No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF, PETITIONER

v.

LOUIS DEJOY, POSTMASTER GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits religious discrimination in employment and defines the prohibited discrimination to include the failure to reasonably accommodate an employee's religious observance unless the accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j); see 42 U.S.C. 2000e-2(a)(1), 2000e-16(a). The questions presented are:

1. Whether this Court should overrule the portion of its decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), reasoning that an accommodation that would require an employer to operate shorthanded or to regularly pay premium wages to secure replacement workers would impose an undue hardship because it would require the employer to bear "more than a *de minimis* cost." *Id.* at 84.

2. Whether the court of appeals erred in affirming the district court's determination that petitioner's requested religious accommodation would have imposed an undue hardship on the "conduct of the employer's business," 42 U.S.C. 2000e(j), in part because of the burdens the accommodation would have imposed on other employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 35 F.4th 162. The opinion of the district court (Pet. App. 33a-60a) is not published in the Federal Supplement but is available at 2021 WL 1264030.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2022. The petition for a writ of certiorari was filed on August 23, 2022, and was granted on January 13, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provide as follows:

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.

42 U.S.C. 2000e-2(a)(1) provides:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) 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-16(a) provides:

> All personnel actions affecting employees or applicants for employment * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Other pertinent statutory provisions and guidelines are set forth in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits religious discrimination in employment and defines the prohibited discrimination to include the failure to reasonably accommodate an employee's religious observance unless the accommodation would impose "an undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j); see 42 U.S.C. 2000e-2(a). In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court held that Title VII did not require an employer to accommodate an employee's Sabbath observance by operating shorthanded or regularly paying premium wages to secure replacement workers. *Id.* at 79-85. The Court reasoned that those accommodations would have imposed an undue hardship by requiring the employer to bear "more than a *de minimis* cost." *Id.* at 84.

Hardison sparked a vigorous dissent, and it has been criticized by some scholars and judges, including Members of this Court. But much of that criticism has focused on *Hardison*'s "*de minimis*" language rather than the Court's holding, which the Equal Employment Opportunity Commission (EEOC) and many lower courts have long understood to be consistent with greater protection for religious adherents than the "*de minimis*" language read in isolation might suggest. And although Congress has often amended Title VII in response to this Court's decisions, it has repeatedly rejected proposals to overturn *Hardison*.

Petitioner now asks this Court to do what Congress would not by overruling *Hardison*. Lower courts have sometimes been led astray by *Hardison*'s "*de minimis*" language, and the Court can and should clarify that the EEOC has correctly interpreted *Hardison* to be con-

sistent with substantial protection for religious observance and practice. But petitioner has not made the extraordinary showing required to overcome this Court's near-categorical rule of statutory *stare decisis* and justify overruling a precedent that has defined the scope of Title VII for nearly half a century.

A. Legal Background

1. In enacting Title VII in 1964, Congress made it unlawful for employers to discriminate based on protected characteristics including "religion." 42 U.S.C. 2000e-2(a)(1); see Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 255. Congress later imposed a parallel requirement on federal employers, including the United States Postal Service (USPS). 42 U.S.C. 2000e-16(a).

In 1967, the EEOC issued guidelines interpreting Title VII's prohibition on religious discrimination to "include[] an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees" when "such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b) (1968); see 32 Fed. Reg. 10,298 (July 13, 1967). The guidelines provided that "the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. 1605.1(c) (1968). The Commission emphasized that it would "review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. 1605.1(d) (1968).

In 1972, Congress amended the statute to codify the EEOC's guidelines. Congress did not alter Title VII's operative provisions, which continue to prohibit dis-

crimination based on religion. But consistent with the Commission's conclusion that the prohibition on discrimination includes an obligation to accommodate, Congress defined "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" "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); see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103.

2. This Court considered the scope of that undue hardship standard in *Hardison*, a suit brought by a Trans World Airlines (TWA) employee who sought to abstain from work at the airline's maintenance facility during his Saturday Sabbath. 432 U.S. at 66-69. Under the collective-bargaining agreement between TWA and the union representing the facility's workers, shifts were allocated using a seniority system. *Id.* at 67. TWA, the union, and Hardison explored several options in an effort to allow him to abstain from Sabbath work, but were unable to agree on an accommodation. *Id.* at 68-69. TWA terminated Hardison after he refused to work assigned Saturday shifts. *Id.* at 69. Hardison then sued, alleging that the failure to accommodate his Sabbath observance violated Title VII.

Although the relevant events occurred before the 1972 amendment to Title VII, Hardison and the United States argued that the amended statute governed his claim. See *Hardison*, 432 U.S. at 69; Gov't Amicus Br. at 15-16 & n.5, *Hardison*, *supra* (Nos. 75-1126 and 75-1385). This Court found it unnecessary to decide whether the amendment should be "applied retroactively" because it concluded that Congress had "'ratified'"

the EEOC's guideline by adopting the same standard in "'positive legislation.'" *Hardison*, 432 U.S. at 76 n.11 (citation omitted). The Court thus gave the pre- and post-amendment versions of Title VII the same meaning by treating the guideline as a controlling interpretation of the pre-1972 statute. *Ibid.*

On the merits, the Court concluded that each of Hardison's proffered accommodations would have imposed an undue hardship on TWA. The Court first held that TWA was not required to compel more senior employees to swap jobs or shifts to allow Hardison to abstain from Sabbath work because those actions "would have amounted to a breach of the collective-bargaining agreement." *Hardison*, 432 U.S. at 79. The Court reasoned that "Title VII does not require" an employer to "deprive [other employees] of their contractual rights." *Id.* at 81; see *id.* at 79-81. Petitioner does not challenge that holding here. Pet. Br. 47 n.9; Cert. Reply Br. 3.

The Court separately rejected Hardison's suggestion that TWA should have been required to allow him to work a four-day week or to pay "premium wages" to induce other employees to work Hardison's Saturday shifts. *Hardison*, 432 U.S. at 84. The Court explained that those proposals would have caused TWA to "incur[] substantial costs" in the form of regular premium pay or reduced efficiencies. *Id.* at 83 n.14; see *id.* at 83-84. The Court concluded that requiring TWA to "bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84.

3. Three years after *Hardison*, the EEOC issued guidelines explicating the "undue hardship" standard in light of this Court's decision. 45 Fed. Reg. 72,610 (Oct. 31, 1980). Those guidelines, which remain in force today, explain that the Commission interprets "more than

a de minimis cost," as that phrase "was used in the *Hardison* decision," to mean "costs similar to the regular payment of premium wages" for substitute workers, which was the cost "at issue in *Hardison*." 29 C.F.R. 1605.2(e)(1). In contrast, the Commission stated that it would presume that costs such as "the infrequent payment of premium wages for a substitute" or the "administrative costs" of arranging an accommodation are those that "an employer can be required to bear." *Ibid.* And the Commission added that assessing claims of hardship requires "due regard" for "the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Ibid.* The Commission further suggested several options to accommodate an employee's Sabbath observance without undue hardship, including voluntary substitutes, flexible scheduling, and transfers. 29 C.F.R. 1605.2(d)(1).

The Commission's 1980 guidelines were adopted with broad support from "individuals and organizations that observe the Sabbath from sunset on Friday to sunset on Saturday." 45 Fed. Reg. at 72,611. Those individuals and groups advised the Commission that the guidelines would "greatly decrease the incidence of religious discrimination." *Ibid.*

B. The Present Controversy

1. Petitioner was employed by USPS as a Rural Carrier Associate (RCA) from 2012 until he resigned in January 2019. Pet. App. 4a. An RCA is "a non-career employee who provides coverage for absent career employees." *Ibid.* RCAs "are scheduled on an as-needed basis." *Id.* at 36a. Accordingly, "the job requires flexibility," *id.* at 4a, and "all RCAs must be willing to work weekends and holidays," *id.* at 36a. Petitioner's reli-

gious beliefs prevent him from working on Sunday, when he observes the Sabbath. *Id.* at 3a. Initially, that posed no problem because "[a]s a [general] rule, letter carriers have never gone out on their rounds on Sundays." USPS, *Delivery: Monday through Saturday since 1863*, at 2 (June 2009), https://about.usps.com/who/profile/history/pdf/delivery-monday-through-saturday.pdf.

That changed in 2013, when USPS, "[i]n an effort to remain profitable," signed an agreement with Amazon to deliver packages on Sundays. Pet. App. 36a. Amazon Sunday delivery service "initially began at only some post offices." *Id.* at 4a. In 2015, when it was instituted at the post office where petitioner worked, he was "exempted" from Sunday work as an accommodation because the station was "relatively large" and "had sufficient carriers available for Sunday delivery." *Id.* at 6a.

