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

REPLY FOR PETITIONER

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I. THE COURT SHOULD DISAPPROVE *HARDISON*'S DE MINIMIS TEST AND CONSTRUE "UNDUE HARDSHIP" ACCORDING TO ITS PLAIN MEANING

Respondent maintains that a heightened form of *stare decisis* reserved for statutory precedents protects the de minimis test because *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), interpreted the 1972 amendment to Title VII. But *Hardison* construed only the pre-1972 statute and EEOC guidelines. Thus, the de minimis test is dicta that lacks *stare decisis* effect.

Even if *stare decisis* applies, the United States correctly explained three years ago that "revisiting *Hardison*'s *de minimis* standard [is not] precluded by stare decisis." U.S. Br. 21, *Patterson* v. *Walgreen Co.*, 140 S. Ct.

685 (2020) (No. 18-349) (hereinafter, "U.S. *Patterson* Br."). The *Hardison* Court's cursory consideration of the undue-hardship standard sharply limits its precedential force. And Respondent's own arguments underscore why it cannot survive *stare decisis* analysis. Respondent's refusal to defend *Hardison*'s neutrality rationale only highlights its inconsistency with *Abercrombie* and weakens the case for deferring to precedent. Respondent paradoxically emphasizes reliance and stability while simultaneously noting lower-court confusion and asking this Court to adopt a new, EEOC-inspired version of the de minimis test. And Respondent's test, while some improvement over *Hardison*'s, still falls far short of the statute's robust protection for religious liberty. Rather than substituting Respondent's non-textual approach for *Hardison*'s, the Court should construe Title VII's undue-hardship test according to its plain meaning: significant difficulty or expense in light of the employer's operations.

A. The de minimis test is dicta

Eager to invoke *stare decisis*, Respondent resists three Justices' conclusion that "*Hardison* did not apply the current form of Title VII, but instead an [EEOC] guideline that predated the 1972 amendments." *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 n.* (2020) (Alito, J., concurring in denial of certiorari); see Pet. Br. 15-17. While Respondent admits *Hardison*'s events occurred before 1972, he insists a murky footnote reveals that the Court nonetheless bindingly construed the amendment. Resp. Br. 19 (citing *Hardison*, 432 U.S. at 76 n.11).

Not so. For starters, Respondent observes that the Court "found it unnecessary to decide whether the amendment should be applied retroactively." Resp. Br. 5. How could the Court issue a holding about a statute it did *not* apply? Respondent suggests that *Hardison* equated the guideline's meaning with that of the amended statute by

stating that the amendment "ratified" the guideline in "positive legislation." 432 U.S. at 76 n.11. But the Court passingly consulted the amendment only to confirm that it could "accept[] *the guideline* as a defensible construction of *the pre-1972 statute*." *Ibid.* (emphases added). Whatever the utility of the Court's terse observation for *that* purpose, it "did not even purport to interpret the text of the [amended statute]." *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022). Any statement or implication about the amended statute's meaning is "pure dicta," *ibid.*, issued while construing the EEOC guideline and applying the pre-1972 statute.[1]

"While [Respondent] warns that revisiting precedent results in uncertainty, no revisiting is necessary here. Far more uncertainty would follow from [Respondent's] method of divining definitive interpretations from stray remarks." *Wilkins* v. *United States*, No. 21-1164, 2023 WL 2655449, at *8 (U.S. Mar. 28, 2023).

B. *Stare decisis* does not support adherence to *Hardison*'s de minimis test in any form

Respondent declares that the United States' "*Patterson* brief gave insufficient weight to statutory *stare decisis*." Resp. Br. 15 n.2. But the Government's switch in position has little to do with principles of precedent and instead stems from course reversals on numerous other discrete issues. See *infra* pp. 4, 12, 13, 14. Because Respondent is unwilling to defend either *Hardison*'s standard or its reasoning, the Court should discard the de minimis test in favor of one that implements Title VII's text and meaningfully protects workplace religious liberty.

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[1] *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986), did not involve the undue-hardship defense, so its repetition of the de minimis test cannot elevate it from dicta to precedent. *Castro-Huerta*, 142 S. Ct. at 2498 ("the Court's dicta, even if repeated [later], does not constitute precedent and does not alter the plain text of the [statute]").

