NO. 22-174

IN THE
Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Respondent.

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

BRIEF OF JOHN KLUGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

John Kluge is a Title VII plaintiff and former high school orchestra teacher who was fired because a few of his students disagreed with his religious beliefs. After his public-school employer ordered Mr. Kluge to use transgender names and pronouns in violation of his religious beliefs, he requested and the school granted a Title VII accommodation of using all students' last names only. That reasonable accommodation caused no disturbances in the classroom or meaningful disruption of the school. Yet when a few students complained that they found Mr. Kluge's use of last names offensive, the school district stripped away Mr. Kluge's accommodation and forced him to resign on pain of termination—ending the teaching career that he worked for four years (and earned two degrees) to achieve.

On summary judgment, the U.S. District Court for the Southern District of Indiana granted final judgment in the school district's favor. That judgment is now on appeal to the U.S. Court of Appeals for the Seventh Circuit, which has not issued a ruling despite oral argument taking place over a year ago.

Mr. Kluge has a strong interest in Mr. Groff's case because the district court in Mr. Kluge's case also applied the more-than-a-*de minimis*-cost standard established by *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), holding that no Title VII religious accommodation was required as a result. Mr. Kluge files this brief to highlight the damage

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and his counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Hardison has wrought to religious accommodations outside the Sabbatarian context and to urge this Court to overrule that decision without delay.

SUMMARY OF THE ARGUMENT

Hardison's *de minimis*-cost test arose in the Sabbatarian context. Mr. Groff's case is highly similar. Though *Hardison* has proven devastating for those with Sabbatarian beliefs, its distortion of Title VII is not so limited. *Hardison* has doomed all manner of religious accommodations in the workplace, including those that are imminently reasonable, cost nothing, and have no cognizable effect on an employer's business.

Mr. Kluge's case is a perfect example. When faced with a public school's edict to use transgender names and pronouns in violation of his beliefs, Mr. Kluge requested *and was granted* a Title VII accommodation of using all students' last names only. And that accommodation succeeded in the classroom. But the district withdrew it and forced Mr. Kluge to resign when some students claimed offense. After Mr. Kluge sued under Title VII, the district court ruled against him because it viewed students' offense as more than a *de minimis* cost under *Hardison*. And the district, the United States, and other amici have used *Hardison* to bludgeon Mr. Kluge on appeal. Mr. Kluge's experience makes clear that, under *Hardison*, *any* religious accommodation request is nearly futile.

Hardison's evisceration of Title VII's religious-accommodation mandate has injured far more than Christians like Mr. Kluge. Lower courts regularly deny Muslims, Sikhs, Jews, and Rastafarians' pleas for reasonable accommodation in the workplace.

Seemingly no employer hardship is too trivial to rate below a *de minimis* cost.

Yet *Hardison*'s *de minimis*-cost standard is directly opposed to Title VII's language, which requires a religious accommodation that is "reasonabl[e]" and does not impose "undue hardship on the … employer's business." 42 U.S.C. 2000e(j). Whereas *Hardison* focuses exclusively on the cost to the employer, Title VII establishes a balancing test under which courts consider *both* a condition of employment's burden on an employee's religion and an accommodation's toll on an employer's business. Employers must accept burdens that are not excessive or unwarranted in a particular case. If the district court had applied this textualist standard in Mr. Kluge's case, the outcome would have almost certainly been different. But *Hardison* obstructed any meaningful consideration of Mr. Kluge's Title VII claim.

This Court should overrule *Hardison*. No one claims that *Hardison* is true to Title VII's language. The *only* mark in its favor is *stare decisis*. Because *Hardison* was egregiously wrong the day it was decided, offers no reasoning, contradicts more recent precedent, has proven unworkable, and engenders no major reliance interests, *stare decisis* is no concern.

ARGUMENT

I. *Hardison* arose in the Sabbatarian context but its corrosive effects on Title VII and religious liberty extend far beyond, as Mr. Kluge's experience makes clear.

Hardison involved a former airline employee whose religion taught that he should "refrain[ ] from performing any work from sunset on Friday until sunset on Saturday." *Hardison*, 432 U.S. at 67. Similarly, Petitioner Groff, is a former postal service employee and "Christian who observes a Sunday Sabbath, believing that day is meant for worship and rest." Op.Br.6. Like the Founders, Petitioner believes "that when faced with a conflict between earthly authority and God's commandments, he must always choose to honor God." Op.Br.9; accord James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), Founders Online, Nat'l Archives, bit.ly/3SmFole ("It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.").

Sabbatarians' ability to keep their jobs has clearly fallen by the wayside under *Hardison*, even when accommodating their religious beliefs would cause no undue hardship to their employer's business. 42 U.S.C. 2000e(j). Petitioner correctly highlights this problem and its devastating effects on Mr. Groff, who did everything in his power to avoid a position that involved Sunday work. Op.Br.6–8.

Yet *Hardison* is not a Sabbatarian problem: it is a religious liberty disaster writ large.

Mr. Kluge, a former high school orchestra and music teacher, asked for no particular day off. He wished only to avoid a public school's edict to use transgender names and pronouns, abide by his sincerely held religious beliefs, and call all students by their last names in class—no matter who was present. Mr. Kluge was the only teacher to request a religious accommodation to the district's transgender-affirmation rule. And his reasonable accommodation caused no undue hardship to the district's business.