In 2016, however, USPS and the union representing RCAs entered into a memorandum of understanding (MOU) governing Sunday and holiday schedules. Pet. App. 5a & n.3; see J.A. 129-132. Under the MOU, a given post office or regional hub must first seek to staff deliveries on such days with any Assistant Rural Carriers (ARCs)—part-time carriers whose sole job is to work on Sundays and holidays—followed by other part-time flexible carriers, including RCAs, who had volunteered for Sunday or holiday work. Pet. App. 5a-6a. If those sources prove insufficient, USPS must assign other part-time flexible carriers on a rotating basis. *Id.* at 6a. During peak seasons (mid-November through early January), each post office is responsible for scheduling its own carriers and delivering its own packages on Sundays and holidays. J.A. 150-151. During non-

peak seasons, individual post offices become part of a regional hub that handles scheduling. *Ibid.*

After the MOU went into effect, petitioner was told that he would have to join the rotation for Sunday shifts. Pet. App. 6a. Petitioner transferred to a small station in Holtwood, Pennsylvania, to avoid Sunday work, but in March 2017 that station also began Sunday deliveries. *Ibid.* The Holtwood Postmaster attempted to find other carriers to cover petitioner's Sunday shifts and stated that such shift swaps were "the only accommodations that would not 'impact operations.'" *Id.* at 7a (citation omitted). Another RCA initially volunteered to cover petitioner's shifts, but she suffered an injury and was unable to continue. *Ibid.* Holtwood's only other RCA was thus required to "bear the burden of Amazon Sundays alone during the 2017 peak season." *Ibid.* And in the 2018 peak season, the "Holtwood Postmaster himself was forced to deliver mail on Sundays when no RCAs were available." *Id.* at 8a.[1]

The Holtwood Postmaster explained that petitioner's absences "created a 'tense atmosphere' among the other RCAs" and led to "resentment toward management." Pet. App. 8a (citation omitted). A supervisor at the Lancaster Annex hub (which included Holtwood) stated that petitioner's absences "contributed to morale problems." *Ibid.* Other carriers had "to deliver more mail than they otherwise would have on Sundays." *Id.* at 9a. "One carrier transferred from Holtwood because he felt it was not fair that [petitioner] was not reporting on scheduled Sundays." *Id.* at 39a. "Another carrier

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[1] The Holtwood station was too small to employ ARCs. J.A. 35-36, 70; C.A. App. 95. The Lancaster Annex hub, which takes over scheduling for Holtwood during non-peak seasons, had two ARCs. J.A. 133-134.

resigned in part because of the situation." *Ibid.* And a union member working at the hub submitted a grievance in 2017, alleging that he had been forced to work on Sundays during non-peak season to cover for petitioner, in contravention of the MOU. *Id.* at 8a n.8; J.A. 98-142. USPS ultimately resolved the grievance by entering into a settlement reiterating its obligation to follow the MOU. J.A. 125-127.

Despite the Holtwood Postmaster's "undisputed good-faith efforts" to find volunteers to cover petitioner's Sunday shifts each time he was scheduled to work, petitioner ultimately missed at least 24 shifts that were not filled with shift swaps. Pet. App. 21a. In response, USPS took disciplinary measures, including imposing "paper suspensions" that did not result in a loss of work or pay. *Id.* at 40a. Petitioner ultimately resigned in January 2019. *Id.* at 9a.

2. Petitioner filed this suit alleging that USPS had violated Title VII. The district court granted the government's motion for summary judgment. Pet. App. 33a-60a. As relevant here, the court found that petitioner's "desired accommodation of being skipped over in the schedule every Sunday" would have imposed an undue hardship. *Id.* at 55a; see *id.* at 55a-60a. The court explained that USPS had "identified multiple * * * hardships that would easily meet the *de minim[i]s* standard," including "the impact on the Holtwood Post Office" from skipping petitioner in the Sunday rotation. *Id.* at 58a; see *id.* at 58a-60a. The court also relied on *Hardison*'s separate holding "that violation of a collectively bargained agreement is an undue hardship." *Id.* at 56a. The court observed that "allowing [petitioner] to be skipped in the schedule every Sunday would be a clear violation of the MOU," *ibid.*, which was inde-

pendently "sufficient to prove undue hardship," *id.* at 60a n.3; see *id.* at 56a-58a.

3. The court of appeals affirmed. Pet. App. 1a-32a. As relevant here, the court held that exempting petitioner from Sunday work would have imposed an undue hardship on USPS's operations because "[t]he impact on the workplace * * * far surpasses a de minimis burden." *Id.* at 22a n.18. The court emphasized that petitioner's repeated Sunday absences had "actually imposed on his co-workers, disrupted the workplace and workflow, and diminished employee morale" during both peak and nonpeak seasons. *Id.* at 24a. The court explained that given the limited number of RCAs at Holtwood, petitioner's absences "placed a great strain on the Holtwood Post Office personnel and even resulted in the Postmaster delivering mail." *Id.* at 25a. The court observed that petitioner's absences "also had an impact on operations and morale," "made timely delivery [of mail] more difficult," and required other carriers "to deliver more mail." *Ibid.*

Judge Hardiman dissented. Pet. App. 26a-32a. He would have remanded for a trial because he found insufficient evidence in the summary-judgment record that accommodating petitioner would "harm [USPS's] 'business,'" and not merely "[petitioner's] coworkers." *Id.* at 26a (citation and emphasis omitted).

SUMMARY OF ARGUMENT

I. This Court should reject petitioner's request to overrule *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), because petitioner has not made the extraordinary showing required to overrule a statutory precedent. In so doing, however, the Court can and should clarify that the EEOC has correctly interpreted

Hardison to provide substantial protection for religious adherents in the workplace.

A. This Court demands an exceptionally compelling reason to overrule a statutory precedent because Congress is free to correct any error it perceives in this Court's statutory decisions. That principle applies with full force here: In the nearly half-century since *Hardison* was decided, Congress has often amended Title VII, but it has repeatedly declined proposals to overturn *Hardison*. Nor can petitioner escape the force of statutory *stare decisis* by characterizing *Hardison* as an interpretation of the EEOC's 1967 guidelines rather than Title VII as amended in 1972. Both the guidelines and the amended statute were squarely before the Court and an essential premise of the Court's decision was that they had the same meaning.

B. Petitioner fails to offer the sort of extraordinary justification required to overrule a statutory precedent. Petitioner principally asserts that *Hardison* has proved unworkable because it provides insufficient protection for religious adherents. But that is an argument that *Hardison* was wrongly decided, not the sort of workability concern relevant to *stare decisis*. And in any event, petitioner mischaracterizes *Hardison*'s effect. Both the EEOC's experience and recent precedent from lower courts confirm that courts applying *Hardison* often reject employers' undue-hardship defenses—including in Sabbath-observance cases like this one.

Petitioner's other *stare decisis* arguments are likewise unpersuasive. *Hardison* held that the accommodations at issue there would have imposed an undue hardship with the benefit of briefing and argument about Title VII's scope, and over a dissent making essentially the same arguments petitioner advances here.

No subsequent decision has undermined *Hardison*'s holding. And this Court has rejected petitioner's suggestion that decisions interpreting civil-rights statutes are entitled to lesser *stare decisis* effect.

C. For more than 40 years, the EEOC has interpreted *Hardison* to mean that an employer is not required to accommodate an employee's Sabbath observance by operating shorthanded or regularly paying overtime to secure replacement workers, but that employers may be required to bear other costs—including infrequent or temporary payment of overtime and the administrative expenses associated with rearranging schedules. Many lower courts have likewise interpreted *Hardison* to afford meaningful protection for religious observance without imposing substantial burdens on employers and co-workers. That understanding is consistent with Title VII's text, structure, and purpose.

Petitioner would reject that approach and instead read into Title VII a definition of "undue hardship" that Congress adopted in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, and other statutes that post-date *Hardison*. But Congress adopted that definition in a deliberate effort to depart from Title VII as interpreted in *Hardison* by imposing a more stringent standard. Petitioner provides no justification for reading into Title VII a definition that Congress enacted in different statutes addressing different circumstances.

D. Although petitioner and his amici overstate *Hardison*'s effect on religious-accommodation claims, the government agrees that lower courts have sometimes rejected claims that should have been allowed to proceed. In some of those cases, courts have misinterpreted *Hardison*'s "*de minimis*" language by ignoring

its context or treating it as a declaration that the undue-hardship standard can be satisfied by trivial or speculative burdens. The solution to that problem is not, however, to overrule *Hardison*. Instead, as it has done with other precedents, the Court should reaffirm *Hardison* while also clarifying and reinforcing its limits. And the Court can do that by confirming that the EEOC's longstanding interpretation of *Hardison* is correct.

II. Petitioner separately contends that the court of appeals erred in holding that burdens on co-workers can establish undue hardship. But the court correctly recognized that burdens on an employee's co-workers can affect the "conduct of the employer's business," 42 U.S.C. 2000e(j). As this case illustrates, accommodations that affect the workforce often affect the conduct of the business as well. That may occur, for example, when an accommodation would result in unbalanced workloads or unfavorable schedules that hamper employee retention. The EEOC's guidance is consistent with that view. So too is *Hardison*'s holding that an accommodation may not require an employer to violate the terms of a collectively bargained agreement because doing so violates the rights of other employees—a holding that petitioner does not challenge.

III. The court of appeals' decision is correct under any understanding of undue hardship. The record shows that granting petitioner's requested accommodation would have imposed an undue hardship on USPS by requiring it to violate its memorandum of understanding with the union, operate with insufficient staff, and burden workers—burdens that actually contributed to other employees quitting or transferring. Those significant burdens on the conduct of USPS's business qualify as an undue hardship under any standard.

