non-peak season, other RCAs were called to work on Sundays more often. Pet. App. 8a-9a. And when management ceased its practice of scheduling an extra RCA in advance, other RCAs were required to deliver more mail than they otherwise would have on Sundays due to Groff's absences. *Ibid.*

Groff received repeated discipline when he failed to report for Sunday delivery more than 24 times over two years. J.A. 147-150. Groff explained to the Postmaster that when faced with a conflict between earthly authority and God's commandments, he must always choose to honor God. *Id.* at 301. Groff reiterated his request for

accommodation and sought transfer to another position that did not require Sunday work, but he was told no such non-career positions existed. *Id.* at 150.

Knowing termination was the next form of discipline, Groff resigned on January 18, 2019. *Ibid*.

II. PROCEEDINGS BELOW

A. Proceedings in the district court

After resigning, Groff sued USPS under Title VII for failing to reasonably accommodate his religious practice. Pet. App. 34a, 41a. The parties filed cross-motions for summary judgment, and the district court granted USPS's motion. *Id.* at 34a. USPS conceded that Groff established a *prima facie* claim, and the burden thus shifted to USPS to show that it reasonably accommodated Groff or that such an accommodation would cause an undue hardship upon USPS's business. *Id.* at 52a-53a. The district court first held that "an employer does not need to wholly eliminate" the conflict between work and religion "to offer an employee a reasonable accommodation." *Id.* at 55a. Because USPS lessened the work-religion conflict by attempting to swap Groff's shifts with other employees, the district court concluded that USPS offered him a reasonable accommodation. *Ibid*. In addition, the district court held that exempting Groff from Sunday deliveries would cause undue hardship to USPS because it would "cause[] more than a *de minimus* [sic] impact on [Groff's] co-workers" and cause USPS to violate the MOU's non-seniority-based scheduling provisions. *Id.* at 56a, 58a-59a.

B. Proceedings in the court of appeals

A divided Third Circuit panel affirmed. Pet. App. 1a-32a. The majority held that "[i]nterpreting 'reasonably accommodate' to require that an accommodation eliminate the conflict between a job requirement and the religious practice is consistent with the meaning of the word 'accommodate.'" *Id*. at 14a. Accordingly, USPS's ad hoc shift-

swapping efforts "did not constitute an 'accommodation' as contemplated by Title VII because [they] did not successfully eliminate the conflict." *Id.* at 21a.

The court of appeals concluded, however, that accommodating Groff by exempting him from Sunday work would result in undue hardship under *Hardison*. *Id.* at 21a, 25a. It reasoned that "[e]xempting Groff from working on Sundays caused more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale at both the Holtwood Post Office and the Lancaster Annex hub." *Id.* at 24a. The majority emphasized that, during peak season, an exemption would "place[] a great strain on the Holtwood Post Office personnel," forcing other carriers to cover Groff's shifts. *Id.* at 25a. The court further noted that accommodating Groff "created a tense atmosphere with the other RCAs" and, even during non-peak season, "result[ed] in other employees doing more than their share of burdensome work." *Ibid.*[1]

Judge Hardiman dissented. At the outset, he explained that "*TWA v. Hardison*, 432 U.S. 63 (1977), obliges us to depart from Title VII's text and determine whether accommodating Groff's religious practice would require USPS to 'bear more than a de minimis cost.'" Pet. App. 27a n.1 (quoting *Hardison*, 432 U.S. at 84). He echoed Justice Marshall in "'seriously question[ing] whether simple English usage permits undue hardship to

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[1] The parties disagreed over whether exempting Groff from Sunday duties would violate the MOU's non-seniority-based scheduling provisions, and, if so, whether that would constitute undue hardship. See Pet. App. 10a; cf. *Hardison*, 432 U.S. at 79, 81-82 (holding that violating seniority-based provisions of a collective-bargaining agreement could constitute undue hardship given Title VII's preferential treatment for seniority provisions). However, the court of appeals did not reach those questions. See Pet. App. 24a-25a.

be interpreted to mean more than de minimis cost,' particularly when such a reading can 'effectively nullify' Title VII's promise of religious accommodation." *Ibid.* (quoting *Hardison*, 432 U.S. at 89, 93 n.6 (Marshall, J., dissenting)).

Even under the *Hardison* test, Judge Hardiman could not agree—at least "without more facts"—that USPS had established undue hardship. *Id.* at 26a. In his view, the majority misapplied *Hardison*'s standard by reasoning that "an accommodation that causes more than a *de minimis* impact on *co-workers* creates an undue hardship." *Id.* at 27a (emphasis added). That is because "Title VII requires USPS to show how Groff's accommodation would harm its *business*, not merely how it would impact Groff's coworkers." *Id.* at 28a. Judge Hardiman warned that "[b]y affirming the District Court's atextual rule, the Majority renders *any* burden on employees sufficient to establish undue hardship, effectively subjecting Title VII religious accommodation to a heckler's veto by disgruntled employees." *Ibid.*

Judge Hardiman concluded that a trial was necessary to determine whether the alleged scheduling difficulties created an undue hardship on USPS's business. *Id.* at 29a-30a. He explained that USPS faced scheduling challenges for only a few weeks each year during peak season (when the Holtwood Postmaster used only RCAs at that station). *Ibid.* Additionally, he contended that USPS's assertions regarding the impact on other RCAs during non-peak season was "too speculative to be dispositive," noting that "USPS has provided no evidence that [the other] RCAs did 'more than their share' of work they were hired to perform." *Id.* at 30a n.4. To the contrary, USPS's corporate representative "conceded that scheduling an extra RCA in advance to take Groff's place on Sundays would not harm USPS; Groff's former postmaster acknowledged the same in his email to USPS Labor Relations." *Id.* at 31a. Thus, Judge Hardiman would have reversed and remanded for

trial on the undue-hardship question. *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

This Court should not hesitate to inter *Hardison*'s lawless and damaging de minimis test. To begin with, *Hardison*'s undue-hardship discussion is dicta, for the Court was not interpreting Title VII at all. Thus, the Court writes on a clean slate when construing Title VII's undue-hardship provision in this case.

Plain language dictates that "undue hardship" cannot mean "more than a de minimis cost." It must mean, as it does in analogous civil-rights statutes, "significant difficulty or expense" in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities.

Hardison's diluted test reflexively defers to employer rules that facially treat religious and non-religious employees equally, while discriminating in effect against religious employees. Giving teeth to the undue-hardship standard better reflects the statute's requirement to provide "favored treatment," not "mere neutrality," toward religious practices. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). *Hardison*'s atextual de minimis test should be discarded and replaced by a test that honors the words Congress enacted.

Even if the de minimis test were not dicta, *stare decisis* would not mandate adherence to *Hardison*'s egregious error. Bedrock *stare decisis* doctrine readily permits course correction where, as here, the prior decision wrongly resolved a minimally briefed issue with scant reasoning, engendered no meaningful reliance interests, and gave rise to extreme consequences. The lower courts' embrace of *Hardison*'s de minimis test has evolved into a per se rule that virtually any cost to an employer counts as undue hardship. As a result, *Hardison* has eviscerated Title VII's protection of religious employees and thereby

eroded the Nation's commitment to religious freedom and pluralism. *Hardison* should be jettisoned in favor of a test that matches Title VII's text.

