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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

INTRODUCTION

Respondent does not dispute that this Court should revisit *Hardison*'s damaging and non-textual test for all the reasons given in the petition, the United States' own briefing in *Patterson*, and the 14 amicus briefs from 17 states and a diverse array of groups. It argues only that this case is not the right vehicle to do so. But none of Respondent's vehicle arguments impede the Court from resolving the primary question presented and definitively rejecting *Hardison*'s more-than-de-minimis test. And each vehicle argument falls short on its own terms as well. Unlike previous petitions that sought to revisit *Hardison*, this case presents a clean vehicle for correcting *Hardison*'s undisputed and consequential error.

ARGUMENT

I. RESPONDENT IDENTIFIES NO VEHICLE ISSUE THAT WOULD PREVENT THE COURT FROM RECONSIDERING *HARDISON*'S MORE-THAN-DE-MINIMIS TEST

At most, Respondent's purported vehicle arguments show only that the Court would need to follow its usual practice of addressing the question presented while remanding for the court of appeals to apply this Court's new standard and address any other remaining issues in the first instance. That familiar disposition should not deter the Court from establishing the proper undue-hardship standard both for Groff's case and for the numerous other employees who seek religious accommodations every day. The Court should not delay in correcting a test that Respondent cannot even bring itself to defend on the merits.

A. Respondent's proposed alternative ground for affirmance creates no vehicle issue

Respondent first argues that this case is an imperfect vehicle to revisit *Hardison*'s more-than-de-minimis test because "[i]n a holding independent of its de-minimis reasoning, *Hardison* concluded that Title VII does not require an employer to violate the terms of a collectively bargained agreement." BIO 10. While conceding that the court of appeals did not address this variety of undue hardship, Respondent notes that it "may" defend the judgment on that "alternative ground" before this Court. *Id.* at 12. According to Respondent, therefore, the existence of a collective bargaining agreement ("CBA") here provides a "clear alternative basis for rejecting petitioner's Title VII claim" and "would make this case a poor vehicle in which to address the first question presented." *Id.* at 13. Respondent is wrong on both counts. Its alternative collective-bargaining theory poses no barrier to addressing the first question presented.

And on the merits, the collective-bargaining theory provides no clear basis for affirming the court of appeals' judgment.

1. Respondent argues that *Hardison* contains two separate reasons for finding no undue hardship. BIO 10. First, an employer suffers "undue hardship" whenever a religious accommodation imposes "more than a de minimis cost." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977). Second, according to Respondent, "Title VII does not require an employer to violate the terms of a collectively bargained agreement," and an accommodation that requires doing so is a per se undue hardship. BIO 10 (citing *Hardison*, 432 U.S. at 79-81). But as Respondent acknowledges, the court of appeals did *not* address the interplay between CBAs and Title VII, either in general or as applied to the Memorandum of Understanding ("MOU") at issue in this case. *Id.* at 12; see Pet. 9 n.1. Rather, the court of appeals held only that accommodating Groff would impose more than a de minimis cost on his employer—without reference to the "alternative" MOU argument urged by Respondent.

Consequently, Respondent's objection is not a vehicle issue at all. The Court need only disapprove *Hardison*'s more-than-de-minimis test to reverse the court of appeals. To do so, the Court need not address when a CBA may establish undue hardship. While Respondent is free to urge its MOU argument as an alternative ground for affirmance, the ordinary course would be to remand that issue to be addressed in the first instance below in light of this Court's determination of the proper standard for undue hardship.

That approach would follow this Court's "usual practice [not] to adjudicate either legal or predicate factual questions in the first instance." *CRST Van Expedited, Inc.* v. *EEOC*, 578 U.S. 419, 435 (2016); see also *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009)

("We see no reason to abandon our usual procedures in a rush to judgment [on an alternative basis for affirmance] without a lower court opinion."). As "a court of review, not of first view," the Court typically avoids addressing issues in the first instance and instead remands for the court of appeals to do so. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals * * * we do not consider them here."); see, *e.g.*, *Brownback* v. *King*, 141 S. Ct. 740, 747 n.4 (2021) ("The [court of appeals] did not address those arguments," and "[w]e leave it to the Sixth Circuit to address [the] alternative arguments on remand."). As a result, Respondent's MOU-based argument neither impedes this Court from reaching the first question presented nor adds an issue that this Court must decide to dispose of the case.