1. *Hardison*'s fleeting attention to Title VII's undue-hardship provision limits its precedential sway

Even if the de minimis test is not dicta as to Title VII, statutory *stare decisis* should be reserved for cases that squarely construed the statute, not passingly mentioned it while construing EEOC guidelines. Moreover, neither the parties nor the *Hardison* Court focused on the undue-hardship issue, draining the de minimis test's precedential force. See Pet. Br. 28-30. The United States once shared that view. U.S. *Patterson* Br. 21 ("Granting review here would present the Court with its first meaningful opportunity to interpret 'undue hardship' in Title VII with the benefit of full briefing."). No longer.

Although Respondent concedes that "the parties' briefing in *Hardison* principally addressed the effect of a collectively bargained seniority system," he notes that the parties briefly addressed how to analyze undue hardship and that Justice Marshall authored a dissent. Resp. Br. 25. But Respondent omits that (1) "neither the government nor any of the parties had urged" the de minimis standard, U.S. *Patterson* Br. 21, and (2) Justice Marshall did not construe undue hardship, *Hardison*, 432 U.S. at 90 n.3 ("I find it unnecessary to decide how much cost an employer must bear before he incurs 'undue hardship.'"). The de minimis test sprang from cursory review, not careful vetting.

Respondent attempts to limit to "summary dispositions" this Court's practice of affording lesser precedential effect to lightly considered holdings. Resp. Br. 25. But the Court applies this principle even where the prior decision followed oral argument. See *McCutcheon* v. *FEC*, 572 U.S. 185, 202 (2014). Regardless of *how* the Court processes a precedent, a later 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." *Ibid.* Consequently, "plenary consideration" of Title VII's undue-hardship test is warranted. *Id.* at 203.

2. Respondent's failure to defend *Hardison*'s reasoning further saps its *stare decisis* effect

"When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished." *Citizens United* v. *FEC*, 558 U.S. 310, 363 (2010). Respondent does not defend the reasoning underlying *Hardison*'s de minimis test. That test grew from the rationale that "Title VII does not contemplate" "unequal" or "prefer[ential]" treatment of "religious needs" over "nonreligious[] reasons for not working on weekends." 432 U.S. at 81, 84-85. The Court believed that favoring religious practices 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. Thus, the Court adopted the de minimis test because "requir[ing] TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want 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.

Recognizing that this strict-neutrality rationale is indefensible after *Abercrombie* and the Court's Establishment Clause evolution, Pet. Br. 35-37, Respondent unceremoniously jettisons it. It is found nowhere in Respondent's brief. In its place, Respondent asks the Court to reimagine the de minimis test, maintaining that "*Hardison* should be understood and applied in light of its facts to afford greater protection to religious observance than the '*de minimis*' language might suggest if read in

isolation." Resp. Br. 27, 30. Respondent thereby abandons *Hardison*'s animating rationale in favor of a jerry-rigged standard that bears little resemblance to *Hardison*'s test.

Respondent cannot have his cake and eat it too. For "[*s*]*tare decisis* is a doctrine of preservation, not transformation." *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring). Asking to reaffirm a precedent while "radically reconceptualizing its reasoning" is "an argument * * * at odds with itself." *Ibid.* There is "no basis for the Court to give precedential sway to reasoning that it has never accepted." *Ibid.*

Thus, Respondent's newly confected "arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent." *Id.* at 385. This Court should decline to give *stare decisis* effect to *Hardison* and instead judge the parties' constructions of undue hardship against that term's plain meaning.

3. *Stare decisis* analysis favors discarding *Hardison*'s de minimis test

The foregoing illustrates that the de minimis test exerts no precedential force. But even if the Court conducts a full *stare decisis* analysis, that well-settled rubric also favors correcting *Hardison*'s egregious error.

a. Respondent asserts that "*Hardison* implicates this Court's near-categorical presumption against overruling statutory precedents." Resp. Br. 16. Yet he cites no majority opinion endorsing a "near-categorical" rule. See *id.* at 16-17. This Court "ha[s] never applied *stare decisis* mechanically to prohibit overruling [its] earlier decisions determining the meaning of statutes." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978). At most, the Court has 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* v. *Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). But this Court has not shied away from overruling statutory precedents that passingly considered the relevant issue, were ill-reasoned, and engendered little reliance. See, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 251 (1998); *Hubbard* v. *United States*, 514 U.S. 695, 702 (1995); *Monell*, 436 U.S. at 695. *Hardison* fits that mold.

In any event, there is good reason for skepticism of applying heightened *stare decisis* to statutory precedents. That concept lacks historical roots and conflicts with the traditional understanding of *stare decisis* as a flexible doctrine. Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1065-1066 (2003). "[T]he presumption against overruling cases interpreting statutes did not appear until the twentieth century," and "until the last half-century, courts usually felt free to overrule precedent that demonstrably conflicted with [text]." *Id.* at 1066.