In addition to replacing *Hardison*'s de minimis test, the Court should reject the prevalent view among the courts of appeals that an employer may establish undue hardship by showing only that an accommodation burdens the plaintiff's co-workers. That concept is irreconcilable with the statutory text, which requires the employer to demonstrate "undue hardship *on the conduct of* [*its*] *business*." 42 U.S.C. § 2000e(j) (emphasis added). It also conflicts with the statute's objective of providing favored treatment to employees' religious practices. Title VII must not be subject to a heckler's veto based on an accommodation's effect on other employees.

Under the proper standard, USPS did not satisfy its burden to show that granting Groff an accommodation would cause it undue hardship. Accordingly, the Court should reverse the grant of summary judgment in favor of USPS and direct entry of summary judgment in favor of Groff.

ARGUMENT

I. *HARDISON*'S UNSOUND DEFINITION OF "UNDUE HARDSHIP" LACKS PRECEDENTIAL FORCE, AND THE COURT SHOULD CONSTRUE THAT TERM ACCORDING TO ITS PLAIN MEANING

Because Title VII does not define the phrase "undue hardship," the Court would ordinarily construe it according to its plain meaning. The Court's statement in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), that an employer suffers "undue hardship" whenever a religious accommodation imposes "more than a de minimis cost" departs from that approach and contradicts Title VII's text, structure, history, and purpose. *Stare decisis* does not mandate adherence to *Hardison*'s misguided

dicta. Rather, applying statutory-construction principles, "undue hardship" must mean, as it regularly does throughout the U.S. Code, significant difficulty or expense in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities. Anything less disrespects the text and upsets the balance Congress struck. This Court should faithfully construe the statute and disapprove *Hardison*'s flawed reading of Title VII.

A. *Hardison*'s undue-hardship test is dicta that lacks *stare decisis* effect

The *Hardison* Court was not interpreting Title VII's 1972 amendment that defined "religion," rendering its undue-hardship remarks dicta with respect to the meaning of that statute. *Hardison*, 432 U.S. at 66 ("At the time of the events involved here, a guideline of the [EEOC] required, as the Act itself now does, that an employer, short of 'undue hardship,' make 'reasonable accommodations' to the religious needs of its employees.") (internal citations omitted). "Because the employee's termination had occurred before the 1972 amendment * * *, *Hardison* applied the then-existing EEOC guideline—which also contained an 'undue hardship' defense—not the amended statutory definition." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part); see also *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 n.* (2020) (Alito, J., concurring in denial of certiorari) ("*Hardison* did not apply the current form of Title VII, but instead an [EEOC] guideline that predated the 1972 amendments defining the term 'religion.'"). Thus, any statement in *Hardison* about the statute's definition of "religion" is "dictum" and "entirely beside the point." *Abercrombie*, 575 U.S. at 787 n.* (Thomas, J., concurring in part and dissenting in part); see also *Patterson*, 140 S. Ct. at 686 n.* (Alito, J.).

Basic principles of precedent confirm this conclusion. "[E]xpressions" in an opinion that "are beyond the point involved * * * do not come within the rule of stare decisis." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 626 (1935); see also *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66-67 (1996) (Court is "bound" by the "result" and "those portions of the opinion necessary to that result"). In other words, if the prior case "did not address * * * the point now at issue," the Court is "not bound to follow any dicta in the case." *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021). *Hardison*'s statement on the meaning of "undue hardship" in a case that arose under the Act's pre-1972 version is therefore dicta that does not bind the Court.

While *stare decisis* requires consideration of past judgments, "respect for past judgments also means respecting their limits." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022). Given the limits of *Hardison*, no principle of judicial decisionmaking supports following its dicta. Statutory questions should not be decided "on the basis of a handful of sentences extracted from [a] decision[] that had no reason to pass on the argument," nor should courts "comb these pages for stray comments and stretch them beyond their context." *Ibid.*; see also *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) ("suggest[ion]" in prior case that "did not even purport to interpret the text" of the relevant statute was dicta); *Van Buren*, 141 S. Ct. at 1660 (rejecting as dicta prior "paraphrase" of Computer Fraud and Abuse Act of 1986). Rather, the Court is free to depart from its earlier statements where "more complete argument demonstrate[s] that the dicta is not correct." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (rejecting as dicta prior interpretation of Copyright Act); see also *Cent. Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("Careful study and reflection have

convinced us, however, that [a previous] assumption [in dicta] was erroneous.").

Applying these settled principles, the Court owes no deference to *Hardison*'s dicta about the meaning of Title VII's undue-hardship provision, and it should proceed to interpret that phrase in accord with statutory-construction precepts.

B. Title VII's plain language requires a showing of significant difficulty or expense to excuse an employer from offering an accommodation

As the United States once urged (but now seems to have recanted), *Hardison* is "incorrect," and this Court should construe "undue hardship" consistent with its plain meaning. U.S. Amicus Br. 19-21, *Patterson*, 140 S. Ct. 685 (No. 18-349) (hereinafter, "U.S. *Patterson* Br."). Under ordinary rules of statutory construction, "undue hardship" means that an employer must incur significant difficulty or expense in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities before it is excused from accommodating an employee's religious exercise. This definition matches how "undue hardship" is regularly defined throughout the U.S. Code, and it follows from Title VII's text, structure, history, and purpose. By contrast, *Hardison*'s de minimis test "makes a mockery" of Title VII. 432 U.S. at 88 (Marshall, J., dissenting). Its construction defies "simple English usage" and "effectively nullif[ies]" the statute's promise of a workplace free from religious discrimination. *Id*. at 89, 92 n.6; see also *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari) (same).

1. Requiring significant difficulty or expense accords with the ordinary meaning of "undue hardship," while *Hardison*'s de minimis test affronts the statutory text

a. "When a statute does not define a term, we typically give the phrase its ordinary meaning." *FCC* v. *AT&T Inc.*, 562 U.S. 397, 403 (2011). Because Title VII does not define the term "undue hardship," the Court must determine "the ordinary public meaning of [that] term[] at the time of its enactment." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

"Hardship" ordinarily means "a condition that is difficult to endure," "suffering," or "something hard to bear." The Random House Dictionary of the English Language 602 (1968). This word alone conveys that a business must incur "some pretty substantial costs" before it is excused from offering an accommodation. *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 827 (6th Cir. 2020) (Thapar, J., concurring), cert. denied, 141 S. Ct. 1227 (2021). Nothing less than a true "hardship" can justify refusing a religious accommodation.

But Congress went further, specifying that the "hardship" must also be "undue." "Undue" means "unwarranted," "excessive," "inappropriate," "unjustifiable," or "improper." The Random House Dictionary of the English Language 1433 (1968). Accordingly, the term "undue" indicates that a hardship must be judged against some set of factors to determine whether it is "excessive." The statute provides the context for this determination: "the conduct of the employer's business."