But *Hardison* doomed Mr. Kluge's Title VII claim in the district court and has been used as a bludgeon against him on appeal. Until this Court overrules *Hardison*, that erroneous decision will continue to foreclose practically all religious accommodations in the workplace, as Mr. Kluge's experience makes clear.

A. Mr. Kluge requested and received a reasonable Title VII accommodation that the school district erased based on complaints of ideological offense.[2]

John Kluge taught orchestra and music classes at Brownsburg High School in Brownsburg, Indiana from 2014 to 2018. Mr. Kluge's students characterized him as a "wonderful teacher," Doc. 52-5 at 2, who really "cares about his students," Doc. 52-4 at 2, and made "a positive influence" on their lives, Doc. 120-18 at 11. The school district was also pleased with Mr. Kluge's teaching, always giving him positive written

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[2] The record cites in this and the following subsection indicate the docket number and ECF page number of documents filed in *Kluge* v. *Brownsburg Community School Corp.*, No. 1:19-cv-02462-JMS-DLP (S.D. Ind.).

performance evaluations. Doc. 113-2 at 2. But all that changed when the school district ordered Mr. Kluge to use certain students' preferred names and pronouns, instead of their legal names.

Even though the district had not yet established any transgender-affirmation rules, Mr. Kluge was almost fired on the spot when he told the school district that he planned to use students' legal names in class based on his religious beliefs. Docs. 15-3 at 3; 120-3 at 14–15; 120-19 at 6. This disagreement occurred because Mr. Kluge is a man of deep Christian faith who served as an ordained elder, worship leader, and head of youth ministries at his church. Doc. 120-3 at 4–5. Like millions across the world, Mr. Kluge believes that God ordains "[g]enetic sex and sexual identity," and the two "cannot be separated." Doc. 120-3 at 11.

Mr. Kluge's objection to using transgender names and pronouns in class was straightforward. Doing so, in his view, would "encourage[ ] students in transgenderism." Doc. 113-1 at 9. And that would not only harm students but cause Mr. Kluge to sin, subjecting him to "special punishment" from God. *Id.* For those religious reasons, Mr. Kluge could not use transgender names and pronouns in the regular course of teaching a class. Doc. 120-3 at 9.

Yet Title VII's longstanding requirement that employers reasonably accommodate their employees' religious practices was the last thing on the school district's mind. After Mr. Kluge returned from a two-day suspension, the district gave him the choice of using transgender names and pronouns in class, resigning, or being fired. Docs. 15-3 at 3; 120-3 at 14; 120-19 at 6. Mr. Kluge suggested a Title VII

accommodation instead. He would use *all* students' last names only, like a coach, regardless of whether any transgender students were present. Docs. 15-3 at 4; 120-2 at 3–4; 120-3 at 17–18; 120-19 at 6. Ongoing students would notice little change because Mr. Kluge had previously used honorifics such as "Mr." and "Ms." along with students' last names. Doc. 52-1 at 3.

The district agreed to Mr. Kluge's last-names-only accommodation after he promised to answer any student questions about the practice using a sports-coach analogy—not his religious beliefs. Doc. 120-3 at 17. After Mr. Kluge returned to the classroom, he called all students by their last names without using honorifics or drawing attention to himself. Doc. 120-3 at 20. Only one student asked about Mr. Kluge's practice of using students' last names, and Mr. Kluge responded with a coach and sports-team analogy, as he'd promised the district. Doc. 120-3 at 34.

By every objective measure, Mr. Kluge's accommodation was a success. Brownsburg's orchestra performed "better than ever" in competitions, students received performance awards, and student participation in the orchestra's extracurricular activities was high. Docs. 113-2 at 4; 120-3 at 23–24. No administrator visited Mr. Kluge's classroom out of concern that the accommodation was not working. And, for a whole semester, there were no classroom disturbances, canceled classes, or student protests related to Mr. Kluge's use of students' last names. Doc. 113-2 at 4. Title VII had saved the day by allowing Mr. Kluge to focus on teaching music and "remain neutral" on gender ideology, rather than advocating his own beliefs or the opposing views of transgender students. Doc. 120-3 at 24.

Yet when the school district heard grumblings about the accommodation—almost exclusively from the Equality Alliance Club's student members and faculty advisor—it targeted Mr. Kluge for removal. Docs. 15-3 at 5; 113-5 at 7. Students complained that Mr. Kluge's use of last names made them feel "uncomfortable" or "dehumanized." Docs. 15-3 at 4; 113-5 at 7. And that led the district to pressure Mr. Kluge to resign at the end of the school year, with the promise of a good reference if he left voluntarily. Doc. 15-3 at 5. In the district's view, accommodating religion was okay as long as it did not create any "tension." Docs. 120-3 at 23; 15-3 at 5. But a religious accommodation should yield to even the most ideological of complaints.

After Mr. Kluge declined to resign, the district issued a formal transgender-affirmation policy, which escalated matters. This policy required teachers to use certain transgender students' preferred names and pronouns. Doc. 15-4 at 2, 4, 9. And it authorized punishment for teachers who used "the wrong name/pronoun" depending on the number of infractions and their "intent." *Id.* at 2. What's more, the district's written policy forbid the use of students' last names beginning the next school year, *id.* at 9, and condemned teachers (*i.e.*, Mr. Kluge) who failed to use "correct pronouns" and called "students by their last name," *id.* at 10. It explicitly mandated that employees "follow[ ] practices that are different than [their] beliefs," with no consideration of whether a Title VII accommodation was required. *Id.* at 10.