No sound rationale supports the notion that statutory precedents carry special force. That doctrine cannot explain "[w]hy * * * an errant initial interpretation of legislative expectations [should] be considered acceptable judicial lawmaking, and a later, corrective interpretation [should] be considered usurpation." Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1399 (1988). And the doctrine's reliance on congressional acquiescence similarly rests "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." *Gamble* v. *United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring).

It is also doubtful that "congressional silence could be meaningfully understood as acquiescence" in this Court's statutory interpretation. *Id.* at 1988. That is because "enacting new legislation is difficult—and far more difficult than the Court's cases sometimes seem to assume." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kava-

naugh, J., concurring in part). As a result, "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); see also *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (failure to act may represent "inability to agree upon how to alter the status quo," "unawareness of the status quo," "indifference to the status quo," or "political cowardice"). And even if congressional inaction *could* be construed as acquiescence, it *should not* be, for mere silence "falls short of the bicameralism and presentment required by Article I and therefore is not a valid way for our elected representatives to express their collective judgment." *Gamble*, 139 S. Ct. at 1988 (Thomas, J., concurring).

This is a particularly troubling case for applying statutory-*stare-decisis* principles. The Court did not merely misinterpret a statutory term; by Respondent's admission, *Hardison* nullified a duly enacted statute. Resp. Br. 6 (*Hardison* "gave the pre- and post-amendment versions of Title VII the same meaning").

b. Even under the statutory-*stare-decisis* framework, Congress never acquiesced to *Hardison*'s judicial nullification. To begin with, it was unclear at best whether *Hardison*'s de minimis test constituted a holding under the 1972 amendment, so "there was no definitive judicial interpretation to which Congress could acquiesce." *Wilkins*, 2023 WL 2655449, at *7.

Further weakening any inference from inaction, Congress has not amended Title VII's definition of religion, 42 U.S.C. § 2000e(j), or even Title VII's core anti-discrimination provision that incorporates it, *id.* § 2000e-2(a), since the definition's enactment. See *United States* v. *Wells*, 519 U.S. 482, 495-496 (1997) ("finding any interpretive help in congressional behavior here is impossible" because

Congress never amended the "crucial statutory language"). This is quite different from *Kimble*, where Congress had amended "the specific provision" at issue but declined to reverse the Court's interpretation. 576 U.S. at 456.

Nor has Congress overhauled Title VII while leaving "undue hardship" untouched. "[W]hen, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments," "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001).

Furthermore, no bill addressing *Hardison* received a vote in either house of Congress, Resp. Br. 18 & n.3, so it can hardly be said that "Congress has rebuffed bills" that would have disapproved *Hardison*. See *Kimble*, 576 U.S. at 456-457 (reflecting that Senate passed bill overruling precedent but Congress enacted bill that did not). Without any of these indicia of acquiescence, "Congress' failure to overturn a statutory precedent" is not sufficient "reason for this Court to adhere to it." *Patterson*, 491 U.S. at 175 n.1. Accordingly, "want of specific Congressional repudiations" of *Hardison* "[does not] serve as an implied instruction by Congress * * * not to reconsider" it. *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940) (overruling tax precedent).[2]

Ascribing meaning to Congress's inaction is especially inappropriate here because *Hardison*'s de minimis test

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[2] Accord *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 327 n.17, 349-350 (1971) (overruling Patent Act precedent); *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 240-242 (1970) (overruling Norris-LaGuardia Act precedent); *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946) ("Congressional silence" insufficient to prevent overruling Naturalization Act precedent).

seemingly stemmed from constitutional avoidance rather than ordinary statutory interpretation. See Pet. Br. 35-36; COLPA Br. 7-12. Unlike with typical statutory-construction cases, Congress could not overrule the *Lemon* test that motivated the de minimis standard. Cf. *The Workplace Religious Freedom Act of 2005: Hearing on H.R. 1445 Before the Subcomm. on Emp't-Emp. Rels. of the H. Comm. on Educ. and the Workforce*, 109th Cong. 34 (2005) (statement of Professor Marcosson) (rejecting *Hardison* "raises substantial [Establishment Clause] concerns" because Court adopted de minimis standard "at least in part and implicitly" due to Establishment Clause). Having now abandoned *Lemon*, see *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022), the Court should not "place on the shoulders of Congress the burden of the Court's own error." *Monell*, 436 U.S. at 695.