"Undue" thus calibrates the "hardship" with reference to the circumstances of the employer. That is, whether the "condition that is difficult to endure" rises to the level of excessiveness must be assessed against the employer's resources and operations. An "undue hardship" is therefore

one that imposes significant costs or difficulties on the employer in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities. See *Small*, 141 S. Ct. at 1228 (Gorsuch, J.); see also *Small*, 952 F.3d at 827 (Thapar, J., concurring) ("undue hardship" means "the accommodation must impose significant costs on the company").

Logic dictates that an "undue hardship" cannot be less than a "hardship." Cf. *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.,* 139 S. Ct. 361, 368 (2018) ("According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality."). Consequently, "undue" cannot be used to weaken the meaning of the core term by "weigh[ing] the employer's costs against the value of accommodating the employee's religious beliefs or practices." U.S. *Patterson* Br. 20. "[T]o the extent the word 'undue' requires courts to engage in balancing, that balancing should be solely on the employer's side of the equation; that is, the court should weigh the cost of a given accommodation against what the particular employer may properly be made to bear." *Ibid.* That inquiry is consistent with the EEOC's approach, which considers, *inter alia*, "the identifiable cost in relation to the size and operating cost of the employer." 29 C.F.R. § 1605.2(e)(1).

This textual exegesis reveals just how starkly *Hardison*'s de minimis standard conflicts with the ordinary public meaning of Title VII's terms at the time of its enactment. *Small*, 952 F.3d at 827 (Thapar, J., concurring) (reviewing contemporaneous definitions for "undue" and "hardship"). "De minimis" means "very small or trifling matters"—so small that "[t]he law does not concern itself" with them. Black's Law Dictionary 482 (4th ed. 1968). A de minimis imposition falls well short of a "hardship," let alone one that is "undue." Interpreting "undue hardship"

"to mean any cost that is 'more than a trifle'" bears "an ill fit" to the ordinary meaning of that phrase. U.S. *Patterson* Br. 19; see also *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting) (de minimis standard cannot be reconciled with "plain words" of Title VII).

b. Analogous, later-enacted civil-rights statutes confirm the ordinary meaning of undue hardship and illustrate Congress's rejection of *Hardison*'s anomalous construction. The Americans with Disabilities Act ("ADA") requires covered entities to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability * * * unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). The ADA defines "undue hardship" to mean "an action requiring significant difficulty or expense" in light of certain enumerated factors such as the covered entity's financial resources, the number of individuals it employs, and the nature of its operations and facilities. *Id.* § 12111(10). Congress therefore expressly rejected "the principles enunciated by the Supreme Court in [*Hardison*]." S. Rep. No. 101-116 at 33 (1989); H.R. Rep. No. 101-485(II) at 68 (1990) (same); see also H.R. Rep. No. 101-485(III) at 40 (1990) ("[A] definition was included in order to distinguish the duty to provide reasonable accommodation in the ADA from [*Hardison*].").[2]

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[2] Congress recently enacted a new accommodation law that incorporates the ADA's plain-meaning definition of "undue hardship." Pregnant Workers Fairness Act, Pub. L. No. 117-328, div. II, 136 Stat. 4459 (2022). The statute requires employers to "make reasonable accommodations" for an employee's "known limitations related to [] pregnancy, childbirth, or related medical conditions" unless "the accommodation would impose an undue hardship on the operation of the business." *Id.* § 103(1). The statute gives "undue hardship" "the meaning[] given such term[] in [the ADA]." *Id.* § 102(7).

Similarly, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") requires an employer to make "reasonable efforts" to reemploy returning U.S. service members as long as the employer would not suffer "undue hardship." 38 U.S.C. §§ 4303(10), 4312(d), 4313(a). Using virtually identical language to the ADA, USERRA defines "undue hardship" as "actions requiring significant difficulty or expense" in light of the employer's financial resources and operations. *Id.* § 4303(16). Likewise, the Fair Labor Standards Act exempts certain employers from accommodating nursing mothers only if doing so "would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. § 207(r)(3). "Given the parallel purpose, structure, and language of [these statutes]," the Court should interpret Title VII's undue-hardship provision "in the same manner." *Commc'ns Workers of Am.* v. *Beck*, 487 U.S. 735, 752 (1988).

Outside of the civil-rights context, courts regularly construe the undefined term "undue hardship" consistently with its plain meaning rather than following *Hardison*. For example, the Bankruptcy Code permits debtors to discharge a student loan if they can show that the debt imposes an "undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). Courts have explained that "[t]he plain meaning of the words chosen by Congress is that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor," such as "prevent[ing] the debtor from maintaining a minimal standard of living over the course of the repayment period despite good faith efforts to fulfill her obligations." *In re Thomas*, 931 F.3d 449, 454 (5th Cir. 2019). Courts specifically note the intensifying effect of the modifier "undue." "[T]he existence of the

adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans." *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005) (citation and internal quotation marks omitted).

Much the same is true for Federal Rule of Civil Procedure 26(b)(3)(ii)'s exemption of certain documents from discovery unless a party "cannot, without undue hardship," obtain their equivalent through other means. Courts applying that rule have held that "undue hardship" may be satisfied with a showing of "unusual expense." *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1241 (5th Cir. 1982).

In sum, both plain meaning and consistency with identically worded statutory provisions strongly support construing Title VII's "undue hardship" defense to require a showing of significant difficulty or expense in light of the circumstances of the employer. See *Commc'ns Workers of Am.*, 487 U.S. at 754 ("In the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings.").

2. Requiring significant difficulty or expense honors Title VII's unique treatment of religion

Defining "undue hardship" to mean significant difficulty or expense also accords with Title VII's unique treatment of religion. For Title VII's other protected categories, Congress mandated mere neutrality: Employers may not "discriminate" on account of race, sex, etc. But Congress recognized that religion is different. To avoid religious discrimination, mere neutrality toward religion is not enough; active "accommodat[ion]" of religious practices is required. By making it easy to avoid accommodations, *Hardison*'s de minimis standard overrode Congress's design and deferred to employers' neutral

treatment of religious and secular practices. This Court should restore the statute to its original meaning.

Abercrombie points the way. There, the Court explained that "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices." *Abercrombie*, 575 U.S. at 775. "Rather, it gives them favored treatment." *Ibid.*; see also *id*. at 772 n.2 ("accommodate" "means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary").

In requiring "favored treatment" for religious practices, Title VII recognizes that formally neutral workplace rules may discriminate in practice against religious employees. For example, a rule barring head coverings may appear neutral, but that prohibition will penalize Muslim employees who wear headscarves. See *id.* at 775. Only an accommodation that gives favored treatment to the religious employee's practices—*e.g.*, permitting Muslim employees to wear headscarves despite the employer's facially neutral rule—can prevent a coercive choice between work and faith. Congress recognized that accommodations that grant favored treatment to religious practices are necessary to create a truly level playing field for religious employees.