When Mr. Kluge raised his religious accommodation, the district doubled down on its policy. Starting the next school year, Mr. Kluge would be treated "just as everybody else," no religious accommodation

allowed. Doc. 113-4 at 24. Title VII could not save Mr. Kluge's job, in the district's view, because certain students were "offended by being called by their last name." *Id.* at 26. For the second time in seven months, the district put Mr. Kluge to the choice of his religion or his job. Doc. 15-3 at 3, 6. If Mr. Kluge returned to teach and declined to use transgender names and pronouns, he would be terminated. Doc. 113-4 at 43.

Mr. Kluge reiterated to the district that his last-names-only accommodation was based on "a conviction of [his] faith" and asked how the written policy was "not religious discrimination." Doc. 113-4 at 25. But his appeal to Title VII did not move the district an iota. Everyone had to "follow th[e] policy," Doc. 113-4 at 29, and there was "no[ ] question of a religious accommodation," Doc. 113-4 at 47. The school district gave Mr. Kluge a deadline to either resign and keep his summer pay, or refuse and face termination. Docs. 15-3 at 2, 6; 113-4 at 33. Because Mr Kluge was concerned about feeding his family, Doc. 113-4 at 51, he submitted a resignation that he later tried to rescind, but he was unable to do so. Docs. 113-6 at 8; 120-17 at 2. From that point on, the district refused to meet with Mr. Kluge, locked him out of the high school's buildings and online services, and posted his job as vacant. Docs. 15-3 at 1; 113-2 at 7.

Mr. Kluge's request to speak at a public school board meeting was ignored. He had only a brief time during the public-comment section to explain what had happened and appeal to the board to reinstate him. Yet the board never responded to Mr. Kluge's pleas and accepted his forced resignation as part of a package of employee exits, as if he had not spoken and was not even there. Doc. 120-18 at 2, 18.

All because a few students complained, the district stripped Mr. Kluge of his livelihood, placing his family in jeopardy and robbing his students of a talented and caring teacher. Discarding Mr. Kluge's religious accommodation ended the teaching career that he loved and which he worked for four years (and obtained two degrees) to achieve. And it sent a strong message: people of certain religious persuasions are not welcome and need not apply to the school.

Such a message would not be tolerated in any other context. Yet because Mr. Kluge complained of religious discrimination—not race, sex, or national origin discrimination—the school district failed to take his Title VII claim seriously. That near total disregard for Congress's mandate of religious accommodation is *Hardison*'s direct result.

B. Mr. Kluge sues and the district court grants summary judgment to the school district, citing *Hardison*.

Mr. Kluge sued the school district in the U.S. District Court for the Southern District of Indiana, alleging Title VII claims for religious discrimination (*i.e.*, failure to accommodate) and retaliation, among other things. Doc. 15 at 17–18. The district court refused to dismiss these two claims. *Kluge* v. *Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 859–60 (S.D. Ind. 2020). Later, Mr. Kluge and the school district filed competing motions for summary judgment, Docs. 113 at 1–4; 120 at 1–3. The district's motion focused on *Hardison*'s more-than-a-*de minimis*-cost test, arguing that "[a]s the term 'de minimus' suggests, undue hardship is easy for an employer to establish," allowing "imposition of only the most modest burdens on employers." Doc. 121 at

32–33 (quotation omitted). Without a hearing or oral argument, the court granted the district's motion and denied Mr. Kluge's motion, entering final judgment in the district's favor. *Kluge* v. *Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 849 (S.D. Ind. 2021).

The trial court had no doubt that the school district "forced [Mr. Kluge] to resign" after he declined to encourage transgenderism "due to his religious objections." *Id.* at 819. It recognized Mr. Kluge's "forced resignation," stemming from the district's "withdrawal of the last names only accommodation," as an "adverse employment action" under Title VII. *Id.* at 841. And the court rejected outright the district's defenses that forcing teachers to use transgender names and pronouns was merely an "administrative duty," *id.* at 842, incapable of establishing a prima facie case of discrimination under Title VII, *id.* at 843. It recognized that the "central issue [in Mr. Kluge's case] is whether the last names only accommodation—*which presents a sort of middle ground* between the opposing philosophies of Mr. Kluge on the one hand and [the district] on the other—results in undue hardship" to the school district. *Id.* at 844 (emphasis added).

Even though the trial court recognized that the school district bore the burden of proving undue hardship, it deemed that burden slight. *Id.* at 843. Under *Hardison*, "[r]equiring an employer 'to bear more than a *de minimis* cost' or incur more than a 'slight burden' constitutes an undue hardship." *Ibid.* (quoting *EEOC* v. *Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (quoting *Hardison*, 432 U.S. at 84)). The court held that "emotional harm" to "two specific students" and the fact "that other students and teachers complained" about Mr. Kluge's

accommodation proved undue hardship "[a]s a matter of law." *Id.* at 845. No meaningful undue-hardship analysis was required—or conducted—by the court because, in its view, the school district was "incurring a more than *de minimis* cost to its mission to provide . . . public education." *Id.* at 845.