ARGUMENT

I. THIS COURT SHOULD NOT OVERRULE *HARDISON*, BUT SHOULD CLARIFY THAT IT AFFORDS SUBSTANTIAL PROTECTION FOR RELIGIOUS OBSERVANCE

The Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), has defined the scope of Title VII's reasonable-accommodation requirement for nearly half a century. During that time, Congress has repeatedly rejected proposals to overturn *Hardison*. Petitioner has not made the extraordinary showing required to overrule such a statutory precedent. Petitioner principally contends that *Hardison* affords too little protection for religious observance. But that argument should be directed to Congress, which is better positioned to weigh the competing interests in this sensitive area and strike the appropriate balance. In any event, petitioner's portrayal of *Hardison*'s effect is incorrect: The EEOC and many lower courts have long understood and applied that decision to provide meaningful protection for religious observance in the workplace. And although other lower courts have sometimes been led astray by *Hardison*'s "*de minimis*" language, the Court can and should address that problem by clarifying *Hardison* rather than overruling it.[2]

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[2] In *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685 (2020), the government filed an amicus brief urging the Court to overrule *Hardison*'s "*de minimis*" standard. Gov't Br. at 19-22, *Patterson*, *supra* (No. 18-349). Following the Court's grant of certiorari in this case, the government reexamined the issue and determined that the *Patterson* brief gave insufficient weight to statutory *stare decisis* and failed to recognize the extent to which *Hardison* can be (and often has been) applied to provide meaningful protection for religious observance, in accordance with the EEOC's guidelines.

A. *Hardison* Implicates This Court's Near-Categorical Presumption Against Overruling Statutory Precedents

1. "Overruling precedent is never a small matter." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). Respect for precedent is "a foundation stone of the rule of law," *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014), and application of that principle "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Accordingly, any departure from precedent demands "'special justification'" —something more than "an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted).

This Court has long held that "*stare decisis* carries enhanced force when a decision, like [*Hardison*], interprets a statute." *Kimble*, 576 U.S. at 456. Such decisions implicate "the legislative power" because "Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). Ordinarily, therefore, the Court has "left the updating or correction of erroneous statutory precedents to the legislative process." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part); accord, *e.g.*, *Halliburton*, 573 U.S. at 266; *Bay Mills*, 572 U.S. at 798; *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008). "[E]ven where the error is a matter of serious concern," the Court will adhere to its statutory precedents to vindicate interests in "stability" because any necessary correction "can be had by legislation." *Square D Co.* v. *Niagara Frontier*

Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (citation omitted).

This Court's recent practice confirms that it applies an "almost categorical rule of *stare decisis* in statutory cases." *Rasul* v. *Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting). So far as we are aware, the Court has not overruled a statutory precedent since *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007). And in that case, the Court emphasized that the usual strong form of statutory *stare decisis* did not apply because the Sherman Act is a "common-law statute." *Id.* at 899; see *Ramos*, 140 S. Ct. at 1413 n.2 (Kavanaugh, J., concurring in part).

This Court's approach to statutory *stare decisis* has deep roots. "The traditional Anglo-American view is that an authoritative interpretation of written law (legislation) acquires the power of law and becomes part of the statute itself." Brian A. Garner et al., *The Law of Judicial Precedent* 333 (2016). When the Court construes a federal statute, therefore, its interpretation "effectively become[s] part of the statutory scheme, subject (just like the rest) to congressional change." *Kimble*, 576 U.S. at 456. Except in the most extraordinary circumstances, proposals to alter that interpretation should be directed to Congress, not to this Court.

2. *Hardison* presents a particularly strong case for *stare decisis* because "Congress has spurned multiple opportunities to reverse" the Court's decision—"openings as frequent and clear as this Court ever sees." *Kimble*, 576 U.S. at 456. Such "long congressional acquiescence * * * 'enhance[s] even the usual precedential force' [the Court] accord[s] to [its] interpretation of statutes." *Watson* v. *United States*, 552

U.S. 74, 82-83 (2007) (citation omitted); see *Kimble* 576 U.S. at 456.

Hardison's analysis has governed the "undue hardship" inquiry for nearly half a century. During that time, Congress has repeatedly amended Title VII, including to overrule several of this Court's precedents. See, *e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. But the Court's decision in *Hardison* "survived every such change." *Kimble*, 576 U.S. at 456. And that cannot be dismissed as inadvertence: To the contrary, Congress declined to enact bills introduced in every Congress between 1994 and 2013 that were specifically crafted to overturn *Hardison* and replace it with the "significant difficulty or expense" standard petitioner urges here. S. 3686, § 4(a)(3), 112th Cong., 2d Sess. (2012).[3] "Congress's continual reworking of [Title VII]—but never of the [*Hardison*] rule—further supports leaving the decision in place." *Kimble*, 576 U.S. at 457.

3. Recognizing the considerable barrier that statutory *stare decisis* presents, petitioner asserts (Br. 15-17) that it does not apply at all. According to petitioner,

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[3] See, *e.g.*, S. 4046, § 4(a)(3), 111th Cong., 2d Sess. (2010); S. 3628, § 2(a)(1)(B), 110th Cong., 2d Sess. (2008); H.R. 1431, § 2(a)(4), 110th Cong., 1st Sess. (2007); H.R. 1445, § 2(a)(4), 109th Cong., 1st Sess. (2005); S. 677, § 2(a)(4), 109th Cong., 1st Sess. (2005); S. 893, § 2(a)(4), 108th Cong., 1st Sess. (2003); S. 2572, § 2(a)(4), 107th Cong., 2d Sess. (2002); H.R. 4237, § 2(a)(4), 106th Cong., 2d Sess. (2000); S. 1668, § 2(a)(4), 106th Cong., 1st Sess. (1999); H.R. 2948, § 2(a)(4), 105th Cong., 1st Sess. (1997); S. 1124, § 2(a)(4), 105th Cong., 1st Sess. (1997); S. 92, § 2(a)(3), 105th Cong., 1st Sess. (1997); H.R. 4117, § 2(a)(3), 104th Cong., 2d Sess. (1996); S. 2071, § 2(a)(3), 104th Cong., 2d Sess. (1996); H.R. 5233, § 2, 103d Cong., 2d Sess. (1994).

Hardison's analysis of "undue hardship" was dicta, because *Hardison* applied the 1967 EEOC guidelines rather than the 1972 amendments that explicitly incorporated the "undue hardship" standard into Title VII. That is incorrect.

Although it is true that *Hardison* applied the EEOC guidelines, the Court did so on the express premise that the amended statute shared the guidelines' meaning, *Hardison*, 432 U.S. at 74-75—a premise that petitioner concedes is correct (Br. 27). Only by adopting that premise could the Court reject Hardison's claim without determining whether, as he and the United States had argued, the 1972 amendment "must be applied retroactively." *Hardison*, 432 U.S. at 76 n.11.

Hardison's holding about the scope of "undue hardship" is thus nothing like the dicta addressed in the cases petitioner cites (Br. 16-17). In those cases, the Court declined to be bound by dicta from a decision that "did not address—much less resolve"—the relevant question. *Van Buren* v. *United States*, 141 S. Ct. 1648, 1660 (2021). In *Hardison*, by contrast, the question whether the requested accommodations would have imposed an "undue hardship" was squarely before the Court, and the essential premise of the Court's decision was that its analysis of that issue governed both the 1967 guidelines and the amended statute, 42 U.S.C. 2000e(j). Accordingly, this Court has since treated *Hardison* as an authoritative construction of Title VII's "undue hardship" standard. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67-70 (1986).

B. Petitioner Fails To Offer The Special Justification Required To Overrule A Statutory Precedent

Because *Hardison* implicates the "superpowered form of *stare decisis*" applicable to statutory prece-

dents, petitioner must identify some "superspecial justification to warrant reversing [it]." *Kimble*, 576 U.S. at 458. Petitioner cannot make that showing. In considering whether to overrule a statutory precedent, the Court primarily asks whether it has "proved unworkable" and whether its "doctrinal and statutory underpinnings" have "eroded." *Id.* at 458-459. Neither condition is satisfied here. And petitioner's various other justifications likewise lack merit.