Hardison sharply contradicts the statutory design and *Abercrombie*'s command to give "favored treatment" to employee's religious practices. That is because *Hardison* deems virtually any departure from neutral workplace rules an "undue hardship" under its de minimis test. *Hardison* reasoned that "Title VII does not contemplate" the "unequal" or "prefer[ential]" treatment of "religious needs" over "nonreligious[] reasons for not working on weekends." 432 U.S. at 81, 84-85. In the *Hardison* Court's view, enforcing the plain meaning of undue hardship would "involve unequal treatment of employees on the basis of their religion" and "require an employer to

discriminate against some employees in order to enable others to observe their Sabbath." *Id.* at 84-85. Favoring religious practices in this way, *Hardison* continued, would conflict with Title VII's requirement that "similarly situated employees are not to be treated differently solely because they differ with respect to * * * religion." *Id.* at 71. *Hardison*'s reflexive deference to "neutral" rules, *id.* at 78-79, and concern about requiring employers "to finance" religious practice, *id.* at 84, flouts Title VII's unique treatment of religion.

Justice Marshall's dissent, by contrast, properly recognized that an accommodation is needed only when a neutral rule conflicts with an employee's religious practice: "[I]f an accommodation can be rejected simply because it involves preferential treatment, then [Title VII], while brimming with 'sound and fury,' ultimately 'signif[ies] nothing.'" *Hardison*, 432 U.S. at 87. *Abercrombie* has now vindicated Justice Marshall's understanding. After all, "[i]f neutral work rules (*e.g.,* every employee must work on Saturday, no employee may wear any head covering) precluded liability, there would be no need to provide [the undue-hardship] defense." *Abercrombie*, 575 U.S. at 779 (Alito, J., concurring in the judgment).

Hardison's misplaced concerns about neutrality—rather than a careful construction of the statute—generated its erroneous de minimis dicta. Interpreting the undue-hardship defense to require a showing of significant difficulty or expense respects Title VII's unique treatment of religion and *Abercrombie*'s corollary that "favored treatment" is necessary to prevent religious discrimination.

3. Requiring significant difficulty or expense accords with the history and purpose of the 1972 amendment

a. Title VII's history and manifest purpose further underscore that "undue hardship" means significant

difficulty or expense in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities.

When first enacted in 1964, Title VII did not explicitly require religious accommodations. See *supra* pp. 4-5. The EEOC quickly received complaints "rais[ing] the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek." 31 Fed. Reg. 8370 (June 15, 1966). These complaints "typically involve[d] employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year." *Ibid.* In response, the EEOC in 1966 adopted guidelines requiring employers to accommodate the religious needs of employees "where such accommodation can be made without serious inconvenience to the conduct of the business." *Ibid.*

A year later, the EEOC received additional complaints asking whether it was discriminatory "to discharge or refuse to hire employes [sic] who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days." 32 Fed. Reg. 10298 (July 13, 1967). The EEOC responded by adopting revised guidelines requiring accommodation absent "undue hardship on the conduct of the employer's business." *Ibid.* The guidelines specifically noted that "[s]uch undue hardship, for example, may exist where the employee's needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." *Ibid.* (emphasis added); see also 29 C.F.R. §§ 1605.2, 1605.3, pt. 1605 App. A (discussing background of the EEOC guidelines and 1972 amendment). Thus, the revised guidelines "seemingly stiffened" the prior

standard of "serious inconvenience." Ackerman, Cong. Research Serv., No. 77-163A, *Religious Discrimination in Employment: An Analysis of* Trans World Airlines v. Hardison 5 (1977).

At least two courts promptly issued decisions questioning whether the EEOC guidelines were consistent with Title VII insofar as accommodating Sabbath observers would require departing from facially neutral employment practices. See *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972). *Dewey* reasoned that Title VII did not mandate an accommodation that "would require [the employer] to discriminate against its other employees by requiring them to work on Sundays in the place of [the Sabbatarian employee]." 429 F.2d at 330. Similarly, in *Riley*, the court held that the employer did not discriminate against the Sabbatarian employee because "[a]ll of the foremen were treated equally"—that is, the shift assignment "came in the usual and normal conduct of the defendant's business." 330 F. Supp. at 591.

In light of these decisions, Senator Jennings Randolph, a Seventh-Day Baptist and Saturday Sabbath observer, proposed an amendment to Title VII tracking the language of the EEOC guidelines "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972). He expressed concern that "there has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Ibid.* He explained that *Dewey* and *Riley* had "clouded" whether Title VII protected both religious belief and practice, making it necessary "to resolve by legislation" this question. *Id.* at 706.

Similarly, the conference report on the amendment stated that "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in [*Dewey*]." *Id.* at 7564.

This "instructive" history shows that the 1972 amendment's "primary purpose" was to codify the EEOC's requirement of accommodation absent "undue hardship." *Hardison*, 432 U.S. at 88-89 (Marshall, J., dissenting). Congress sought "to make clear that Title VII requires religious accommodation, even though unequal treatment would result," including "to protect Saturday Sabbatarians * * * 'whose religious practices rigidly require them to abstain from work * * * on particular days.'" *Id.* at 89 (quoting 118 Cong. Rec. 705 (1972)). By codifying the EEOC guidelines, Congress indicated that finding temporary replacements to perform a religious observer's work is not an undue hardship.

b. The *Hardison* Court seemed "oblivious" to this history. *Id.* at 88. By adopting the de minimis standard, *Hardison* departed from the EEOC guidelines Congress aimed to codify and effectively relieved employers of their obligation to accommodate Sabbath observance—the very motivating cause for the amendment. *Id.* at 89. *Hardison* thus returned Title VII to nothing more than a bar on disparate treatment on account of religious belief, "effectively nullifying" the 1972 amendment. *Ibid.*

Despite Congress's concerted efforts to increase workplace protections for religious employees, *Hardison* dramatically undercut them, violating the text, purpose, and history of the 1972 amendment. See *Van Buren*, 141 S. Ct. at 1660 ("When Congress amends legislation, courts must presume it intends the change to have real and substantial effect.") (citation and internal quotation marks omitted). A reading of Title VII that requires the employer to demonstrate significant difficulty or expense—including

when accommodating an employee's Sabbath observance—accords with the history and purpose of the EEOC guidelines and the 1972 amendment. To restore Title VII's goal of eliminating religious discrimination from employment, the statute must be read in accordance with its plain meaning.

C. Even if *Hardison*'s de minimis test were not dicta, *stare decisis* would not mandate adherence to its egregiously unsound reasoning

Even if *Hardison*'s manifestly defective undue-hardship test were not dicta, *stare decisis* principles would still favor overruling it. "[*S*]*tare decisis* is 'not an inexorable command.'" *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (collecting cases). It is "a flexible doctrine permitting error-correction," Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1013 (2003), which requires careful consideration of "the quality of [the decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S. Ct. at 2478-2479. As the United States previously urged, consideration of those factors shows that "revisiting *Hardison*'s *de minimis* standard [is not] precluded by stare decisis." U.S. *Patterson* Br. 21.