c. Turning to the *stare decisis* factors, Respondent wants it both ways on workability. On one hand, he claims that "*Hardison* has neither proved unworkable nor foreclosed religious-accommodation claims." Resp. Br. 20. On the other, he admits that "lower courts have sometimes been led astray by *Hardison*'s '*de minimis*' language" and urges the Court to "clarify[]"—really, rewrite—the de minimis test. Resp. Br. 15, 38. Because the de minimis test demonstrably "can[not] be understood and applied in a consistent and predictable manner," *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2272 (2022), and produces "uncertainty and arbitrariness of adjudication," *Johnson* v. *United States*, 576 U.S. 591, 605 (2015), the test is unworkable.

The truth is that lower courts have faithfully followed—not misunderstood—*Hardison*'s neutrality rationale and de minimis test, with tragic results. Pet. Br. 33-34; Church of Jesus Christ of Latter-Day Saints Br. 12-15; Thomas More Society Br. 6-15. *Hardison*'s "significant consequence[s]" in eliminating statutory

religious-liberty rights render its rule "unworkable in practice." *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2178-2179 (2019).

Respondent disputes *Hardison*'s deleterious effects, claiming that "courts often reject employers' undue-hardship defenses." Resp. Br. 21-23. But he ignores the wealth of scholarly and empirical analysis of *Hardison*'s harms, Pet. Br. 33-34; Uddin Br. 14-17, not to mention the experiences of diverse faith groups recounted by Groff's *amici*. Rather than cite a single scholarly analysis of its own, Respondent says "the Commission has informed" him that things are not so bad.[3] He offers, however, only a cherrypicked handful of instances where the EEOC secured meager consent decrees or an employer failed to prevail on summary judgment. Resp. Br. 21-23. And these cases involved extreme facts where the employer made no attempt to accommodate or relied on wholly speculative harms. See, *e.g.*, *Sutton* v. *DirecTV LLC*, No. 2:19-CV-00330-MHH, 2022 WL 808692, at *6-7 (N.D. Ala. Mar. 16, 2022) (employer declined to engage with union or explore possible accommodations); *Enriquez* v. *Gemini Motor Transp. LP*, No. CV-19-04759-PHX-GMS, 2021 WL 5908208, at *12 (D. Ariz. Dec. 14, 2021) (employer "did very little to determine whether any accommodation was feasible"). This paltry showing offers cold comfort that the de minimis test workably effectuates Title VII.

d. Respondent vainly tries (at 23-24) to refute that "the growth of judicial doctrine" has "removed the basis" for *Hardison*. *Kimble*, 576 U.S. at 458. This Court in *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), undercut *Hardison*'s neutrality rationale, pro-

[3] Whatever the EEOC "informed" Respondent, it declined to sign his brief, in marked contrast to other religious-accommodation cases. See, *e.g.*, U.S. *Patterson* Br.; U.S. Br., *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843 (2019) (No. 18-525).

claiming that "Title VII does not demand mere neutrality with regard to religious practices," but rather "gives them favored treatment." *Id.* at 775; see Pet. Br. 22-24, 35. Respondent rejoins that *Abercrombie* did not address "the magnitude of the hardship Congress required employers to bear in accommodating religion." Resp. Br. 23. But that misses the point. The Government was right when it earlier concluded that *Abercrombie* "is irreconcilable with *Hardison*'s focus on neutrality." U.S. *Patterson* Br. 22. And as Respondent's own brief here reflects, *Hardison*'s neutrality justification is indefensible—and so undefended—after *Abercrombie*. The fact that Respondent's preferred magnitude of undue hardship is not foreclosed by *Abercrombie* cannot obscure the decisive point that *Abercrombie* has "eroded" the "doctrinal underpinnings" for *Hardison*'s de minimis test. *Kimble*, 576 U.S. at 458 (emphasis added).