1. **Hardison** ***has neither proved unworkable nor foreclosed religious-accommodation claims***

Petitioner asserts (Br. 33-34) that *Hardison* has proved unworkable because, in his view, it affords too little protection to religious adherents. But that is an argument about the merits, not workability. And petitioner's account of *Hardison*'s effect is in any event inconsistent with the EEOC's experience and with experience in the lower courts.

a. To ask whether a precedent is "workable" is to ask "whether it can be understood and applied in a consistent and predictable manner." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2272 (2022). A precedent may be unworkable if it leads to "uncertainty and arbitrariness of adjudication," *Johnson* v. *United States*, 576 U.S. 591, 605 (2015), "embroil[s] courts in technical and arbitrary disputes," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018), or causes unforeseen practical problems in application, *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2178-2179 (2019). Petitioner does not contend that *Hardison* has yielded any such difficulties. Instead, petitioner asserts (Br. 33-34) that *Hardison* affords too little protection to religion in the workplace. But that is not a workability argument; instead, it is a restatement of petitioner's

view that *Hardison* was wrongly decided. And that is not sufficient, because "an argument that [this Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S. at 455.

b. In any event, petitioner's account of *Hardison*'s effect is mistaken. The premise of petitioner's brief is that "*Hardison* deems virtually any departure from neutral workplace rules an 'undue hardship,'" Br. 23, meaning that accommodation claims are doomed "before suit is even filed," Br. 33. But that has not been the EEOC's experience. Congress has charged the Commission with enforcing Title VII through administrative proceedings and litigation. 42 U.S.C. 2000e-5(b) and (f)(1). The Commission has informed this Office that from October 2006 through March 2023, roughly 90% of the religious-accommodation cases it has filed have resulted in favorable district-court resolutions—a percentage comparable to the Commission's success rate in bringing other types of discrimination claims.

A few recent examples addressing the particular form of religious observance at issue here illustrate the point:

- The Commission secured a consent decree and $90,000 for a phlebotomist whose employer failed to accommodate her Sabbath observance. 20-cv-2939 D. Ct. Doc. 65, *EEOC* v. *Quest Diagnostics, Inc.* (N.D. Tex. Feb. 4, 2022).
- The Commission secured a consent decree and $50,000 for a delivery driver whose employer failed to accommodate his church attendance. 21-cv-2302 D. Ct. Doc. 9, *EEOC* v. *Tampa Bay Delivery Serv., LLC* (M.D. Fla. Jan. 27, 2022).

- The Commission secured a consent decree and $99,000 for a hotel attendant whose employer failed to accommodate her Sabbath observance. 21-cv-20754 D. Ct. Doc. 30, *EEOC* v. *Noble House Sole, LLC* (S.D. Fla. Dec. 7, 2021).
- The Commission secured a consent decree and $12,500 for a seasonal worker in a packing facility whose employer failed to accommodate her Sabbath observance. 19-cv-64 D. Ct. Doc. 21, *EEOC* v. *Cottle Strawberry Nursery, Inc.* (E.D.N.C. Feb. 11, 2020)

See also EEOC, *Fact Sheet on Recent EEOC Religious Discrimination Litigation* (Feb. 19, 2015), https://www.eeoc.gov/fact-sheet-recent-eeoc-religious-discrimination-litigation (listing successful religious-accommodation cases from 2010-2015).

In private litigation as well, courts often reject employers' undue-hardship defenses. As particularly relevant here, courts have recently held that an employer failed to show that accommodating an employee's Sabbath observance would cause an undue hardship in the following circumstances:

- A satellite technician could be allowed to take unpaid leave. *Sutton* v. *DirecTV LLC*, No. 19-cv-330, 2022 WL 808692, at *6-*7 (N.D. Ala. Mar. 16, 2022).
- A pilot's occasional missed shifts could be covered using the airline's system for shifts missed because of illness or emergency. *Cassell* v. *Skywest, Inc.*, No. 19-cv-149, 2022 WL 375855, at *7-*9 (D. Utah Feb. 8, 2022).
- A truck driver could be allowed to begin his weekly routes early or assigned shorter routes.

Enriquez v. *Gemini Motor Transport LP*, No. 19-cv-4759, 2021 WL 5908208, at *12 (D. Ariz. Dec. 14, 2021).

- A casino could refrain from offering an employee Sabbath shifts. *Rivas* v. *Caesars Enters. Servs., LLC*, No. 19-cv-1637, 2021 WL 3572659, at *5-*6 (D. Nev. Aug. 11, 2021).
- A cook could be allowed to use the employer's voluntary shift-swapping system. *Logan* v. *Organic Harvest, LLC*, No. 18-cv-362, 2020 WL 1547985, at *5-*6 (N.D. Ala. Apr. 1, 2020).

Those examples—all from the last three years, and all involving the same sort of religious observance at issue here—refute petitioner's assertion (Br. 13) that *Hardison* "has evolved into a per se rule that virtually any cost to an employer counts as undue hardship."

2. Hardison*'s underpinnings have not eroded*

Nor can petitioner show that later decisions have "eroded" *Hardison*'s "statutory and doctrinal underpinnings." *Kimble*, 576 U.S. at 458. Petitioner relies (Br. 35) on this Court's statement in *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), that Title VII "gives [religious practices] favored treatment" rather than demanding "mere neutrality." *Id.* at 775. But that observation is consistent with *Hardison*, which recognized that employers are required to accommodate religious practices unless they can demonstrate undue hardship. 432 U.S. at 77-78. Employers generally have no obligation to accommodate employees' secular practices even if they could do so without hardship. And nothing in *Abercrombie* addresses the magnitude of the hardship Congress required employers to bear in accommodating religion.

Petitioner also asserts (Br. 35) that *Hardison*'s approach "may have" been intended to "avoid a perceived Establishment Clause problem" that has proven unfounded. Petitioner rightly couches that claim as conjecture, as *Hardison* did not invoke principles of constitutional avoidance. See 432 U.S. 84-85. Regardless, it is appropriate to take account of the Establishment Clause backdrop in considering whether a hardship is "undue." This Court has recognized that, to be consistent with the Establishment Clause, a law requiring religious accommodations "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005). For example, in *Estate of Thornton* v. *Caldor*, 472 U.S. 703 (1985), this Court invalidated a statute guaranteeing employees the right not to work on their chosen Sabbath because it took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709.

Finally, petitioner asserts (Br. 37) that *Hardison* employed an "outdated" mode of interpretation that was insufficiently focused on the statutory text. But the Court in *Kimble* rejected an identical argument that precedent may be more easily overruled if it was not "focused only on statutory text." 576 U.S. at 456. "All [of the Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme" and are entitled to the same *stare decisis* effect. *Ibid.* And in any event, *Hardison*'s holding that the requested accommodations constituted an undue hardship is consistent with Title VII's text. See pp. 33-34, *infra*.

3. Petitioner's remaining arguments lack merit

Unable to demonstrate that *Hardison* has proved unworkable or that its foundations have eroded, petitioner makes several other attempts to supply the "superspecial justification," *Kimble*, 576 U.S. at 458, this Court demands before overruling a statutory precedent. None has merit.

First, petitioner errs in asserting (Br. 29) that "this Court has never had a meaningful opportunity to interpret Title VII's undue-hardship provision." Although the parties' briefing in *Hardison* principally addressed the effect of a collectively bargained seniority system, each set forth a view of how to analyze undue hardship on the facts of the case. See Pet. Br. at 41, 47, *Hardison*, *supra* (Nos. 75-1126 and 75-1385); Resp. Br. at 19-23, *Hardison*, *supra* (Nos. 75-1126 and 75-1385); Pet. Reply Br. at 12-17, *Hardison*, *supra* (Nos. 75-1126 and 75-1385); Gov't Amicus Br. at 20, 28-29, *Hardison*, *supra* (Nos. 75-1126 and 75-1385). The Court questioned the parties at argument about the limits of the duty to accommodate. See Tr. at 43-44, 47, 54-55, *Hardison*, *supra* (No. 75-1126). And the Court adopted its holding over a vigorous dissent making many of the same arguments petitioner now asserts. See 432 U.S. at 84; *id.* at 91-97 & n.6 (Marshall, J., dissenting). Contrary to petitioner's suggestion (Br. 29), therefore, *Hardison* falls well outside the Court's practice of treating *summary dispositions*—which are "rendered without full briefing or argument"—as having lesser precedential effect. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998).

Second, petitioner asserts that *stare decisis* applies "less rigorously" to civil rights statutes like Title VII. Br. 31 (quoting *Johnson* v. *Transportation Agency*, 480 U.S. 616, 672-673 (1987) (Scalia, J., dissenting)). But

this Court has never endorsed such a rule. To the contrary, the year after Justice Scalia issued the dissent on which petitioner relies, he joined the Court in rejecting the suggestion that statutes benefiting "civil rights plaintiffs" should not "be subject to the same principles of *stare decisis*." *Patterson* v. *McLean Credit Union*, 485 U.S. 617, 619 (1988) (per curiam). And after supplemental briefing and argument in that case, the Court concluded that the relevant civil-rights precedent should not be overruled, applying the same heightened form of *stare decisis* applicable to other statutory decisions. *Patterson*, 491 U.S. at 171-173. In contrast, in those rare cases where the Court has overruled prior interpretations of civil rights statutes, it has concluded that the result is warranted "even under the most stringent test for the propriety of overruling a statutory decision." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 700 (1978).

Third, petitioner errs in asserting (Br. 31) that reliance interests do not support adhering to *Hardison*. Countless employers have relied on *Hardison*'s analysis of undue hardship, as understood and applied by the EEOC and the courts, in formulating and enforcing corporate policies and employment agreements. Overruling *Hardison* would upset those settled expectations. In constitutional cases, this Court has sometimes held that reliance interests reflected in employment agreements must yield to other *stare decisis* considerations. See *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018). But in a statutory case like this one, the "reasonable possibility that parties have structured their business transactions in light of" *Hardison* is "one more reason to let it stand." *Kimble*, 576 U.S. at 457-458.