C. The district, the United States, and other amici use *Hardison* as a bludgeon against Mr. Kluge on appeal.[3]

Mr. Kluge appealed to the Seventh Circuit, arguing that complaints from hostile third parties do not create undue hardship. Doc. 13 at 33–35. Usurpingly, the school district's response was that "'[t]he Supreme Court has construed the term 'undue hardship' in 42 U.S.C. § 2000e(j) to mean a cost to the employer that is anything more than de minimis.'" Doc. 17 at 28 (quoting *EEOC* v. *Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997)). To prevail, the district claimed, all it had to do was "demonstrate a de minimis or slight burden." *Id.* at 23.

The United States agreed in its amicus brief supporting the school district. It explained that *Hardison* "defined 'undue hardship' to mean that an employer is not required to 'bear more than a de minimis cost' when accommodating an employee's religious practice." Doc. 34 at 13 (quoting *Hardison*, 432 U.S. at 84). Alleging that Mr. Kluge's reasonable accommodation of "calling all students (of either sex) by their last names" was "adopted for discriminatory reasons," the United States maligned the religious

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[3] The record cites in this subsection indicate the docket number and ECF page number of documents filed in *Kluge* v. *Brownsburg Community School Corp.*, No. 21-2475 (7th Cir.).

beliefs of Mr. Kluge—and millions of people around the world—as discriminatory. *Id.* at 31 (quotation omitted). In its view, the district established "far more than a de minimis burden" by citing the ideological offense of transgender students. *Id.* at 14.

The American Civil Liberties Union Foundation (ACLU) piled on, citing *Hardison* and related Seventh Circuit precedent as establishing "that an accommodation poses an 'undue hardship' to an employer if it would make the employer 'bear more than a de minimis cost,'" Doc. 29 at 13 (quoting *Hardison*, 432 U.S. at 84); or "'slight burden,'" *ibid.* (quoting *Walmart Stores*, 992 F.3d at 658). In its view, merely showing that "complaints from students … result[ed] from the *accommodation he demanded*" was enough to scuttle Mr. "Kluge's last-name-only accommodation." *Id.* at 16. Any time a religious accommodation made students feel "uncomfortable," the ACLU claimed, a Title VII accommodation must give way. *Id.* at 17 (quotation omitted).

The Seventh Circuit heard oral argument in Mr. Kluge's case in January 2022, Doc. 56, and then the court pondered the matter for six months. After Mr. Kluge filed a supplemental authority letter, Doc. 57, the Seventh Circuit ordered supplemental briefing regarding this Court's recent decision in *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407 (2022), Doc. 59. The parties filed their supplemental briefs in July 2022. Docs. 62 & 63. Over seven months later, the Seventh Circuit has *still* not issued a decision.

The panel may be struggling with *Hardison*'s enigmatic test. After all, what constitutes a "*de minimis* cost" is largely in the eye of the beholder. This Court has never explained what a "*de minimis*

cost" means or how it applies to non-fiscal burdens. In fact, this Court has considered Title VII's religious-accommodation provision only a handful of times. Likely, that is because few plaintiffs litigate accommodation claims after *Hardison* hamstrung the statute. Those who do almost always lose, just like Mr. Kluge in the district court. His case proves that *Hardison* is lethal to all religious accommodations, even those that are objectively reasonable and cost nothing. Indeed, if the district court was correct that ideological complaints pose a "*de minimis* cost," it is difficult to imagine what religious accommodations could survive.

D. *Hardison*'s demolition of Title VII's religious-accommodation mandate harms Muslim, Sikhs, Jews, and Rastafarians, not just Christians like Mr. Kluge.

Mr. Kluge's experience proves *Hardison*'s flaws. Yet his injury is by no means exclusive. The *de minimis*-cost test has doomed pleas for reasonable accommodation by Muslims, Sikhs, Jews, and Rastafarians—not just Christians. Practically all religious-accommodation requests run aground on *Hardison*'s reef, as seemingly no employer hardship is trivial enough to rate below a *de minimis* cost. And that seems to be precisely what *Hardison* intended. For "a standard less difficult to satisfy than the 'de minimus' standard for demonstrating undue hardship … is difficult to imagine."[4] *Yott* v. *N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979).

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[4] *Hardison* set the stage for denying nearly all Title VII religious-accommodation requests. Yet some courts have gone even further than *Hardison* and its progeny allow. For instance, this

Take *Webb* v. *City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009), for instance. Kimberlie Webb risked life and limb to serve Philadelphia as a police officer for eight years. A practicing Muslim, Webb requested permission to wear a headscarf on the job that "would cover neither her face nor her ears, but would cover her head and the back of her neck." *Id.* at 258. Other Western countries provide this accommodation. *E.g.*, Amit Sarwal, *Hijab made part of police uniform for Muslim female officers*, The Australia Today (Jan. 30, 2021), bit.ly/3xCwhn6. But the City refused to even consider it and Webb filed a Title VII suit for religious discrimination (among other things). *Webb*, 562 F.3d at 258–59.