Nor can Respondent credibly contest that shifting Establishment Clause jurisprudence has undermined *Hardison*. Pet. Br. 35-36. While *Hardison* did not facially employ constitutional avoidance, the Establishment Clause's ubiquity in briefing and argument persuasively explains the Court's atextual approach. See Pet. Br. 35; COLPA Br. 7-12. Indeed, Respondent declares that "it is appropriate to take account of the Establishment Clause backdrop in considering whether a hardship is 'undue.'" Resp. Br. 24. But he rightly presses no argument that Groff's "undue hardship" test poses Establishment Clause concerns. For good reason: A textually sound construction of "undue hardship" merely aligns religious accommodations with secular ones for disability, pregnancy, and military status. Pet. Br. 20-21; see *Espinoza* v. *Montana Dep't of Rev.*, 140 S. Ct. 2246, 2254 (2020) ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."). Under modern

constitutional doctrine, a definition that honors religious and secular accommodations on equal footing necessarily "take[s] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005). See Pet. Br. 36; Religious Liberty Scholars Br. 20-28.

e. Respondent next contends that "[c]ountless employers have relied on *Hardison*'s analysis of undue hardship * * * in formulating and enforcing corporate policies and employment agreements." Resp. Br. 26; but see U.S. *Patterson* Br. 21-22 ("[r]eliance interests" "are less of a concern in this context"). Respondent's reliance concerns, however, cannot be squared with his simultaneous request to revamp *Hardison*'s de minimis test. Similarly, while Respondent warns (at 27) against upsetting an established "body of case law and guidance," many cases concededly under-protect religious liberty and must be scrapped in any scenario. Resp. Br. 38. If the Court is going to remake the "undue hardship" standard no matter who prevails, reliance cannot cut against a textualist test. That is especially so because courts and employers could draw upon decades of ADA caselaw applying a significant-difficulty-and-expense test. Pet. Br. 37-38; Union of Orthodox Jewish Congregations Br. 19-25.

Regardless, Respondent's reliance worries are overblown even if taken at face value. Employment contracts are typically short-term, and employers must regularly adapt to legal changes. Compare *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484 (2018) (overruling where short-term union contracts governed), with *Kimble*, 576 U.S. at 457 (declining to overrule where it would upset long-term contractual arrangements). What is more, several states, including California and New York, use the significant-difficulty-or-expense test for religious accommodations. Washington Br. 18-19; West Virginia Br. 12-14. Employers could readily adjust

their practices to comply with a standard already extant in multiple large states, and federal courts applying Title VII could draw on those states' decisional law.

* * *

Even if "supercharged" *stare decisis* applies, *Hardison*'s "interpretation of [the] statute was so wrongheaded or has had such calamitous consequences—while earning meager reliance—that it should not be retained." Garner et al., The Law of Judicial Precedent 337-338 (2016).

C. Respondent's reimagined de minimis test is fatally flawed

Rather than follow either the statutory text or *Hardison*'s more-than-de-minimis-cost test, Respondent seeks a third way.[4] He cobbles together *Hardison*'s facts and EEOC guidelines to devise loose maxims that seem relevant mostly for Sabbath accommodations. Resp. Br. 27-28 (causing employer to "regularly" pay premium wages or operate "shorthanded" would be undue hardship but incurring "infrequent" premium wages or "administrative" expenses associated with the accommodation would not); *id.* at 39-40 (other proposed principles). But what about all the other accommodation scenarios and effects that arise outside the Sabbath context? See Union of Orthodox Jewish Congregations Br. 20-23. Respondent provides no answer, for he offers no overarching test that construes the term "undue hardship."

Respondent's approach is no mere "clarification" of *Hardison*; it is the worst of both worlds, finding no refuge in either *stare decisis* or plain meaning. EEOC's guidelines—while preferable in some respects—are nonetheless constrained by *Hardison*'s wrongheaded test. See

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[4] The Government previously urged discarding *Hardison* altogether and construing "undue hardship" based on "ordinary meaning." U.S. *Patterson* Br. 19.

Resp. App. 11a-12a (repeatedly invoking *Hardison*'s de minimis test). And while Respondent dutifully recites dictionary definitions, he manages only the claim that his guidance "is consistent with Title VII's text." Resp. Br. 33. Even this modest assertion is dubious: Rather than give independent meaning to the term "hardship," see Pet. Br. 18, Respondent endorses a free-floating inquiry into whether the "*cost* or other injury * * * may appropriately be imposed." Resp. Br. 33 (emphasis added). Thus, according to Respondent, an accommodation that causes any "lost efficiency * * * would not be appropriate." *Id.* at 34-35.

A hardship, however, is more than a "cost"; it is "a condition that is difficult to endure," "suffering," or "something hard to bear." The Random House Dictionary of the English Language 602 (1968). And that is the *baseline* showing; courts must then assess the hardship's "appropriateness" or "excessiveness" with reference to the employer's operations. Pet. Br. 18-19. An "undue hardship" is more than a mere "[in]appropriate" "cost," and Respondent's contrary view must be rejected.