1. The cursory consideration of *Hardison*'s de minimis test saps its precedential force

At the outset, *Hardison*'s precedential force is sharply limited because the parties' briefing and the Court's decision were not focused on Title VII's undue-hardship provision. *Stare decisis* doctrine teaches that "[t]he precedential sway of a case is directly related to the care and reasoning reflected in the court's opinion." Garner et al., The Law of Judicial Precedent 226 (2016). For "[i]t is usually a judicial decision's reasoning—its *ratio decidendi*—

that allows it to have life and effect in the disposition of future cases." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1404 (2020) (plurality op.). While a decision that is "unexplicated" or "stripped from any reasoning" may resolve the dispute between the parties, it does not bind future decisions, *ibid.*, and the Court is not obligated to follow it, see, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (Court "felt less constrained to follow [a statutory] precedent where, as here, the opinion was rendered without full briefing or argument"); *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 139-140 (1941) (declining to follow "[l]oose language and a sporadic, ill-considered decision" when resolving issue "with our eyes open and in the light of full consideration").

As the United States once acknowledged, this Court has never had a meaningful opportunity to interpret Title VII's undue-hardship provision. U.S. *Patterson* Br. 21. *Hardison* "primarily addressed whether Title VII's accommodation provision required employers to violate seniority systems created by their collective-bargaining agreements." *Small*, 952 F.3d at 828 (Thapar, J., concurring) (citing *Hardison*, 432 U.S. at 78-84). As a result, "the parties' briefs in *Hardison* did not focus on the meaning of [undue hardship]," and "no party in that case advanced the *de minimis* position." *Patterson*, 140 S. Ct. at 686 (Alito, J.). The Solicitor General's amicus brief in *Hardison* assumed a standard that required accommodation "except to the limited extent that a person's religious practice *significantly and demonstrably affects* the employer's business." U.S. *Patterson* Br. 21 (quoting U.S. Amicus Br. 20, *Hardison*, 432 U.S. 63 (No. 75-1126)). And even the employer in *Hardison* conceded that potentially substantial out-of-pocket costs would not necessarily qualify as undue hardship. *Ibid.* (citing Pet. Br. 41, 47, *Hardison*, 432 U.S. 63 (No. 75-1126)).

Nonetheless, "in two brief paragraphs at the end of the opinion," the Court "asserted—almost as an afterthought—that requiring an employer 'to bear more than a de minimis cost' in order to accommodate an employee's religion would be 'an undue hardship.'" *Small*, 952 F.3d at 828 (Thapar, J., concurring) (quoting *Hardison*, 432 U.S. at 84). "The Court announced that standard in a single sentence with little explanation or supporting analysis." *Small*, 141 S. Ct. at 1228 (Gorsuch, J.). Given the absence of briefing and consideration, it is unsurprising that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson*, 140 S. Ct. at 686 (Alito, J.).

These aspects of *Hardison* counsel strongly against treating its de minimis test as binding precedent. "[A] case cannot be resolved merely by pointing to [several] sentences in [a prior decision] that were written without the benefit of full briefing or argument on the issue." *McCutcheon* v. *FEC*, 572 U.S. 185, 202 (2014). Whether *Hardison* is dicta or something more, "plenary consideration" of Title VII's undue-hardship test is warranted. Cf. *id.* at 203.

2. *Hardison*'s de minimis test cannot survive scrutiny under a *stare decisis* analysis

a. Even if *stare decisis* analysis applies, "the quality of [the decision's] reasoning"—or lack thereof—militates strongly in favor of revisiting *Hardison*'s de minimis test. *Janus*, 138 S. Ct. at 2479; see *Hubbard* v. *United States*, 514 U.S. 695, 702 (1995) (overturning statutory precedent that was "a seriously flawed decision"). *Hardison*'s de minimis test does not even pretend to interpret the statutory text, and it has few, if any, defenders. "[*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; see also *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 465-466 (2015) (Alito, J., dissenting) (*Stare decisis* does not require honoring a "clear case of judicial overreach" or an interpretation that "was not really statutory interpretation at all."). *Hardison* is the poster child for an egregiously wrong legal test that lacks even the most tenuous connection to the governing text. It is a purely judicial creation.

The Court should not shrink from overruling *Hardison*, especially since "this Court has applied the doctrine of *stare decisis* to civil rights statutes less rigorously than to other laws." *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672-673 (1987) (Scalia, J., dissenting). As in past civil-rights cases, the Court should 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) (citation and internal quotation marks omitted).

b. Reliance interests do not favor retaining *Hardison*'s de minimis test. As the United States has argued, reliance interests "are less of a concern" here, U.S. *Patterson* Br. 21-22, for this case does not involve property or contract rights, where "considerations favoring *stare decisis* are at their acme." *Kimble*, 576 U.S. at 457 (citation and internal quotation marks omitted). Overruling where parties have structured complex business arrangements in reliance on a precedent could cause "long-dormant" agreements to "spring back to life." *Ibid.* But that is not the case here. Employment agreements are typically short-term, and employers regularly adapt their human-resources arrangements in response to legal changes and employee needs. Cf. *Janus*, 138 S. Ct. at 2484 ("[I]t would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time."). Overruling *Hardison* would not implicate employers' long-term investments or sunk costs, and they would face

minimal barriers, if any, to revising accommodation policies. Any claim of "entitlement" to a virtually non-existent accommodation duty should be "outweigh[ed]" by the employees' "countervailing interest * * * in having their [Title VII] rights fully protected." *Ibid.*

What is more, employers "have been on notice for years regarding this Court's misgivings about [*Hardison*]," diminishing any reliance interests they may claim. *Ibid.* Members of this Court, lower-court judges, scholars, and even the United States have all acknowledged that *Hardison*'s test is baseless. This persistent criticism counsels in favor of overruling that decision. See *Pearson* v. *Callahan*, 555 U.S. 223, 234-235 (2009).

Finally, any reliance interests that remain are minimized because Title VII, properly construed, still gives employers ample protection. Title VII affords employees a right to "reasonable accommodation," not an unqualified right to override employer needs. Thus, even before invoking the undue-hardship defense, the employer has discretion to select reasonably among accommodations that resolve the work-religion conflict. Title VII does not obligate an employer "to choose any particular reasonable accommodation," much less the employee's preferred one. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68 (1986). As the court below and other circuits have explained, the employer enjoys flexibility to choose from an array of measures that reasonably accommodate the employee. Pet. App. 19a; *Cosme* v. *Henderson,* 287 F.3d 152, 158 (2d Cir. 2002) ("[T]he employer need not offer the accommodation the employee prefers."). Restoring the undue-hardship defense to its plain meaning will respect religious employees' rights without hamstringing employers.

Given *Hardison*'s clearly erroneous reasoning and the negligible reliance interests at stake, *stare decisis* favors overruling the de minimis test. *Hubbard*, 514 U.S. at 714

(plurality op.) (recognizing that although *stare decisis* may have special force in statutory cases, decision was flawed and "the reliance interests at stake in adhering to [the precedent] are notably modest").

c. *Hardison*'s de minimis test has also proven "unworkable in practice." *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). The outcome of Title VII religious-accommodation cases is usually known before suit is even filed. "[T]he lower courts have embraced [*Hardison*], routinely granting employers summary judgment if an accommodation would impose on the employer virtually any burden at all." Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 Wash. L. Rev. 1673, 1683 (2020); accord Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 621 (2000); Zablotsky, *After the Fall: The Employer's Duty to Accommodate Religious Practices under Title VII after* Ansonia Board of Education v. Philbrook, 50 U. Pitt. L. Rev. 513, 547 (1989).