In any event, even without such "detrimental reliance," this Court has recognized that overturning precedent "threaten[s] to substitute disruption, confusion, and uncertainty for necessary legal stability," and a lack of reliance cannot "overcome th[o]se considerations." *John R. Sand*, 552 U.S. at 139. That point has particular force here. In the decades since *Hardison* was decided, a body of case law and guidance has developed to address frequently recurring categories of religious accommodations, including Sabbath observance, exceptions from dress and grooming codes, and requests to accommodate midday prayer or other religious practices during the workday. See EEOC, *Compliance Manual* § 12-IV(C) (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination; see also, *e.g.*, *EEOC* v. *Greyhound Lines, Inc.*, 554 F. Supp. 3d 739, 759-760 (D. Md. 2021) (dress policy); *Mohamed* v. *1st Class Staffing, LLC*, 286 F. Supp. 3d 884, 910-911 (S.D. Ohio 2017) (prayer space and breaks). Overruling *Hardison* would erase that body of law, with destabilizing effects for employers, the Commission, and the lower courts.

C. When Properly Applied, *Hardison*'s "*De Minimis* Cost" Language Is Consistent With Title VII

In *Hardison*, this Court reasoned that it would impose an undue hardship to require an employer "to bear more than a *de minimis* cost" to accommodate an employee's religious observance. 432 U.S. at 84. As the EEOC has long recognized, that language should be interpreted in light of *Hardison*'s facts and holding: An employer is not required to accommodate an employee's Sabbath observance by operating shorthanded or regularly paying premium wages to secure substitute workers, but may be required to bear other costs—including

infrequent payment of premium wages or the administrative expenses associated with an accommodation. 29 C.F.R. 1605.2(e)(1). Many courts of appeals have likewise recognized that *Hardison* affords more robust protection for religious observance than the "*de minimis*" language might suggest. When properly interpreted, that aspect of *Hardison* is consistent with Title VII's text, structure, and purpose. And petitioner errs in asserting that the Court should instead read into Title VII a specific definition of "undue hardship" that Congress adopted in later statutes that were deliberately intended to depart from Title VII.

1. In *Hardison*, the Court considered whether TWA was required to provide Hardison with Saturdays off, at the cost of either leaving the airline shorthanded for one shift per week or paying "premium wages" to replace Hardison with "other available employees." 432 U.S. at 84. The Court noted that "[b]oth of th[o]se alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages," and concluded that requiring the airline to "bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Ibid.*

In reaching that conclusion, the Court explained that it was relying on "the District Court's findings that TWA had done all that it could do to accommodate Hardison's religious beliefs without either incurring substantial costs or violating the seniority rights of other employees." *Hardison*, 432 U.S. at 83 n.14 (citing 375 F. Supp. 877, 891 (W.D. Mo. 1974)). Consistent with that finding, the Court appeared to equate "more than

a *de minimis* cost" with "substantial expenditures" or "substantial additional costs." *Id.* at 83-84 & n.14.[4]

Following *Hardison*, the EEOC adopted guidelines on what constitutes an "undue hardship" under this Court's decision. See pp. 6-7, *supra*. Those guidelines interpret the phrase "more than a *de minimis* cost" as it was "used in the *Hardison* decision" to mean that "costs similar to the regular payment of premium wages [for] substitutes, which was at issue in *Hardison*, would constitute undue hardship." 29 C.F.R. 1605.2(e)(1). But the Commission emphasized that it "will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear." *Ibid.* And the Commission explained that in assessing cost, it would give "due regard" to the "identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Ibid.*

Noting that employees "most frequently request an accommodation" involving work schedules, the EEOC also identified several accommodations that can avoid undue hardship in that context. 29 C.F.R. 1605.2(d)(1). Those accommodations include facilitating "voluntary substitute[s]" and "swap[s]"; allowing "flexible work schedule[s]" that permit employees to "make up time

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[4] Petitioner is thus wrong to assert (Br. 33) that *Hardison* found an undue hardship even though the employee "could have been accommodated for $150." That assertion relies on the dissent's view of the facts. *Ibid.* (citing *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting)). But the Court specifically rejected the dissent's "view of the record," instead deferring to "the findings of the District Judge who heard the evidence." *Id.* at 83 n.14.

lost due to the observance of religious practices"; and providing for "lateral transfer[s]" or "change[s] [in] job assignment" when the employee "cannot be accommodated either as to his or her entire job or an assignment within the job." 29 C.F.R. 1605.2(d)(1)(i)-(iii).

Finally, the EEOC has emphasized that the undue hardship inquiry is fact-specific, and the burden remains on the employer to "demonstrate how much cost or disruption the employee's proposed accommodation would involve" with "objective information"—not reliance on "hypothetical hardship." EEOC, *Compliance Manual* § 12-IV(B)(1).

2. Many lower courts have likewise recognized 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. Those courts have explained that *Hardison*'s "broad reference to 'more than a *de minimis* cost' should be understood in * * * context" and while "keep[ing] in mind both words in the key phrase of the actual statutory text: 'undue' and 'hardship.'" *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013). Courts have likewise recognized that "undue hardship means something greater than hardship." *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 616 (9th Cir. 1988) (brackets and citation omitted), cert. denied, 489 U.S. 1077 (1989); see, *e.g.*, *Crider* v. *University of Tenn.*, 492 Fed. Appx. 609, 613 (6th Cir. 2012). And courts have emphasized that an employer cannot carry its burden merely by showing that an accommodation would be "bothersome to administer or disruptive of the operating routine." *Smith* v. *Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (citation omitted).

Courts applying that understanding have long rejected undue-hardship defenses unsupported by proof that the requested accommodation would impose a burden on the employer comparable to those present in *Hardison*. In *Protos* v. *Volkswagen of America, Inc.*, 797 F.2d 129, cert. denied, 479 U.S. 972 (1986), for example, the Third Circuit held that Volkswagen had failed to show that accommodating an assembly-line employee's Sabbath observance would be an undue hardship because Volkswagen maintained "a crew of roving absentee relief operators" that served as "substitutes for absent employees," allowing the company's "efficiency, production, quality and morale" to "remain[] intact." *Id.* at 135; accord *Brown* v. *General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979). Similarly, courts have held that when an employer had a "ready and willing *volunteer* to substitute" for an absent employee, there is no undue hardship. *Davis* v. *Fort Bend Cnty.*, 765 F.3d 480, 489 (5th Cir. 2014), cert. denied, 576 U.S. 1004 (2015); see *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 839-840 (5th Cir. 2013); *Opuku-Boateng* v. *California*, 95 F.3d 1461, 1471 (9th Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

By contrast, where employers have shown that they would suffer a loss of efficiency or would have to pay additional wages on a regular basis, courts have found an undue hardship. For example, in *Bruff* v. *North Mississippi Health Services, Inc.*, 244 F.3d 495, cert. denied, 534 U.S. 952 (2001), the Fifth Circuit held that a medical center that employed three traveling counselors would suffer an undue hardship if it were required to excuse one counselor from counseling on certain subjects. *Id.* at 501. The court considered the "size of the [counseling] staff, the area covered by the program and

the travel involved," where "[t]ypically only one counselor would travel to a given location" and it was impossible to determine in advance which subjects would arise. *Id.* at 497, 498, 501. Under the circumstances, the court concluded that "[r]equiring one or both" of the other counselors to "assume a disproportionate workload, or to travel involuntarily with [the plaintiff] to sessions to be available in case a problematic subject area came up, is an undue hardship." *Id.* at 501.

Similarly, in two cases much like this one, the Eighth Circuit has held that USPS is not required to accommodate employees' requests not to work on their Sabbath because doing so would violate collective-bargaining agreements, would require others to work overtime, would disrupt work rotations, or would require the post office to operate with insufficient staff. See *Harrell* v. *Donahue*, 638 F.3d 975, 980-981 (2011); *Mann* v. *Frank*, 7 F.3d 1365, 1370 (1993); see also, *e.g.*, *Williams* v. *United States Steel Corp.*, 40 F. Supp. 3d 1055, 1067 (N.D. Ind. 2014) (undue hardship to accommodate Sabbath observance where it was "essential" to "operate around the clock every day of the year," the employer was "chronically short of qualified" employees, and replacements would require overtime pay); *Slocum* v. *Devezin*, 948 F. Supp. 2d 661, 669-670 (E.D. La. 2013) (undue hardship to accommodate Sabbath observance where accommodation would require hiring a "substitute" or "part-time employee" or would "overload[]" other employees).

Courts thus have appropriately recognized that undue hardship must be supported by "concrete" showings rather than hypothetical harms, *Opuku-Boateng*, 95 F.3d at 1474; that each case requires a fact-specific determination, *Protos*, 797 F.2d at 134; and that mere

co-worker "grumbling" is insufficient, *Crider*, 492 Fed. Appx. at 613. Contrary to petitioner's account, those courts do not hold that "any inconvenience or disruption, no matter how small, excuses [the employer's] failure to accommodate." *Adeyeye*, 721 F.3d at 455-456. Instead, they scrutinize employers' claims of hardship and demand evidence of a burden on the employer's operations akin to those this Court identified in *Hardison*.