An example illustrates the shortcomings of Respondent's test. Although not at issue here, Respondent believes that paying overtime once a week to secure a Sabbath substitute would be an inappropriate cost. But surely paying an extra $132 a week would not be an "undue hardship" for a large corporation to accommodate an employee's religious conscience. See Bureau of Labor Statistics, *Employment and Average Hourly Earnings By Industry* (reflecting average private wage of $33/hour, resulting in approximately $132 of excess wages per eight-hour workday).[5]

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[5] https://www.bls.gov/charts/employment-situation/employment-and-average-hourly-earnings-by-industry-bubble.htm.

Respondent's approach also flouts Title VII's purpose and history. Resp. Br. 35-36. The 1972 amendment's principal goal was accommodating Sabbath observance and other religious practices. Pet. Br. 24-27. The EEOC guidelines codified by Congress did not equate undue hardship with lost efficiency, premium-wage payment, or involuntary substitutions. 32 Fed. Reg. 10298 (July 13, 1967); General Conference of Seventh-Day Adventists Br. 11, 22-23 (discussing pre-*Hardison* EEOC decisions that rejected considerable wage expense as undue hardship). Instead, they described undue hardship as arising when a Sabbatarian's work "cannot be performed" by a substitute with similar skills. 32 Fed. Reg. 10298. Nor did the legislative history reflect the carveouts proposed by Respondent, which would have gutted the amendment's purpose.[6]

Besides the substantive problems with Respondent's test, it goes beyond merely "clarifying [*Hardison*'s] scope and reinforcing its limits," Resp. Br. 38, so this Court's decisions in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), and *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), offer no aid. There, the Court reaffirmed the core reasoning and tests set forth in prior holdings while clarifying them in certain respects. See, *e.g.*, *Halliburton*, 573 U.S. at 279 (reaffirming precedent's central holding and rationale while clarifying rule that precedent "itself made clear"); *Kisor*, 139 S. Ct. at 2414-2415 (Court "[took] the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages" it had

[6] The record belies Respondent's attempt to analogize RCAs to Senator Randolph's hypothetical employees hired to work only on weekends. Resp. Br. 36; see *id.* at 7, 49. RCAs provide coverage for career employees whenever they are absent, not just on weekends, and USPS employs a specific position, ARCs, to work only on Sundays and holidays. Pet. Br. 6.

sent and "reinforc[ed] some of the limits inherent" in the precedents). Here, in contrast, Respondent abandons *Hardison*'s rationale and test while seeking to transfer its precedential value (if any) to Respondent's new approach. No decision from this Court supports such judicial jiu-jitsu.

D. Groff offers the only construction that honors Title VII's text, history, and purpose

Groff proposes a straightforward interpretation of "undue hardship on the conduct of the employer's business": significant difficulty or expense in light of the employer's operations. Respondent never disputes Groff's textual analysis, Pet. Br. 18-19, or claims that his test would be unworkable. Instead, he offers only a single, misguided criticism, accusing Groff of "graft[ing]" the ADA's undue-hardship definition into Title VII. Resp. Br. 36-38.

Groff's test derives from the plain meaning of the phrase "undue hardship." Pet. Br. 18-19. The ADA, USERRA, FLSA, and PWFA simply confirm that Groff's interpretation is correct. Pet. Br. 20-21. When Congress sought to enact later accommodation statutes that mirrored Title VII, it specifically defined the shared term "undue hardship" according to its ordinary meaning. Respondent mistakenly claims that in defining undue hardship under the ADA, "Congress was deliberately departing from Title VII." Resp. Br. 37. In fact, by spelling out that term's plain meaning, Congress was departing from *this Court's misinterpretation* of Title VII. H.R. Rep. No. 101-485, pt. 3, at 40 (1990) (rejecting "the Supreme Court's interpretation of title VII in [*Hardison*]"). Congress did not incorporate a bespoke meaning of "undue hardship" into the ADA and its progeny; it rejected *Hardison*'s deviant construction in favor of an ordinary understanding. The Court should correct *Hardison* and harmonize Title

VII with the plain meaning of undue hardship reflected in analogous accommodation statutes.[7]

Respondent, for his part, embraces the anomaly *Hardison* created, asserting that religious workers should receive less accommodation than disabled, pregnant, or military-veteran employees. But he never explains why Congress would have intended believers to suffer second-class status. Each group has an important trait that Congress sought to accommodate, and Congress struck the same basic balance vis-à-vis employer interests in each statute. The Court should enforce the law Congress passed and realign Title VII with similar civil-rights statutes.