On appeal, the Third Circuit rejected Webb's accommodation request. Whatever undue hardship means, "*Hardison* strongly suggests that the … test is not a difficult threshold to pass." *Id.* at 260 (quotation omitted). So the Court of Appeals accepted the City's argument that residents would doubt the police force's "neutrality" and "impartiality" if Webb was allowed to wear a symbol of her "'personal religion, bent[,] or bias.'" *Id.* at 261 (citation omitted). In effect, the court treated Webb's desire to wear a headscarf not as a sign of personal devotion but as a declaration

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Court recognized that an accommodation must "*eliminate[ ] the conflict* between employment requirements and religious practices." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70 (1986) (emphasis added). Yet two Court of Appeals have held that *lessening the conflict* is good enough. *E.g., EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315 (4th Cir. 2008) (requiring "a reasonable, though not necessarily a total, accommodation"); *Sturgill* v. *United Parcel Serv.*, 512 F.3d 1024, 1033 (8th Cir. 2008) ("[T]he district court erred in instructing the jury that a reasonable accommodation must eliminate the religious conflict ….").

that she would only protect and serve other Muslims. That troubling notion had no basis in fact: Webb was the same officer that she had always been, with or without a headscarf. Yet *Hardison* led the court to deny Webb a reasonable accommodation based on Philadelphia residents' presumed anti-religious bias. Accord *United States* v. *Bd. of Educ. for the Sch. Dist. of Phila.*, 911 F.2d 882, 884–91 (3d Cir. 1990) (ruling against a Muslim teacher who wore religious attire at school based on a state garb statute that conflicts blatantly with Title VII and the First Amendment).

No overt prejudice featured in *Tagore* v. *United States*, 735 F.3d 324 (5th Cir. 2013), but the rejection was the same. Kawaljeet Tagore worked as an IRS agent in a Houston federal building. After her initiation in the faith, Tagore began wearing the five articles associated with Sikhism, including a kirpan with a three-inch, dulled blade. *Id.* at 326–27. Tagore explained to an IRS supervisor that her kirpan was "less dangerous than scissors, box cutters, or other objects that are regularly brought into federal buildings." *Id.* at 326. Yet the Federal Protective Service barred Tagore's dulled kirpan from her workplace as a "dangerous weapon," even though it allowed sharp pocket knives with blades less than two-and-a-half inches. *Id.* at 326 (citing 18 U.S.C. 930(a)). The IRS ultimately fired Tagore for refusing to remove her kirpan and she filed a Title VII suit.

The Fifth Circuit never addressed the disparity of welcoming *sharp* knives and barring *dulled* kirpans, or the aptness of labeling a dulled blade shorter than most scissors a "dangerous weapon." Yet, based on *Hardison*, the Court of Appeals did recite the *de minimis*-cost standard and the associated concern that allowing religious employees to keep their jobs

would place them "in a more favorable position, at the employer's expense, than [their] coworkers." *Id.* at 330. Even though Tagore requested "a security waiver" for her specific kirpan, *id.* at 326, the court deemed it more than a *de minimis* cost for security officers "to ascertain whether a blade is sharp or dull" more generally. *Id.* at 330. Such an *ad hoc* inquiry, however inapposite, would be "time-consuming, impractical[,] and detrimental to the broad vigilance required at the entrance to public offices." *Ibid.* Congress' goal of religious accommodation lost again. Accord *EEOC* v. *Sambo's of Ga., Inc.*, 530 F. Supp. 86, 90 (N.D. Ga. 1981) (rejecting an accommodation for a Sikh man under Title VII because his facial hair "would adversely affect [a restaurant's] public image").

A *Hardison*-based refusal to give quarter to people of faith is also evident in *Litzman* v. *New York City Police Department*, No. 12-cv-4681, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013). Fishel Litzman "ranked in the top 1.3% of his Police Academy class." *Id.* at *1. The only barrier to Litzman becoming a New York City police officer was his Orthodox Jewish faith, which taught that men should not cut or trim their facial hair. *Ibid.* Although the NYPD allowed exceptions to its no-beard policy and officers admittedly flouted it without consequence, the department officially drew the line at facial hair one millimeter in length. *Id.* at *1–2. Litzman's facial hair "naturally gr[ew] out … one inch from his skin." *Id.* at *1. After this 24.4-millimeter difference resulted in his termination, Litzman sued the NYPD under Title VII (among other things). *Ibid.*

Citing *Hardison*, the district court held that accommodating Litzman would impose more than a

de minimis cost. *Id.* at *6. Only 69.3% of officers were certified under the NYPD's Chemical Ordinance, Biological and Radiological Awareness Training Program, which required clean-shaven participants for respirator-fit tests. *Id.* at *2. The NYPD refused to allow Litzman to join the other 30.7% of officers who were not certified. And the district court upheld that decision based on the NYPD's infinitesimal "'lost efficiency'" in "respond[ing] to emergencies." *Id.* at *6 (quoting *Hardison*, 432 U.S. at 84). Petitioner is correct that "*Hardison*'s de minimis test has evolved into a per se rule that virtually any cost to an employer counts as undue hardship." Op.Br.13.