Hardison itself is a prime example. As Justice Marshall noted, the employee could have been accommodated for $150, a "far from staggering" cost. *Hardison*, 432 U.S. at 92 n.6. But that amount was deemed too burdensome for "one of the largest airlines in the world." *Small*, 952 F.3d at 828 (Thapar, J., concurring).

"The irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities—people who seek to worship their own God, in their own way, and on their own time." *Id.* at 829. *Hardison* disadvantages religious minorities because accommodating their less common practices may seem more challenging, making it easier for employers to satisfy *Hardison*'s already lenient standard. See *Hardison*, 432 U.S. at 85 (Marshall, J., dissenting) (noting "the plight of adherents to minority faiths who do not observe the holy days on which most

businesses are closed Sundays, Christmas, and Easter but who need time off for their own days of religious observance"). That outcome "is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Id.* at 87.

The result of *Hardison*'s rule is that many employees do not exercise their right to religious accommodation, and many employers have little incentive to work with employees to find agreeable accommodations. See Marshall et al., *Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion*, 4 Emp. Rts. & Emp. Pol'y J. 87, 92 (2000) (remarks of Professor Roberto L. Corrada) (*Hardison* has produced "[e]mployer apathy toward religious accommodation" and a "culture of nonaccommodation."). This creates a profound anomaly in federal civil-rights laws. Employers appropriately accommodate disabilities, military service, and pregnancy-related medical conditions, while religious practices get second-class treatment. The disparate respect for these groups is unworkable—and unsustainable—when all enjoy identically worded rights in the statute books. See *supra* pp. 20-21.

By effectively depriving employees of the ability to vindicate their statutory rights to a workplace free of religious discrimination, *Hardison*'s "significant consequence[s]" render its rule unworkable. Cf. *Knick*, 139 S. Ct. at 2179 (holding rule unworkable because "many takings plaintiffs never have the opportunity to litigate in a federal forum that § 1983 by its terms seems to provide"). *Hardison* undermines "one of this Nation's pillars of strength"—"our hospitality to religious diversity"—and "[a]ll Americans will be a little poorer until [*Hardison*] is erased." 432 U.S. at 97 (Marshall, J., dissenting).

d. This Court's subsequent decisions have "eroded" *Hardison*'s "statutory and doctrinal underpinnings." *Kimble*, 576 U.S. at 458. Most fundamentally, *Abercrombie*'s recognition that affording favored treatment to religious accommodations is a feature, not a bug, of Title VII cannot be reconciled with *Hardison*'s misreading of the statute to prize neutrality. See *supra* pp. 22-24.[3]

The *Hardison* majority, moreover, may have misconstrued "undue hardship" to avoid a perceived Establishment Clause problem. See *Small*, 952 F.3d at 828 (Thapar, J., concurring) (Establishment Clause concern was "implicit reason" for adoption of de minimis standard). The employer and the union both argued that requiring them to accommodate the employee "would create an establishment of religion contrary to the First Amendment of the Constitution." *Hardison*, 432 U.S. at 70. As Justice Marshall noted, "[t]he Court's interpretation of the statute, by effectively nullifying it, ha[d] the singular advantage of making consideration of petitioners' constitutional challenge unnecessary." *Id.* at 89. He criticized the majority's implicit reliance on constitutional avoidance not only because its construction was hardly a "fair alternative," but also because its Establishment Clause concerns lacked merit. *Id.* at 89-90 (citation and internal quotation marks omitted).

Whatever the soundness of the *Hardison* majority's Establishment Clause fears in 1977, they are no longer valid today. In *Hardison*'s day, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), supplied the test for analyzing whether a statute ran afoul of the Establishment Clause. *Id.* at 612-

[3] Later civil-rights statutes also draw on the insight that providing accommodation to those who need it does not invidiously discriminate against others. "No right-minded person" would call ADA accommodations "a form of impermissible discrimination against non-disabled employees." *Small*, 952 F.3d at 828 (Thapar, J., concurring).

613. The *Lemon* test required that "the statute must have a secular legislative purpose"; "its principal or primary effect must be one that neither advances nor inhibits religion"; and "the statute must not foster an excessive government entanglement with religion." *Ibid.* (citation and internal quotation marks omitted).

In the years after *Hardison*, however, this Court rejected the view that "statutes that give special consideration to religious groups are *per se* invalid" and clarified that "there is ample room for accommodation of religion under the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 338 (1987). Indeed, the Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* at 334; see also *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012) (First Amendment "gives special solicitude to the rights of religious organizations"). While an "absolute and unqualified right" to accommodation may implicate the Establishment Clause, "appropriately balanced" accommodation provisions—like those in Title VII's plain text—are permissible. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (citation omitted). And to top it off, this Court has firmly abandoned the very test that may have animated *Hardison*'s narrow construction of "undue hardship." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot."). *Hardison*'s apparent "concerns about phantom constitutional violations"—it is now clear—cannot justify its atextual and egregiously wrong test. *Id.* at 2432.[4]

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[4] In *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), this Court applied the *Lemon* test to invalidate a state law that created an "absolute and unqualified" right for employees to abstain from work on

At a broader doctrinal level, the Court's approach to interpreting statutes has changed dramatically in the intervening decades as well. *Hardison* is "a relic from a 'bygone era of statutory construction.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted). Courts previously "paid less attention to statutory text as the definitive expression of Congress's will," "[b]ut courts today zero in on the precise statutory text." *Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020). Under current doctrine, "[this Court's] license to interpret statutes does not include the power to engage in" the type of "freewheeling judicial policymaking" evident in *Hardison. Pereida* v. *Wilkinson*, 141 S. Ct. 754, 766-767 (2021). *Hardison*'s outdated methodology further supports its overruling.

e. A textually sound test for "undue hardship" is close at hand. Decisions under the ADA, various civil-rights statutes, and other statutory provisions regularly apply the plain meaning of that term: "significant difficulty or expense in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities." *Small*, 141 S. Ct. at 1228 (Gorsuch, J.) (citation and internal quotation marks omitted); see *supra* pp. 20-22. Thus, the Court need not wonder whether a workable replacement exists for *Hardison*'s test. Cf. *Fulton* v. *City of Phila.*, 141 S. Ct. 1868, 1882-1883 (2021) (Barrett, J., concurring). The Court need only confirm that a textually faithful construction—and not *Hardison*'s

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their chosen Sabbath. *Id.* at 709. Justice O'Connor's concurrence aptly distinguished Title VII's religious-accommodation provision, explaining that "Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance." *Id.* at 712.

aberrant alternative—is the proper interpretation of Title VII.

* * *

This Court has sometimes reasoned that "*stare decisis* carries enhanced force when a decision * * * interprets a statute" because "Congress can correct any mistake it sees" in the Court's ruling. *E.g.*, *Kimble*, 576 U.S. at 456. But as the foregoing discussion illustrates, the Court has not shied away from discarding precedents—including statutory ones—that lightly considered the relevant issue, were poorly reasoned, and engendered little reliance. This is a case where "an earlier interpretation of a statute was so wrongheaded or has had such calamitous consequences—while earning meager reliance—that it should not be retained." Garner et al., *supra*, at 337-338.