2. Respondent does not dispute that its MOU argument would ordinarily be addressed on remand. Its real contention seems to be that *Hardison*'s CBA holding provides such a "clear" alternative basis for affirmance that the petition is an unworthy vehicle for addressing *Hardison*'s more-than-de-minimis test. BIO 13. But Respondent's claim (*id.* at 12) that this "alternative ground is straightforward" is belied by the fact that the court of appeals declined even to address this argument. If this ground provided an easy route to affirmance, then surely the court of appeals would have adopted it rather than issuing a divided opinion under *Hardison*'s more-than-de-minimis test.

The MOU does not provide a straightforward basis for affirmance because Respondent misreads *Hardison*'s CBA rationale and misapplies it to the MOU. *Hardison* does not broadly hold that an employer suffers undue hardship whenever a religious accommodation would "violate the terms of a collectively bargained agreement." BIO 10. Rather, *Hardison* stands for the much narrower

rule that an employer is "not required by Title VII to carve out a special exception *to its seniority system* in order to help [the employee] to meet his religious obligations." 432 U.S. at 83 (emphasis added). The Court anchored this conclusion in Title VII's special exemption for "seniority" systems from the statute's anti-discrimination mandate. *Id.* at 81-82 (citing 42 U.S.C. § 2000e-2(h)).[1] Later cases confirm the narrow scope of *Hardison*'s CBA holding. See *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 403 (2002) ("[A]n employer need not adapt to an employee's special worship schedule as a 'reasonable accommodation' where doing so would conflict with *the seniority rights* of other employees.") (citing *Hardison,* 432 U.S. at 79-80) (emphasis added).

Extending *Hardison* to a CBA's non-seniority provisions would transgress Title VII's limited exemption and erroneously allow employers and unions to bargain away statutory religious-accommodation rights. See *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 70 (1975) ("[A] union cannot lawfully bargain for the establishment or continuation of discriminatory practices."). Unsurprisingly, Respondent cites no court of appeals that has done so. Cf. Appellant's C.A. Br. 42 & n.4 (collecting cases framing *Hardison*'s CBA holding in terms of seniority provisions). At most, the scope of *Hardison*'s CBA holding presents an issue that would best be addressed in the first instance on remand, after this Court establishes the proper legal standard for undue hardship.

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[1] Title VII provides that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h).

It is undisputed, moreover, that this case falls outside *Hardison*'s exception for accommodations that would violate a CBA's seniority system. Respondent never contends that the MOU establishes a seniority system, and the parties stipulated below that (1) a Rural Carrier Associate ("RCA") has no contractual right to specific days off; (2) Sunday deliveries were assigned without regard to seniority; (3) and no RCA had a superior right to have Sunday off than any other RCA. C.A. App. 532-533. The district court ruled for Respondent on this ground only because it extended *Hardison* to non-seniority provisions. Pet. App. 57a; see BIO 12. Because the MOU falls outside *Hardison*'s seniority-based rationale, it cannot provide an alternative basis to affirm—much less a "clear" one.

Finally, Respondent's MOU theory would not provide a clear alternative ground for affirmance even if *Hardison* extends to a CBA's non-seniority provisions. That is because excusing Groff from Sunday deliveries did not violate the MOU. Respondent took precisely that position when the union filed a grievance complaining of that accommodation. C.A. App. 512 ("Management's position is that no contractual violation exists in this case."); see Pet. App. 28a n.3 (Hardiman, J., dissenting). While the MOU recognizes three grounds to excuse an RCA from Sunday duties, it does not declare them to be exclusive or otherwise preclude religious accommodations.[2] In sum, Respondent's MOU argument fails for multiple reasons

[2] For the same reasons, accommodating Groff would not violate the grievance settlement. See BIO 14. The settlement merely required that "any accommodation must be consistent with applicable provisions of the [MOU] and may not infringe on any other employees' contractual rights." C.A. App. 517. Indeed, Respondent never urged below that the settlement supported an undue hardship independent of the MOU. See Resp. C.A. Br. 52-57.

and certainly is not the type of clear alternative ground for affirmance that could present a vehicle issue.