3. When understood and applied in the manner reflected in those decisions and the EEOC's longstanding guidelines, *Hardison* is consistent with Title VII's text, context, and purpose.

a. In mandating that employers accommodate religion absent a showing of "undue hardship," Congress required an assessment of the particular facts and context at issue. "Hardship" is "[t]hat which is hard to bear, as privation, injury, etc." *Webster's New International Dictionary of the English Language* 1138 (2d ed. 1957). And in this context, "undue" means "[i]nappropriate," "unsuitable," or "excessive." *Id.* at 2772. The statute thus requires an analysis of the degree of cost or other injury that may appropriately be imposed on an employer's business to accommodate an employee's religious observance or practice. Requiring consideration of those burdens is consistent with the principle that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter*, 544 U.S. at 720; cf. *Thornton*, 472 U.S. at 711-712 (O'Connor J., concurring) (distinguishing Title VII from a state law that violated the Establishment Clause because Title VII "calls for reasonable rather than absolute accommodation").

Determining whether a hardship is "undue" is inevitably a context-dependent exercise: A burden or cost

that is "undue" in one circumstance may be entirely appropriate in another. For example, as petitioner notes (Br. 21-22), both the Bankruptcy Code and the Federal Rules of Civil Procedure hinge certain rights on a showing of "undue hardship" without defining the term. See 11 U.S.C. 523(a)(8); Fed. R. Civ. P. 26(b)(3)(A)(ii). Courts have held that to establish "undue hardship" sufficient to discharge a student loan in bankruptcy, the debtor must establish that he cannot maintain "a 'minimal' standard of living for himself and his dependents if forced to repay his loans." *Tetzlaff* v. *Educational Credit Mgmt. Corp.*, 794 F.3d 756, 758-759 (7th Cir. 2015) (brackets and citation omitted), cert. denied, 577 U.S. 1063 (2016). In civil discovery, by contrast, courts have held that a party may show undue hardship sufficient to overcome the work-product privilege merely by pointing to "unusual expense." *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1241 (5th Cir. 1982). The difference between the two standards is explained by the context—the cost that is appropriate to impose in light of the interests at issue.

b. Because of the context- and fact-dependent nature of the inquiry, the undue-hardship standard is best interpreted with reference to the particular accommodations sought and burdens imposed. With respect to accommodations for Sabbath observance, *Hardison* correctly held that regularly requiring an employer to pay premium wages for substitute workers or operate shorthanded constitutes an "undue hardship" under Title VII. As the Court emphasized, those costs would be "substantial." 432 U.S. at 83 n.14. They would burden the conduct of the employer's business, either directly in terms of extra wages or indirectly in terms of lost efficiency, and the Court recognized that such ongoing

deprivation of resources would not be appropriate. *Id.* at 84.

That understanding is consistent with Title VII's focus on "reasonable accommodation." An accommodation is easily understood as "reasonable" when an employer can accommodate a Sabbatarian through flexible scheduling, shift swaps, or other similar means that allow the employee to fulfill his or her responsibilities. But an accommodation that leaves the employer shorthanded or that requires the employer to regularly pay another worker extra to serve in the employee's place "demand[s] action beyond the realm of the reasonable." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002). And that is particularly true where, as here, an employee who objects to working on a weekend day holds a job that specifically calls for weekend work. Pet. App. 36a.

c. The lines *Hardison* and the EEOC have drawn in determining whether an accommodation imposes an undue hardship are also consistent with Title VII's purpose and history. The EEOC first adopted the undue-hardship standard in response to questions about employers' obligation to accommodate Sabbath observers. See 32 Fed. Reg. at 10,298. The Commission noted that a lack of available substitute employees may qualify as an undue hardship. *Ibid.* And it further underscored that each case must be reviewed "on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise." *Id.* at 10,299. From the outset, the EEOC was attuned to the context-specific nature of the inquiry and the varied circumstances affecting its application.

When Congress codified the guidelines, Senator Jennings Randolph (the bill's sponsor) likewise focused on

"employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." 118 Cong. Rec. 705 (1972). In the brief discussion of the bill, Senator Randolph appeared to support schedule changes as a possible accommodation. *Id.* at 705-706. But—in an exchange of particular relevance here—he also assured concerned Senators that the law would not require an employer with a position requiring work only on Saturday and Sunday to "hire a person who could not work on one of the 2 days of the employment." *Id.* at 706. That further underscores that Title VII was not intended to require employers to operate shorthanded or to regularly pay extra to secure replacement workers.

4. Rather than accepting this context-based approach and the nearly 50 years of precedent illuminating how the relevant principles under *Hardison* apply to commonly recurring factual scenarios, petitioner contends that the Court should now graft the specific definition of "undue hardship" from the ADA and other statutes into Title VII. But in those statutes, Congress has adopted express language defining "undue hardship" that does not appear in Title VII. In the ADA, for example, Congress defined "undue hardship" to mean "an action requiring significant difficulty or expense, when considered in light of" various statutory factors. 42 U.S.C. 12111(10)(A); see 38 U.S.C. 4303(16) (adopting ADA definition for purposes of the Uniformed Services Employment and Reemployment Rights Act); 29 U.S.C. 207(r)(3) (adopting similar definition for purposes of the Fair Labor Standards Act).[5]

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[5] Indeed, as recently as December 2022, Congress enacted the Pregnant Workers Fairness Act, Pub. L. No. 117-328, Div. II, 136

In adopting those specific definitions of undue hardship, moreover, Congress was deliberately departing from Title VII. Congress sought, for example, "to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of title VII in [*Hardison*]." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 3, at 40 (1990). Congress found that a "higher standard" for undue hardship was "necessary" under the ADA. H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 68 (1990). Congress's deliberate decision to adopt that standard under the ADA and other statutes—while at the same time repeatedly declining to adopt a similar standard under Title VII, see p. 18, *supra*—strongly suggests that the terms should not be given the same reach. Cf. *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018) ("We usually 'presume differences in language like this convey differences in meaning.'") (citation omitted).

Other statutory context further counsels against accepting petitioner's assertion (Br. 20-22) that "undue hardship" should have the same meaning in Title VII that it has in the ADA. Under the ADA, employers may be required to hire additional employees, see *Searls* v. *Johns Hopkins Hosp.*, 158 F. Supp. 3d 427, 438-439 (D. Md. 2016) (granting plaintiff's motion for summary judgment on undue-hardship defense where the requested American Sign Language interpreter would cost $120,000 annually), or otherwise face hundreds of thousands of dollars in costs, see *Reyazuddin* v. *Montgomery Cnty.*, 789 F.3d 407, 417-418 (4th Cir. 2015) (reversing grant of summary judgment to employer where experts estimated costs between $129,000 and $648,000

Stat. 6085, and expressly defined "undue hardship" to have the same meaning as given in the ADA. See § 102(7), 136 Stat. 6086.

to upgrade call center for accessibility to blind employees). Such costs may be appropriate under the ADA because another provision of that statute specifically contemplates potentially costly accommodations, including modifying an employer's "existing facilities" to make them accessible to individuals with disabilities and providing "qualified readers or interpreters." 42 U.S.C. 12111(9). But Title VII contains no similar provision, and the Court should reject petitioner's proposal to write into the statute a different standard adopted to address a different set of problems—particularly where, as here, Congress has repeatedly rejected proposals to do just that.

D. This Court Should Clarify *Hardison* By Reinforcing the EEOC's Longstanding Interpretation Of That Decision

Although petitioner and his amici overstate *Hardison*'s effect on religious-accommodation claims, the government agrees that lower courts have sometimes rejected claims that should have been allowed to proceed. In some of those cases, moreover, courts have misinterpreted *Hardison*'s "*de minimis*" language by ignoring its context or treating it as a declaration that the undue-hardship standard can be satisfied by trivial or speculative burdens. Such decisions are a real problem, but the solution is not to overrule *Hardison* and unsettle the EEOC guidance and body of precedent that has developed over five decades and that affords substantial protection to religious observance. Instead, as it has done with other precedents, the Court should reaffirm *Hardison* while also clarifying its scope and "reinforcing [its] limits." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019); see, *e.g.*, *Halliburton*, 573 U.S. at 269, 274, 279-283 (finding no "special justification" for overruling precedent, but clarifying its scope).

First, the Court should make clear that the EEOC has correctly understood *Hardison*'s reference to "more than a *de minimis* cost" to refer to the sort of "substantial" costs the Court considered there—that is, the costs associated with regularly operating short-handed or paying premium wages to substitute workers. 432 U.S. at 83-84 & n.14. *Hardison* does not foreclose accommodations that require employers to bear lesser costs, such as occasional premium wages or missed shifts, or the expenses associated with administering an accommodation, even if those costs might be described as more than *de minimis* in other contexts. EEOC, *Compliance Manual* § 12-IV(B)(2); 29 C.F.R. 1605.2(e)(1). As lower courts have recognized, it "read[s] too much into th[at] phrase in *Hardison*" to argue that "*any* inconvenience or disruption, no matter how small, excuses [a] failure to accommodate." *Adeyeye*, 721 F.3d at 456. To minimize the risk that lower courts misunderstand *Hardison* and depart from precedent properly applying that decision to ensure meaningful protection for religious observance, the Court could emphasize that *Hardison*'s language does not displace the statutory standard and that accommodations should be assessed while "keep[ing] in mind both words in the key phrase of the actual statutory text: 'undue' and 'hardship.'" *Ibid.*

Second, the Court should reiterate that the burden remains on the employer at all times to "demonstrate" undue hardship with concrete evidence, and that such a showing should take into account the "size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." EEOC, *Compliance Manual* § 12-IV(B)(1)-(2); 29 C.F.R. 1605.2(e)(1).