II. RESPONDENT CONFLATES EFFECTS ON CO-WORKERS WITH EFFECTS ON THE CONDUCT OF THE BUSINESS

On the second question presented, Respondent contends that many effects on employees qualify *ipso facto* as undue hardship "on the conduct of the employer's business." See Resp. Br. 41-42, 45. He therefore maintains that "there is no need to mandate separate proof of harm to the business any time co-worker burdens are at issue." *Id.* at 45.

This approach erases Title VII's emphasis on "the conduct of the employer's business." 42 U.S.C. § 2000e(j). As Respondent's dictionary definitions indicate, the conduct of a business entails the overall "management [and] direction" of the entity and execution of its objectives. Resp. Br. 41. Thus, Title VII's undue-hardship inquiry must focus on the employer's business at a macro—not

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[7] The fact that the ADA specifically requires consideration of certain types of accommodations—modifying existing facilities or providing interpreters, see Resp. Br. 38—before evaluating whether they would impose an undue hardship provides no reason to insist on a lower standard for Title VII's "undue hardship" provision, which textually mirrors those in the ADA and other statutes. See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A).

micro—level. Courts may not assume that an effect on an employee automatically burdens "the conduct of the employer's business." If that were Congress's intent, Title VII would have prohibited undue hardship "on the employer's employees" rather than "on the conduct of the employer's business."

The EEOC guidance and *Hardison*'s language that Respondent trumpets are hopelessly infected by the de minimis test and thus conflate almost any employee effects with undue hardship on the conduct of the business. Resp. Br. 42-43. For instance, *Hardison*'s statement that denying a nonreligious employee's "shift and job preferences" is an undue hardship cannot be squared with *Abercrombie*'s favoring religious accommodations. A co-worker with a shift preference is not similarly situated to a worker forced to choose between his faith and his job. Religious Liberty Scholars Br. 20-23. Congress recognized that asymmetry by requiring business-level hardship.

Despite his protests to the contrary, Respondent's approach would subject protected activity to a heckler's veto. If mere "fil[ing] [a] grievance[]" defeats an accommodation, Resp. Br. 42, then co-worker complaints could overcome Title VII's anti-discrimination promise. Similarly, Respondent's rule that an accommodation causes undue hardship if it causes an employee to "quit[] [or] transfer," *ibid.*, grants a single bigot veto power over Title VII rights—regardless whether his departure affected the business's direction. This approach would never stand for disabled, pregnant, or military employees. It should not stand here.[8]

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[8] Respondent faults Groff for relying on the ADA's undue-hardship guidelines—which focus on *business* impacts, see Pet. Br. 42-43—because Congress supposedly opted for a stricter undue-hardship standard in that statute. Resp. Br. 46. But the ADA near-identically

Applying its misguided view to this case, Respondent endorses a Title VII interpretation that automatically equates "increased workload on other employees" and "reduced employee morale" with "negative impacts on the employer's operations," without independently analyzing whether Respondent's business suffered undue hardship. Pet. App. 22a, 24a-25a. This Court should reject that approach and restore the statutory focus on "the conduct of the employer's business."

III. REVERSAL IS REQUIRED

Respondent reveals the malleability of his reconstituted de minimis test by urging affirmance despite the concessions and ample record evidence that accommodating Groff would not inflict an undue hardship on USPS.

A. Respondent first seeks affirmance on an alternative, MOU-based ground, which (1) he concedes was not addressed by the court of appeals and (2) would ordinarily be addressed first on remand. Resp. Br. 46-48. Respondent offers no good reason for departing from the ordinary course, and his argument fails on the merits anyway.

All agree that the MOU does not assign Sunday shifts based upon seniority, distinguishing it from the collective-bargaining agreement in *Hardison*. Compare J.A. 151, 310, with *Hardison*, 432 U.S. at 67, 78-83. But Respondent erroneously contends (at 47) that *Hardison* dictates an undue hardship whenever an accommodation would violate *any* provision of a CBA. In fact, the Court summarized its holding on CBA-based undue hardship in no uncertain terms: "As we have said, TWA was not required by Title VII to carve out a special exception *to its seniority system* in order to help [the employee] to meet his religious

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requires "undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). Nor does Respondent explain why an alleged difference in the ADA's *quantum* of hardship would alter the proper *subject* of the hardship inquiry.