II. AN EMPLOYER DOES NOT DEMONSTRATE UNDUE HARDSHIP BY SHOWING ONLY THAT THE REQUESTED ACCOMMODATION BURDENS THE EMPLOYEE'S CO-WORKERS

In addition to rejecting *Hardison*'s de minimis test, this Court also should correct an offshoot of that test manifested in the decision below. Recall that the court of appeals held that an employer may establish undue hardship by showing only that an accommodation burdens or inconveniences the plaintiff's co-workers. Pet. App. 22a-24a. That holding follows a troubling trend of courts that "emphasize the seeming neutrality of workplace rules in rejecting plaintiffs' claims" and "find that, if other employees would be negatively affected by a proposed accommodation, that accommodation would cause undue hardship to the employer." Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 392 (1997). Like *Hardison*'s de minimis test, this misplaced focus on other employees strays far from the text, structure, purpose,

and history of Title VII. While employee dissatisfaction or inconvenience may be relevant evidence to support a showing that the business as a whole suffers undue hardship, it does not itself establish that fact. The Court should clarify that Title VII requires a showing of undue hardship to the business, not merely a showing of burden to co-workers.

A. Title VII requires the employer to show "undue hardship on the conduct of the employer's *business*." 42 U.S.C. § 2000e(j) (emphasis added). Yet the decision below holds that "an accommodation that causes more than a *de minimis* impact on *co-workers*" suffices to make that showing. Pet. App. 27a (Hardiman, J., dissenting) (emphasis added) (citation and internal quotation marks omitted). The majority reasoned that "increased workload on other employees[] and reduced employee morale" qualify as undue hardship, *id.* at 22a, and accordingly concluded that "[e]xempting Groff from working on Sundays caused more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale at both the Holtwood Post Office and the Lancaster Annex hub," *id.* at 24a. Judge Hardiman rightly criticized this "atextual rule," *id.* at 27a, which courts of appeals have employed to further tighten the already vanishingly narrow protection for religious employees under Title VII. *Id.* at 22a-24a (majority opinion collecting cases).

The court of appeals' approach finds no support in the statutory text. "Simply put, a burden on coworkers isn't the same thing as a burden on the employer's business." *Id.* at 28a (Hardiman, J., dissenting). As Judge Hardiman noted, this Court has never held that "impact on coworkers alone—without showing business harm—establishes undue hardship." *Id.* at 27a. Nor could it do so without further rewriting the statute.

The test devised by the court of appeals is also contrary to the history and purpose of Title VII. Title VII's religious-accommodation provision was enacted specifically to enable Sabbath observance by religious employees *even though* unequal treatment of non-religious employees may result. See *supra* pp. 24-27. Under the EEOC guidelines that the statute codified, undue hardship would arise only "where the employee's needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 32 Fed. Reg. 10298 (July 13, 1967) (emphasis added). Because both the text and history of Title VII reflect that co-workers would generally be required to fill in for Sabbath observers, it would be anomalous to allow burdens on co-workers to foreclose an accommodation.

The court of appeals' rule also conflicts with *Abercrombie*. Title VII commands employers to afford "favored treatment"—not "mere neutrality"—to employees' religious practices and to allow them to engage in those practices "despite the employer's normal rules to the contrary." *Abercrombie*, 575 U.S. at 772 n.2, 775. Yet the court of appeals' emphasis on how an accommodation burdens co-workers (rather than the business) amplifies *Hardison*'s misplaced desire to ensure that religious accommodations do not "discriminate" against non-religious employees. See *supra* pp. 22-24. The United States had it right in its *Hardison* brief: "If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, * * * such grumbling must yield to the single employee's right to practice his religion." U.S. Amicus Br. 28, *Hardison*, 432 U.S. 63 (No. 75-1126) (citation and internal quotation marks omitted).[5]

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[5] USPS invoked this erroneous neutrality rationale in refusing to accommodate Groff, contending that "it would be showing favoritism to allow [Groff] to avoid Sundays," C.A. App. 217, because RCAs are

Giving dispositive weight to co-worker effects disrupts the "balance" Title VII sought to strike between employer and employee interests. Engle, *supra*, at 405. "Once the interests of employees who do not require religious accommodation are brought into the equation, it is difficult for courts to require accommodation, since all accommodation requires disparate treatment." *Id.* at 405-406; see also *Harrell* v. *Donahue*, 638 F.3d 975, 980 (8th Cir. 2011) ("Certainly, every religious accommodation will inevitably cause some differences in treatment among employees."). Furthermore, "many courts have set the bar on what constitutes preferential treatment very low, effectively allowing an employer to show minimal impact on coworkers to be relieved of its accommodation obligation." Birnbach, Note, *Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?*, 78 Fordham L. Rev. 1331, 1371 (2009); see, *e.g.*, *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143, 146-147 (5th Cir. 1982) (co-workers' complaints that Orthodox Jew received "special treatment" for Sabbath observance established undue hardship).

The upshot is that an employer can nearly always establish undue hardship by pointing to the accommodation's imposition on other employees. As Judge Hardiman recognized, this "effectively subject[s] Title VII religious accommodation to a heckler's veto by disgruntled employees." Pet. App. 28a. The ADA does not permit co-worker disgruntlement or resentment to qualify as undue hardship, and the same should be true for Title VII. See *Cripe* v. *City of San Jose*, 261 F.3d 877, 893 (9th Cir. 2001) ("[R]esentment by other employees who are concerned about 'special treatment' for disabled co-workers is not a

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"scheduled when they're scheduled," not "based on religious beliefs or faith systems," *id.* at 477.

factor that may be considered in an 'undue hardship' analysis" under the ADA).

B. To be sure, an accommodation's impact on co-workers can be *relevant* under the proper reading of Title VII. But employee burdens alone do not *establish* undue hardship to the business. U.S. Amicus Br. 28, *Hardison*, 432 U.S. 63 (No. 75-1126). "[R]ather, it is the *effect*" that co-worker burdens "ha[ve] on the employer's ability to operate its business that may alleviate the duty to accommodate." *Crider* v. *Univ. of Tenn., Knoxville*, 492 F. App'x 609, 614 (6th Cir. 2012). In other words, "an accommodation's effect on a co-worker *may* lead to an undue hardship *on the employer*." *Id.* at 615. The focus must always be on undue hardship to the business, and a business seeking to avoid an accommodation must show that co-worker burdens rise to the level of harming the enterprise as a whole. An impact on co-workers—without proof of harm to the business—does not demonstrate undue hardship under Title VII. See Pet. App. 29a (Hardiman, J., dissenting) ("An employer does not establish undue hardship by pointing to a more-than-de-minimis impact on an employee's coworker.").

The ADA's similarly worded undue-hardship defense supports this approach. EEOC guidelines instruct that the ultimate inquiry under the ADA is whether the accommodation would harm "the functioning of [the] business" or impair the "ability of the[] employees to perform their jobs," not simply whether the accommodation burdens co-workers or negatively affects their morale. See 29 C.F.R. pt. 1630 App., § 1630.15(d) ("Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs."). More concretely, where a "second employee is unhappy at being given extra assignments, but the employer determines

that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner," then "the employer cannot show significant disruption to its operation, [and] there is no undue hardship." EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* (Oct. 17, 2002).[6] Only where "the second [employee's] workload will increase significantly beyond his ability to handle his responsibilities" would the employer be able to "show undue hardship based on the significant disruption to its operations." *Ibid.*[7]

As with the ADA, Title VII's undue-hardship analysis should maintain focus on an accommodation's effect "on the conduct of the employer's business," with special care taken to ensure that a heckler's veto does not defeat statutory rights.