Another exemplar of this trend is *Brown* v. *F.L. Roberts & Co.*, 419 F. Supp. 2d 7 (D. Mass. 2006). Bobby Brown worked as a lube technician at a Hadley Jiffy Lube where he serviced cars, greeted customers, and discussed products or services with them. *Id.* at 9. When a new corporate executive required that all employees with customer contact be clean-shaven, Brown informed his supervisors "that he was a practicing Rastafarian, and did not shave or cut his hair because of his religious practice." *Id.* at 9–10. Management refused to consider an accommodation and relegated Brown to the lower bay where he had no customer contact. *Id.* at 11. Worse still, the lower bay was bitterly cold in winter, more dangerous, and Brown was often the only technician working there, "which made it difficult for him to take breaks." *Ibid.* Brown filed suit under Title VII and lost—again.

Under *Hardison* and related First Circuit precedent, the district court held that any "blanket exemption from the grooming policy" would impose more than a *de minimis* cost, *id.* at 17, because it would "'adversely affect the employer's public image,'"

id. at 15 (quoting *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004)). Yet this conclusion gave the court "a sense of uneasiness." *Id.* at 17. First, *Hardison* and its progeny might be construed as allowing an employer to bar employees from "wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics." *Ibid.* Second, employers are more likely to invoke "considerations of 'public image'" when refusing to accommodate the practices of minority faiths "that are less widespread or well known." *Ibid.* Last, *Hardison*'s "balance appears to tip too strongly in favor of an employer's preferences, or perhaps prejudices." *Id.* at 19. And this imbalance could "encourage[ ] an unfortunately (and unrealistically) homogenous view of our richly varied nation." *Ibid.*

The *Brown* Court identified some of *Hardison*'s greatest flaws. Our nation has always placed a high value on religious tolerance and accommodation. In fact, one of the first things the American government did was exempt religious objectors from military service, during the Revolutionary War no less. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1468–69 (1990). That decision posed certain risks and impacted those who were compelled to fight. But the Continental Congress decided that religious freedom was worth the cost.

When Congress enacted Title VII and required religious accommodation in the workplace, it followed the best of American traditions. Congress recognized once again that religious exemptions were "necessary to create a truly level playing field for" people of faith. Op.Br.23. Yet *Hardison* "eviscerated Title VII's protection of religious employees and thereby eroded

the Nation's commitment to religious freedom and pluralism." Op.Br.13–14. And it has been "religious minorities—people who seek to worship their own God, in their own way, and on their own time[—]" who have largely paid the cost. *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (per curiam) (Thapar, J., joined by Kethledge, J., concurring).

II. *Hardison*'s test for reasonable religious accommodations is divorced from, and opposed to, Title VII's language, with devastating results for Mr. Kluge and other people of faith.

Title VII does not say that religious accommodations may pose no "more than a de minimis cost" to employers. *Hardison*, 432 U.S. at 84. *Hardison* created that standard out of whole cloth. In so doing, the Court fundamentally altered Title VII's protection of religious liberty. What Congress said is that an employer must "reasonably accommodate … an employee's or prospective employee's religious observance or practice" unless the accommodation would impose "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). And that standard bears no resemblance to *Hardison*'s atextual and one-sided test.

Generally, a *de minimis* cost is a toll that is "[t]rifling; negligible" or "so insignificant" that "a court may overlook it in deciding an issue or case." *De Minimis*, Black's Law Dictionary (11th ed. 2019). *Hardison*'s test weighs only the *degree* of burden a religious accommodation imposes on the employer's business—allowing only the least onerous to survive. It does not consider whether that hardship is

warranted under the circumstances. *Hardison* fashioned a one-sided, bright-line inquiry in which only the burden on the employer counts, and the employee's religious liberty holds no weight. That lopsided test all but erases an employer's Title VII duty to "reasonably accommodate … an employee's … religious observance or practice," effectively undoing Congress's mandate. 42 U.S.C. 2000e(j); accord Op.Br.3, 13–14, 17, 23–24, 27.

Mr. Kluge's case spotlights *Hardison*'s flaws. The school district took an extreme position on a divisive social issue and forced all teachers to comply, knowing full well that its transgender-affirmation policy would impinge on at least some teachers' religious beliefs. Yet the school district's targeting of certain religious employees for coercion and ouster played no role in the district court's analysis. In the court's view, Title VII had nothing to do with such blatant religious discrimination because *Hardison* established a narrow inquiry in which only the burden Mr. Kluge's resulting accommodation imposed on the district's business was relevant. That is not what Congress intended when it enacted Title VII.

The language Congress actually wrote requires an accommodation that is "reasonabl[e]" and does not impose "undue hardship on the … employer's business." 42 U.S.C. 2000e(j). Regardless of the size of an accommodation's hardship, Title VII asks whether that burden is "[e]xcessive or unwarranted." *Undue*, Black's Law Dictionary (11th ed. 2019). It requires courts to protect religious liberty, while ensuring that an accommodation is "[f]air, proper," or "sensible" in each unique case. *Reasonable*, Black's Law Dictionary (11th ed. 2019). To do so, courts must consider all the circumstances, including an employment condition's

burden on an *employee's religion* and an accommodation's impact on the *employer's business*.

Title VII thus prescribes an evenhanded and all-inclusive inquiry that accounts for both side's legitimate interests. But one thing is clear: undue hardship involves more than a modest burden. Congress has used that term, in other contexts, to indicate that an accommodation is mandatory unless it would "impose 'significant difficulty or expense.'" *Small* v. *Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from the denial of certiorari); accord Op.Br.20–22.