obligations." 432 U.S. at 83 (emphasis added). The Court anchored this conclusion in Title VII's favored treatment of "seniority" systems. *Id.* at 81-82 (citing 42 U.S.C. § 2000e-2(h)).[9]

While *Hardison* also contains more general discussion about violating contractual rights, that language does not expand the narrow scope of *Hardison*'s holding. Contra Resp. Br. 47 (citing 432 U.S. at 79-81). Indeed, this Court later described the same pages Respondent cites as holding that "an employer need not adapt to an employee's special worship schedule * * * where doing so would conflict with *the seniority rights* of other employees." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 403 (2002) (emphasis added) (citing *Hardison*, 432 U.S. at 79-80). Accord Resp. App. 12a (EEOC guidelines referencing only "seniority" provisions).[10]

Extending *Hardison* to a CBA's non-seniority provisions would untether it from Title VII's textually circumscribed "seniority" exemption and improperly allow employers and unions to bargain away statutory religious-accommodation rights. See *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 70 (1975) ("[A] union cannot lawfully bargain for the establishment or continuation of discriminatory practices."); Roesser Br. 18 ("[A] collective bargaining agreement exception under-

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[9] Respondent repeatedly states that Groff "does not challenge" *Hardison*'s CBA-based holding. See, *e.g.*, Resp. Br. 6. That is true if the holding is understood as limited to a seniority system. Groff has consistently challenged Respondent's broader reading of that holding. C.A. Appellant's Br. 39-44; Cert. Reply 4-7.

[10] Respondent cites two decisions that discuss *Hardison*'s holding in broader terms, but both involved accommodations that would violate seniority-based assignment systems, so neither grappled with *Hardison*'s reach. See *Lee* v. *ABF Freight Sys., Inc.*, 22 F. 3d 1019, 1020, 1023 (10th Cir. 1994); *Getz* v. *Pa. Dep't of Pub. Welfare*, 802 F. 2d 72, 74 (3d Cir. 1986).

mines Title VII's effort to protect vulnerable minorities."). There is no good reason why employees' CBA privileges should automatically trump religious conscience when all other co-worker effects must be judged against the undue-hardship standard. *Supra* Part II. The import of violating a CBA's non-seniority provision should be addressed in the first instance on remand, after this Court establishes the test for undue hardship.

In any event, Respondent's MOU theory would not provide an alternative ground for affirmance even if *Hardison* extends to a CBA's non-seniority provisions. That is because excusing Groff from Sunday deliveries did not violate the MOU in the first place. USPS took precisely that position when the union member filed a grievance complaining of Groff's accommodation. J.A. 118 ("Management's position is that no contractual violation exists in this case."); see Pet. App. 28a n.3 (Hardiman, J., dissenting). While the MOU recognizes three grounds to excuse RCAs from Sunday duties, it does not declare them to be exclusive or otherwise preclude religious accommodations. Therefore, the MOU should be read against the backdrop of Title VII's accommodation duty.[11]

B. Defending the reasoning below, Respondent claims that exempting Groff left the Holtwood station shorthanded for a few weeks during peak season. But he crucially ignores Holtwood's option to "borrow" RCAs from another station. Pet. Br. 46 (citing J.A. 309-310). This illustrates a problem with Respondent's "shorthanded" test; surely an employer cannot declare itself shorthanded

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[11] For the same reasons, accommodating Groff would not violate the grievance settlement. See Resp. Br. 48. The settlement merely required that "any accommodation must be consistent with applicable provisions of the [MOU]." J.A. 127. Respondent never argued below that the settlement supported an undue hardship independent of the MOU. See Resp. C.A. Br. 52-57.

without exploring readily available options to accommodate religious needs. And despite Respondent's shorthandedness claims, Holtwood always had at least one other RCA who could be assigned to cover Groff's shifts.

As importantly, Respondent neglects to mention the corporate representative's testimony that exempting Groff would cause no undue hardship and that difficulties arose only when USPS scheduled Groff without a replacement. Pet. Br. 44. And Respondent offers a strained reading of the smoking-gun email in which Holtwood's Postmaster contemporaneously admitted that scheduling an extra RCA did not pose an undue hardship. Resp. Br. 50-51; see Pet. Br. 45. Taken together, this evidence shows that Respondent's claimed hardships (at 51) stemmed from the *failure* to accommodate Groff.

On this record, summary judgment in Groff's favor or a trial was required. At minimum, the case should be remanded for evaluation under the significant-difficulty-or-expense standard. Even under any fair application of Respondent's test, the judgment must be reversed.

Respectfully submitted.

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