Third, the Court should confirm that hypothetical or speculative harms, or generalized concerns about co-worker complaints, are normally insufficient to show an undue hardship. See EEOC, *Compliance Manual* §§ 12-IV(B)(1)-(4); Office of the Press Secretary, The White House, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* § 1(C) (Aug. 14, 1997), 1997 WL 475412 at *8; see also *Brown* v. *Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995), cert. denied, 516 U.S. 1158 (1996); *Opuku-Boateng*, 95 F.3d at 1474 n.25.

Finally, the Court should reiterate that decisions in this area "must be made by considering the particular factual context of each case." EEOC, *Compliance Manual* § 12-IV(B)(1) (citation omitted). The phrase "undue hardship" necessarily calls for a context-specific judgment. No general gloss on that phrase—be it "more than a *de minimis* cost," "significant difficulty or expense," or any other formulation—can yield bright-line rules. Instead, courts must make case-by-case judgments and develop principles to govern recurring fact patterns. By clarifying *Hardison* and reinforcing the requirements outlined here, the Court can ensure that Title VII provides meaningful protection for religious observance in the workplace without unduly upsetting the body of precedent that the EEOC and the lower courts have developed over the last five decades.

II. THE COURT OF APPEALS CORRECTLY HELD THAT BURDENS ON OTHER EMPLOYEES MAY INFORM THE UNDUE-HARDSHIP ANALYSIS

Petitioner separately contends that the court of appeals erred in treating burdens on co-workers as sufficient to demonstrate undue hardship under Title VII. The court of appeals issued no such ruling. Instead, it

correctly recognized that when a requested accommodation would impose burdens on other employees, those burdens can affect the conduct of the employer's business. That holding is consistent with the statutory text, the EEOC's guidance, this Court's precedent, and the uniform view of the courts of appeals.

A. An Accommodation's Effect On Other Employees May Impose An Undue Hardship On The Conduct Of The Employer's Business

1. Title VII's text asks whether an accommodation would impose an undue hardship "on the conduct of the employer's business." 42 U.S.C. 2000e(j). As contemporaneous dictionary definitions show, the "*conduct* of the employer's business" includes the management or direction of the business. See *Webster's Third New International Dictionary of the English Language* 473 (1971) ("the act, manner, or process of carrying out (as a task) or carrying forward (as a business, government, or war): management; direction") (capitalization omitted); *The Random House Dictionary of the English Language* 306 (1971) ("direction or management; execution: *the conduct of a business*").

Some of the most critical aspects of managing and directing a business are supervising the individuals who compose the workforce, coordinating the distribution of labor, and overseeing the conduct of the workplace. When a requested religious accommodation adversely affects other members of the workforce, therefore, it may impose an undue hardship on the conduct of the employer's business. An accommodation that impairs employees' ability to do their work, or causes them to

quit, transfer, or file grievances or litigation, has obvious effects on the conduct of the employer's business.[6]

2. The EEOC's guidance is consistent with that straightforward textual interpretation. The Commission recognizes that undue hardship can exist where a requested accommodation "infringes on other employees' job rights or benefits," or "causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work." EEOC, *Compliance Manual* § 12-IV(B)(2); see *id.* § 12-IV(B)(3). Additionally, "infringing on coworkers' abilities to perform their duties or subjecting coworkers to a hostile work environment will generally constitute undue hardship." *Id.* § 12-IV(B)(4) (footnotes omitted).

Of course, not every effect on co-workers will burden "the conduct of the employer's business." As the EEOC recognizes, "the general disgruntlement, resentment, or jealousy of coworkers will not" suffice, and "[u]ndue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged 'special treatment' afforded to the employee requesting religious accommodation." EEOC, *Compliance Manual* § 12-IV(B)(4). Rather, "a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work." *Ibid.*; see *id.* § 12-III(D).

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[6] In addition, as this Court has emphasized in interpreting the ADA's reasonable-accommodation provision, an accommodation's adverse effects on co-workers may sometimes render it unreasonable—and thus not required—even if the "employer, looking at the matter from the perspective of the business itself, may be relatively indifferent" to those effects. *Barnett*, 535 U.S. at 401.

3. This reading of the undue-hardship standard also reflects *Hardison*'s holding that requiring an employer to violate the terms of a collectively bargained agreement would impose an undue hardship, see 432 U.S. at 79-81—a holding that petitioner does not challenge, see Br. 47 n.9; Cert. Reply Br. 3.

In addressing the collective-bargaining agreement's provision for seniority-based work assignments, the Court in *Hardison* noted that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." 432 U.S. at 81. On that point, even the dissenting Justices appeared to agree. See *id.* at 96 (Marshall, J., dissenting); see also *id.* at 83 n.14 (majority opinion). All nine Justices thus recognized that a proposed accommodation's effect on other employees—there, the deprivation of the employees' seniority-based rights under the collective-bargaining agreement—can establish an undue hardship.

4. The court of appeals applied the correct standard here. The court explained that the undue-hardship analysis focuses on "economic and noneconomic costs suffered by the employer." Pet. App. 22a. The court cited as "[e]xamples" of undue hardships "negative impacts on the employer's operations, *such as* on productivity or quality, personnel and overtime costs, increased workload on other employees, and reduced employee morale." *Ibid.* (emphasis added). The court thus recognized that the undue hardship must affect "the employer's operations," with "increased workload on other employees" providing one example of how that

might occur. *Ibid.* Indeed, the court further explained that effects on employees are relevant because "[a] business may be compromised, in part," by "poor morale among the work force and disruption of work flow." *Id.* at 22a n.19; see *id.* at 24a n.20.

B. Petitioner's Contrary Arguments Are Unavailing

1. Petitioner's objection to the court of appeals' decision is based on a mischaracterization of its holding. Petitioner asserts (Br. 38) that the court held "that an employer may establish undue hardship by showing only that an accommodation burdens or inconveniences the plaintiff's co-workers." But the court did not adopt any such categorical rule. Rather, it adhered to the statute's text and recognized that when effects on coworkers lead to "negative impacts on the employer's operations," that may constitute an undue hardship. Pet. App. 22a.

Petitioner therefore errs in claiming that the court of appeals' decision "effectively subject[s] Title VII religious accommodation to a heckler's veto." Br. 41 (citation omitted; brackets in original). In fact, the court of appeals specifically recognized that "'general disgruntlement, resentment, or jealousy of coworkers will not' constitute undue hardship." Pet. App. 24a n.20 (quoting EEOC, *Compliance Manual*, § 12-IV(B)(4)).

Petitioner is similarly incorrect to suggest (Br. 40) that considering an accommodation's effects on coworkers is inconsistent with this Court's recognition that Title VII requires "favored treatment" of religious practice, not mere neutrality. *Abercrombie*, 575 U.S. at 775. The court of appeals nowhere suggested that all preferential treatment of religious practice automatically creates an undue hardship. Rather, the court correctly recognized only that certain accommodations

may result in burdens on co-workers that will rise to that level. Pet. App. 22a-24a.

2. Petitioner concedes (Br. 42) that "an accommodation's impact on co-workers can be *relevant* under the proper reading of Title VII," yet asks the Court to require an independent showing of harm to "the enterprise as a whole." But the statute does not require "undue hardship to *the business*." *Ibid.* (emphasis added). It requires a showing of "undue hardship on the *conduct* of the employer's business." 42 U.S.C. 2000e(j) (emphasis added). And the management of a business can be burdened by effects other than a reduction in the company's bottom line or a demonstrated inability to fulfill its obligations. For example, a proposed accommodation that would "allow[] actions that demean or degrade * * * members of [the] workforce" or "deprive them of contractual or other statutory rights" would "create[] undue hardship" for an employer by "inhibit[ing] its efforts to attract and retain a qualified, diverse workforce." *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 607-608 (9th Cir. 2004). While such accommodations undoubtedly burden co-workers, they also burden the conduct of the employer's business.

As the EEOC and various courts of appeals have recognized, there is no need to mandate separate proof of harm to the business any time co-worker burdens are at issue. See Pet. App. 22a-23a (collecting cases). Certain burdens on employees necessarily also burden the conduct of the business because of readily foreseeable effects. And where any effects instead are questionable, the EEOC and the courts require a greater showing. See, *e.g.*, EEOC, *Compliance Manual*, § 12-IV(B)(4)

(co-worker complaints); *Opuku-Boateng*, 95 F.3d at 1473-1474; *Brown*, 61 F.3d at 655.[7]

III. THE COURT SHOULD AFFIRM UNDER ANY UNDERSTANDING OF UNDUE HARDSHIP

Even if the Court departs from *Hardison*'s analysis of undue hardship, it should affirm the court of appeals' decision. Granting petitioner's accommodation request would have imposed an undue hardship on the conduct of USPS's business under any reasonable understanding of the statute.