Under this textualist approach to Title VII, the district court should have considered the school district's deliberate and wanton impingement on Mr. Kluge's religious beliefs. And it would have assessed whether any burden imposed by Mr. Kluge's accommodation was *justified* by the district's extraordinary attempt to "prescribe what [is] orthodox in politics, nationalism, religion, or other matters of opinion or force [Mr. Kluge] to confess by word or act [his] faith therein." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). This balancing would include the weight of Mr. Kluge's religious accommodation *and* whether that level of hardship was excessive or "undue" given the district's targeting of Mr. Kluge's religious beliefs. 42 U.S.C. 2000e(j). In that scenario, the district court's ruling would almost certainly have been different, potentially saving Mr. Kluge from years of appeals and the loss of his teaching career.

III. This Court should overrule *Hardison*—*stare decisis* is no impediment.

No doubt exists that *Hardison* was wrongly decided. The opinion has no basis in the statutory text, and its errors have effectively doomed religious liberty in the workplace for 45 years, the exact opposite of what Congress intended in enacting Title VII. This Court should overrule *Hardison*. For five reasons, *stare decisis* is no impediment.

First, *Hardison* was "'egregiously wrong' on the day it was decided." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).[5] Its *de minimis* cost language is "far outside the bounds of any reasonable interpretation" of Title VII's text. *Ibid.* As Justice Marshall noted at the time, "simple English usage [does not] permit[ ] 'undue hardship' to be interpreted to mean 'more than de minimis cost.'" *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). Justices of this Court, esteemed court of appeals judges, and the United States have all recognized this fact, and no one seriously contests it. *Hardison*'s *de minimis*-cost standard is "the poster child for an egregiously wrong legal test that lacks even the most tenuous connection to the governing text." Op.Br.31.

No less than five Justices have acknowledged *Hardison*'s textual errors. Justices Marshall and Brennan first noted them in *Hardison* itself. 432 U.S. at 88 (Marshall, J., joined by Brennan, J., dissenting) (*Hardison* "makes a mockery" of Title VII). In more recent years, Justices Thomas, Alito, and Gorsuch

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[5] Accord *EEOC* v. *Kroger Ltd. P'ship I*, __ F. Supp. 3d __, No. 4:20-cv-1099, 2022 WL 2276835, at *16 n.147 (E.D. Ark. June 23, 2022) ("*Hardison*'s atextual interpretation of undue hardship has been greatly maligned since the day the case was decided.").

have explored them and urged the Court to revisit that decision. *E.g.*, *Small*, 141 S. Ct. at 1228 (Gorsuch, J., joined by Alito, J., dissenting from the denial of certiorari) ("*Hardison*'s *de minimis* cost test does not appear in the statute."); *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship'").

Hardison's faults are so blatant and severe that Sixth Circuit Judge Thapar, joined by Judge Kethledge declared the decision guilty of "rewrit[ing] a statute." *Small*, 952 F.3d at 829 (Thapar, J., joined by Kethledge, J., concurring). And that is undoubtedly correct. Title VII's "undue hardship" text shows that religious accommodations present "'a field of degrees, not a matter for extremes' or 'absolutes.'" *Ibid.* (quoting *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (4th Cir. 2008)). Yet *Hardison*'s *de minimis* cost test is an "absolute" that "'effectively nullif[ies]' the accommodation requirement," and for no good reason. *Ibid.* (alteration omitted) (quoting *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting)).

The United States admitted as much in an amicus brief joined by the Equal Employment Opportunity Commission. Most courts read *Hardison* as foreclosing religious accommodations that involve "any cost that is 'more than a trifle.'" Br. for United States as Amicus Curiae at 19, *Patterson* v. *Walgreen Co.*, No. 18-349 (S. Ct. Dec. 9, 2019). Yet Title VII's language refers to an "undue" or "excessive hardship," *ibid.*, establishing a "balancing" test under which a court "weigh[s] the cost of a given accommodation against what the particular employer may properly be

made to bear" under the facts of each case. *Id.* at 20. The United States, too, argued convincingly in favor of "revisiting *Hardison*[ ]." *Id.* at 21.

Justices, court of appeals judges, and the United States have all agreed that *Hardison* "represent[s] an error that cannot be allowed to stand." *Dobbs*, 142 S. Ct. at 2265. The nature of that error is egregious. "[A]nd it is past time for the Court to correct it." *Small*, 141 S. Ct. at 1229 (Gorsuch, J., dissenting from the denial of certiorari); accord Op.Br.28–31.

Second, *Hardison*'s adoption of a *de minimis* cost standard for Title VII religious accommodations is arbitrary and unreasoned. This Court laid down that test, almost in passing, "in a single sentence with little explanation or supporting analysis." *Small*, 141 S. Ct. at 1228 (Gorsuch, J., dissenting from the denial of certiorari). If the Court may overrule a precedent that is "poorly reasoned," it may certainly revisit *Hardison*, which is not reasoned at all. *Janus* v. *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018). The litigants in *Hardison* never even proposed a *de minimis* cost standard. Br. for United States as Amicus Curiae at 21, *Patterson* v. *Walgreen Co.*, No. 18-349 (S. Ct. Dec. 9, 2019). The Court simply "imposed a new and problematic test with no … grounding in [Title VII's] text." *Dobbs*, 142 S. Ct. at 2272; accord Op.Br.28–30.