III. APPLYING THE PROPER STANDARD, USPS FAILED TO DEMONSTRATE THAT ACCOMMODATING GROFF WOULD CAUSE UNDUE HARDSHIP

Under the proper standard for undue hardship, an employer is excused from accommodating a religious employee's practices when doing so would cause significant difficulty or expense to the employer in light of the employer's financial resources, the number of individuals it

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[6] https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada

[7] The recently enacted Pregnant Workers Fairness Act likewise contemplates that accommodation may require co-workers to assume additional responsibilities. §§ 102(6)(A), 103(1) (requiring reasonable accommodation, absent undue hardship, of an employee's temporary "inability to perform an essential function"); EEOC, *What You Should Know About the Pregnant Workers Fairness Act*, https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act ("possible reasonable accommodations" include "be[ing] excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy").

employs, and the nature of its operations and facilities. Applying that standard here, USPS failed to demonstrate undue hardship.

A. Accommodating Groff worked no hardship on USPS. In a contemporaneous email, the Holtwood Postmaster forthrightly admitted that providing Groff an exemption from Sunday delivery did not pose an undue hardship. J.A. 316-317. He explained to the scheduling supervisors that when USPS automatically scheduled an extra RCA to cover Groff's Sunday deliveries, USPS did not suffer an undue hardship; instead, any hardship arose only when USPS scheduled Groff but he did not report to work:

> I understand the thought process of automatically scheduling an extra RCA. The dilemma is that a volunteer RCA is not needed since an RCA is already prescheduled *and it does not show a hardship/burden to the USPS* because it is not necessary to force an RCA to work on their Sunday off.

Id. at 317 (emphasis added). He reiterated that Groff could be disciplined only if his "refusing to work is causing an undue hardship/burden on the USPS." *Id.* at 316. Accordingly, the evidence establishes that USPS's practice of automatically scheduling an extra RCA "satisfie[d] [Groff's] religious accommodation request for Sundays" and inflicted no undue hardship. *Id.* at 317. Only when USPS discontinued that accommodation in an apparent effort to manufacture an undue hardship did challenges arise. *Ibid.* The dispositive point is that USPS could and did accommodate Groff without any undue hardship on the conduct of its business. See Pet. App. 31a (Hardiman, J., dissenting) (noting that "Groff's former postmaster acknowledged" that "scheduling an extra RCA in advance to take Groff's place on Sundays would not harm USPS").

Bolstering that conclusion, USPS's corporate representative was unable to identify any costs incurred by USPS when skipping over Groff for Sunday shifts. She conjectured that Groff's refusal to work on Sundays would have a "[b]ig impact," specifically with regard to "[c]ost." J.A. 258. She asserted burdens such as overtime for RCAs, later delivery times, and safety concerns. *Id.* at 258-259. But when asked whether these effects were actually felt by USPS or were merely hypothetical injuries, she conceded that she did not know. *Id.* at 259-260.

Even more critically, when asked whether the same alleged costs would arise if an extra RCA were scheduled in place of Groff, USPS's corporate representative conceded that USPS would *not* incur costs in that scenario. *Id.* at 266-268; see Pet. App. 31a (Hardiman, J., dissenting) (noting that concession). These admissions that an effective and nondisruptive accommodation existed—along with the dearth of contrary evidence—prevent USPS from even creating a fact issue on undue hardship.

B. In affirming the grant of summary judgment despite these concessions, the court of appeals principally relied on the alleged effect of Groff's accommodation on coworkers. It held that "[e]xamples of undue hardship include negative impacts on the employer's operations, such as * * * increased workload on other employees" and "reduced employee morale." Pet. App. 22a. The court therefore automatically equated "increased workload on other employees" and "reduced employee morale" with "negative impacts on the employer's operations," *ibid.*, but never independently analyzed whether USPS's business suffered undue hardship, *id.* at 24a-25a. This was error. See *supra* Section II. Indeed, the business-level evidence showed that USPS timely delivered all packages and successfully fulfilled its contractual obligations to Amazon. J.A. 43-44, 92.

At most, the court of appeals identified some effects on USPS's operations resulting from the alleged imposition on Groff's co-workers. But those effects, if any, were minimal, avoidable, and confined to the six-week-per-year peak season. They do not evince significant difficulty or expense to USPS's business. With other employees indisputably available to handle Sunday delivery, USPS cannot demonstrate undue hardship.

The court of appeals first noted that due to an injury, only one RCA was available to cover Groff's few Sundays during Holtwood's 2017 peak season. Pet. App. 24a-25a. But USPS never explained how requiring a co-worker to deliver packages on a few Sundays caused an undue hardship to the business. And in any event, Holtwood could have avoided any complications by "borrow[ing]" an RCA from another station during the 2017 peak season, as expressly allowed by the MOU. J.A. 309-310. The same shortcomings plague the court's reliance on the fact that the Holtwood Postmaster had to deliver mail on three Sundays when the assigned RCA unexpectedly became unavailable. Pet. App. 25a; see J.A. 66-68. Lastly, the court perceived that Groff's absences had a negative effect on his co-workers' morale and resulted in a Union grievance (which USPS ultimately settled). Pet. App. 24a-25a. But USPS did not and could not show that this dissatisfaction disrupted its business operations. If the feelings of Groff's co-workers and the filing of a single grievance were sufficient to show undue hardship without proof of operational harm, then religious accommodation would readily be overridden by a heckler's veto.[8]

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[8] Besides these specific examples, the court of appeals used vague, conclusory language that arguably describes an effect on USPS. See Pet. App. 24a ("disrupted the workplace and workflow"); *id.* at 25a ("made timely delivery more difficult"). These statements are "too speculative to be dispositive" and, at most, create fact issues that must

Under the proper standard, exempting Groff from Sunday delivery and scheduling an RCA in his place did not inflict undue hardship on the conduct of USPS's business. Groff is therefore entitled to summary judgment. At minimum, fact issues preclude summary judgment for USPS.[9]

CONCLUSION

The Court should reverse the grant of summary judgment for Respondent and direct entry of summary judgment for Petitioner.

Respectfully submitted.

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be resolved by a jury. *Id.* at 30a n.4 (Hardiman, J., dissenting).

[9] Should USPS rely on the MOU's scheduling provisions to urge affirmance on an alternative ground, see BIO 10; *supra* n.1, this Court should follow its "usual practice [not] to adjudicate either legal or predicate factual questions in the first instance," *CRST Van Expedited, Inc.* v. *EEOC*, 578 U.S. 419, 435 (2016), and remand that issue to be addressed below in light of this Court's determination of the proper undue-hardship standard. In any event, the MOU does not provide an alternative ground for affirmance. Cert. Reply Br. 4-7.

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February 2023