A. As an initial matter, the MOU between the union and USPS brings this case squarely within the holding in *Hardison* that petitioner has not challenged—that the "duty to accommodate" does not require an employer to "take steps inconsistent with [an] otherwise valid agreement." 432 U.S. at 79. Here, the MOU governs scheduling of Sunday delivery work and requires USPS to assign Sunday work to RCAs like petitioner "on a rotating basis," from a list arranged in alphabetical order, once the lists of volunteers and ARCs are exhausted. J.A. 130-131.

As the district court recognized, "[s]kipping [petitioner] in the Sunday rotation and never scheduling him to work on that day of the week would clearly violate the process carefully laid out in the MOU." Pet. App. 57a. Although the court of appeals did not rest its undue-

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[7] Petitioner also invokes (Br. 42-43) the EEOC's undue-hardship guidelines for the ADA. But those guidelines interpret the ADA's definition of "undue hardship," which Congress specifically intended to be more demanding than Title VII. And in any event, those guidelines do not support petitioner's position. They recognize that mere co-worker dissatisfaction is not undue hardship, but they do not foreclose a showing of hardship based on the sort of concrete harms the court of appeals found here.

hardship determination on the MOU, the government preserved this argument, see Gov't C.A. Br. 52-57, and is "entitled * * * to defend the judgment on any ground supported by the record," *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997).

Petitioner argued before the court of appeals that *Hardison*'s holding regarding collectively bargained agreements applies only to seniority systems. Pet. C.A. Br. 39-44; see Cert. Reply Br. 4-5. But the Court adopted no such limitation. Although *Hardison* involved a seniority system, the Court's holding addressed "otherwise valid agreement[s]," and underscored that "[c]ollective bargaining" in general is "aimed at effecting workable and enforceable agreements between management and labor" and "lies at the core of our national labor policy." 432 U.S. at 79. The Court explained that "[a]llocating the burdens of weekend work was a matter for collective bargaining," and employers may use a "neutral system, such as seniority, a lottery, or *rotating shifts*." *Id.* at 80 (emphasis added). The Court concluded that Title VII does not require an employer to "deprive [employees] of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81.

After so holding, in a separate section of the opinion, the Court found further "support[]" for its conclusion in a provision of Title VII that provides "special treatment" for a "'bona fide seniority or merit system.'" 432 U.S. at 81-82 (quoting 42 U.S.C. 2000e-2(h)). But that additional support does not narrow the Court's holding that the violation of a collective-bargaining agreement is an undue hardship.

The EEOC shares this understanding of *Hardison*'s holding, instructing that "[a] proposed religious accom-

modation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system *or collective bargaining agreement*." EEOC, *Compliance Manual*, § 12-IV(B)(3) (emphasis added). And those courts of appeals that have addressed the issue have uniformly recognized that the violation of a collective-bargaining agreement creates an undue hardship under *Hardison*, even outside the context of seniority systems. See, *e.g.*, *Lee* v. *ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994); *Getz* v. *Pennsylvania, Dep't of Pub. Welfare*, 802 F.2d 72, 74 (3d Cir. 1986).

Petitioner also briefly asserts (Cert. Reply Br. 6) that skipping him in the Sunday rotation "did not violate the MOU." But the MOU requires all RCAs to be on the assignment list and delineates only three circumstances in which an RCA may be bypassed in that rotation. J.A. 129-132. Petitioner did not assert that he fell within any of those exceptions before the court of appeals. See Pet. C.A. Br. 44; Pet. C.A. Reply Br. 21-22. And indeed, USPS faced a grievance from another employee asserting a violation of the MOU when, for a short period, the Lancaster hub effectively bypassed petitioner in creating the Sunday schedule. Pet. App. 8a n.8; see J.A. 98-142. USPS ultimately settled the matter and agreed that any "Sunday/holiday delivery schedules must be consistent with the MOU." Pet. App. 8a n.8; J.A. 125-127. Petitioner's proposed accommodation thus would have required USPS to breach that settlement agreement in addition to the original MOU. Petitioner has provided no reason to second-guess the district court's conclusion that his "preferred accommodation of being skipped in the schedule every single Sunday would violate the MOU." Pet. App. 58a.

B. Even setting aside the MOU, the record evidence is more than adequate to sustain an undue-hardship defense under any standard.

1. USPS is charged with being financially self-sufficient and has suffered substantial losses for many years. See United States Government Accountability Office, *U.S. Postal Service Primer* 17, GAO-21-479SP (Sept. 2021). It was therefore "critically important to the USPS that Sunday Amazon delivery be successful." Pet. App. 36a.

RCAs play a crucial role in meeting Sunday delivery demands. The position involves filling in for delivery routes as needed—which means that, by definition, the job requires flexibility and weekend availability, particularly in small stations lacking ARCs. Pet. App. 35a-36a. USPS had difficulty staffing Sunday shifts in the central Pennsylvania region due to a severe shortage of RCAs, exacerbated by RCAs resigning to avoid Sunday delivery obligations. J.A. 181, 204-206. At the Holtwood station in particular, there were at most three RCAs to handle Sunday delivery, J.A. 28, and frequently only one of them was available, Pet. App. 7a.

Petitioner's Sunday absences meant that a single RCA was forced to "bear the burden of Amazon Sundays alone during the 2017 peak season." Pet. App. 7a. And the "Holtwood Postmaster himself was forced to deliver mail on Sundays when no RCAs were available"—a practice that violated a collective-bargaining agreement. *Id.* at 8a; J.A. 66-67. Petitioner's absences increased the workload of other carriers, Pet. App. 9a, and ultimately contributed to one carrier leaving Holtwood and another quitting altogether, *id.* at 39a. In other words, the record shows that the proposed accommodation of allowing petitioner's continued absences

would lead to shorthanded staff, challenges completing critical deliveries, and difficulty retaining employees. Those consequences constitute significant burdens on the conduct of USPS's business.

2. Petitioner asserts (Br. 45-46) that the court of appeals' analysis does not satisfy his preferred standard, largely because the court relied on the adverse effects that the requested accommodation had on co-workers without separately requiring evidence that the business suffered. As explained (pp. 40-45, *supra*), however, adverse effects on co-workers of the kind at issue here necessarily harm the conduct of the employer's business.[8]

Petitioner further asserts (Br. 8, 44) that the Holtwood Postmaster "admitted" that exempting petitioner from Sunday delivery did not impose an undue hardship and that USPS stopped scheduling an extra RCA to "manufacture" such a hardship. That mischaracterizes the record. In the emails petitioner cites, the Holtwood Postmaster was discussing scheduling procedures with a new supervisor at the Lancaster hub who had begun effectively bypassing petitioner in the Sunday schedule by automatically scheduling an additional RCA. J.A. 315-319; C.A. App. 623. The Postmaster, in consultation with the labor relations manager, informed the supervisor that compliance with the MOU required adhering to the rotation and seeking to accommodate petitioner through volunteer replacements. J.A. 315-319; C.A. App. 476. The Postmaster explained that scheduling a nonvolunteer interfered with that process. J.A. 317. That exchange cannot be read as a concession that by-

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[8] Contrary to petitioner's assertion (Br. 46), the court of appeals identified significant difficulties for USPS during *both* the peak and non-peak seasons. Pet. App. 8a-9a; *id.* at 24a-25a.

passing petitioner in the rotation did not impose an undue hardship. And indeed, as the court of appeals recognized, the evidence established that bypassing petitioner "made timely delivery more difficult" and required carriers to "deliver more mail," resulting in morale problems among other employees who were doing "'more than their share of burdensome work.'" Pet. App. 25a (citation omitted); see J.A. 11-12; 204-206, 224. Petitioner's contrary contentions amount to factual disagreement with the lower courts' findings about what the undisputed evidence established. Such disagreements do not warrant reversal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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Title VII of the Civil Rights Act of 1964:

1. 42 U.S.C. 2000e(j) provides:

Definitions

For the purposes of this subchapter—

(j) 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.

2. 42 U.S.C. 2000e-2(a) provides:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. 42 U.S.C. 2000e-16(a) provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Americans With Disabilities Act of 1990:

1. 42 U.S.C. 12111(9)-(10) provides:

Definitions

As used in this subchapter:

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Guidelines:

1. 29 C.F.R. 1605.1 (1968) provides:

Observance of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire employes 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.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the

employer's business. Such 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.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

2. 29 C.F.R. 1605.2 provides:

Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.* This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for

statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with section 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by title VII that will most often be required to make an accommodation. However, the principles of §1605.2 also apply when an accommodation can be required of other entities covered by title VII, such as employment agencies (section 703(b)) or joint labor-management committees controlling apprecticeship or other training or retraining (section 703(d)). (See, for

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[2] *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunites, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for accommodating religious practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should

consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances."

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) *Undue hardship*. (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs nec-

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[4] *Hardison, supra*, 432 U.S. at 84.

essary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra*, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.