Third, more recent decisions have "eroded" *Hardison*'s presumed foundation "and left it an outlier" in the law. *Janus*, 138 S. Ct. at 2482 (cleaned up); accord Op.Br.35–37. Underlying *Hardison*'s *de minimis* cost standard seems to be an unease that Title VII's text favors religion and violates the Establishment Clause. *E.g.*, *Hardison*, 432 U.S. at 69

n.4, 81–85; *id.* at 89–91 & n.4 (Marshall, J., dissenting). But that concern is no longer valid. When *Hardison* was decided, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), ruled the day. And the second prong of the *Lemon* test asked whether a law's "principal or primary effect … advances [ ]or inhibits religion." *Id.* at 612. Since this Court repudiated *Lemon*, *Kennedy*, 142 S. Ct. at 2427–28, Congress is free to protect workers from the terrible choice between their religion and their jobs.

Title VII poses no plausible Establishment Clause concerns. Its undue-hardship standard guarantees that courts apply the statute in a "balanced way" in which religious accommodations do not always "override other significant interests." *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005). And "[r]eligious accommodations … need not come packaged with benefits to secular" concerns. *Id.* at 724 (quotation omitted). So it makes no difference that Title VII gives religion "favored treatment" by "requir[ing] otherwise-neutral policies to give way to the need for an accommodation." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). History and tradition now guide the Establishment Clause analysis. *Kennedy*, 142 S. Ct. at 2428. And our country's practice of granting religious accommodations is plain. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

What's more, time has evaporated *Hardison*'s concern that Congress mandated accommodation of religion alone. 432 U.S. at 81–85. Over the decades, Congress has provided equal protection for employees who are disabled, 42 U.S.C. 12112(b)(5)(A); serve in the military, 38 U.S.C. 4303(10), 4312(d), 4313(a); or

undergo pregnancy, childbirth, and related medical conditions, Pregnant Workers Fairness Act, Pub. L. No. 117-328, div. II, §103(1), 136 Stat. 4459 (2022). Congress used the same undue-hardship standard in all these laws, but without *Hardison*'s debilitating gloss. Op.Br.20–21 & n.2. Now religious employees receive *worse treatment* than disabled, military, and pregnant workers—not uniquely favorable treatment as *Hardison* understood. And no reasonable person thinks that Congress invidiously discriminated against employees who are non-disabled, non-military, or not new moms. Accord *Small*, 952 F.3d at 828 (Thapar, J., joined by Kethledge, J., concurring). The same should be true of employees who are not compelled by their faith.

Fourth, *Hardison*'s standard has proven unworkable. Accord Op.Br.33–34. There is still no consensus as to what constitutes more than a *de minimis* cost 45 years later. And this Court's handful of decisions have provided no clarity. For example, in Mr. Kluge's case, the parties dispute whether transgender students' ideological complaints about Mr. Kluge's accommodation were more than a *de minimis* burden on the school district's business or simply "a modified heckler's veto, in which … religious activity [is] proscribed based on perceptions or discomfort." *Kennedy*, 142 S. Ct. at 2427 (quotations omitted); accord Op.Br.41, 43, 46. The district court recognized that there was no clear answer and that it was "ill-equipped" to provide one. *Kluge*, 548 F. Supp. 3d at 849. If *Hardison* provided a workable rule, this lack of clarity would not exist. Accord Op.Br.33–34.

Last, this Court has "never applied *stare decisis* mechanically to prohibit overruling [its] earlier

decisions determining the meaning of statutes." *Monell* v. *Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 695 (1978); accord Op.Br.31. *Hardison*'s *de minimis* cost standard is a "judge-made rule" with no basis in Title VII's language and experience has confirmed its many "shortcomings." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). This Court should not "place on the shoulders of Congress the burden of [its] own error." *Girouard* v. *United States*, 328 U.S. 61, 70 (1946). Accord Op.Br.30–31.

What's more, reliance interests are of no major concern. "[A]dvance planning of great precision" is rarely possible when it comes to religious accommodations at work. *Dobbs*, 142 S. Ct. at 2276 (quotation omitted). Such human-resources matters are routinely in flux. Nor would overruling *Hardison* disturb property or contract rights where *stare decisis* is at its apogee. *Pearson*, 555 U.S. at 233. It would simply restore the undue hardship test that Congress wrote and *actually* require religious accommodations in the workplace for the first time in over four decades. Accord Op.Br.31–32.

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Both textually and as a matter of *stare decisis*, *Hardison* is indefensible. This Court should overrule *Hardison* and restore the robust religious liberty protection that Congress intended when it enacted Title VII. No worker should lightly face "the cruel choice of surrendering their religion or their job," *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting), the choice the school district forced on Mr. Kluge.

Like Petitioner Groff, the undue-hardship test was the dispositive issue for Mr. Kluge in the district court. And the 13-month wait (and counting) for an

opinion since oral argument demonstrates that the Seventh Circuit is struggling to reconcile the *Hardison* standard, Title VII's purpose, and the stark injustice inflicted on Mr. Kluge by the school district.

CONCLUSION

This Court should overrule *Hardison*, adopt an undue-hardship test that is true to Title VII's language and purpose, and reverse the Court of Appeals's judgment.

Respectfully submitted,

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