B. As Judge Hardiman's dissent demonstrates, Groff would have a strong possibility of prevailing under a proper undue-hardship standard

Respondent next asserts that this case is a poor vehicle because Groff cannot "prevail under any plausible standard of undue hardship." BIO 13. Despite spending four pages prospectively litigating the merits, Respondent falls far short of showing that Groff could not avoid summary judgment under the undue-hardship standard that Congress drafted.

Most devastating to Respondent's assertion is Judge Hardiman's dissent, which argued that Groff defeated summary judgment *even under Hardison's exceedingly low bar for undue hardship*. Pet. App. 26a-32a. Where one judge has espoused that view in a well-reasoned opinion, it strains credulity to suggest that Respondent would plainly satisfy the proper, *more rigorous* standard for undue hardship. While the majority declared that the hardship in this case "far surpasses a de minimis burden," BIO 15-16 (quoting Pet. App. 22a n.18), that drive-by observation offers little guidance for whether Respondent could satisfy the much higher standard that should apply. The Court should establish the correct standard and afford Groff the opportunity to make his case under the applicable law.

Respondent's one-sided recounting of the facts ignores the standard of review for summary judgments and Judge Hardiman's dissent. For starters, Respondent errs in suggesting that the petition failed to identify an undue-hardship standard. BIO 13. Groff repeatedly explained that a textually sound test is close at hand: the "significant difficulty or expense" test that applies under

the ADA, various civil-rights statutes, and other provisions that require "undue hardship." Pet. 24-25, 33. Under that test, there would at least be a fact issue as to whether the alleged scheduling challenges and co-worker problems invoked by the court of appeals created an undue hardship on Respondent's business. See Pet. 33; Pet. App. 27a n.1 (Hardiman, J., dissenting) (stating "the decision to remand" would have been even "easier" under a text-based test for undue hardship).

Critically, Respondent ignores its own admission that it had a ready solution for accommodating Groff. As Judge Hardiman emphasized, Respondent's corporate representative "conceded that scheduling an extra RCA in advance to take Groff's place on Sundays would not harm USPS," and "Groff's former postmaster acknowledged the same in his email to USPS Labor Relations." Pet. App. 31a. Thus, any alleged hardship (including the Postmaster's occasionally making deliveries) arose only when Respondent failed to accommodate Groff and instead scheduled him without any backup plan despite knowing he would not report to work. C.A. App. 684. Respondent also overlooks that the alleged scheduling difficulties arose only during peak season, which, as Judge Hardiman explained, implicated only the Sundays "between Thanksgiving and New Years" when Groff was scheduled. Pet. App. 29a-30a. It is highly doubtful that such fleeting and easily resolved scheduling challenges could qualify as significant difficulty or expense.[3]

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[3] Relatedly, Respondent argues that "[a]s an RCA, petitioner's very job description was to fill in for career carriers—in particular on weekends and holidays." BIO 14. But an RCA's obligation was to provide coverage for absent career employees whenever needed and not just on weekends and holidays. Pet. App. 4a. Indeed, Respondent hired other employees—Assistant Rural Carriers—whose job was to work only on Sundays and holidays. *Ibid.* And even if that were not so, an employer cannot escape its duty to accommodate

As for alleged co-worker problems, Respondent cites no evidence that Groff's absences hindered it from performing its Sunday delivery obligations. Absent such evidence, Respondent cannot hope to show as a matter of law that imposition on Groff's co-workers caused it significant difficulty or expense. Respondent notes that only one RCA was available to cover Groff's few Sundays during Holtwood's 2017 peak season—allegedly leading that RCA to eventually resign—and that an RCA at a different station allegedly resigned in part due to Groff's accommodation. BIO 14-15; see also C.A. App. 617. On the former, that meant only that Holtwood had to "borrow" an RCA from another station during the 2017 peak season (as expressly allowed by the MOU, C.A. App. 675) and hire a replacement before (or borrow one during) the following peak season, and Respondent identifies no reason it could not have done so. On the latter, Respondent fails to show any hardship at the other station resulting from the RCA's resignation. Mere co-worker impacts are not sufficient even under *Hardison*, see infra pp. 11-12, much less under a higher standard.

In short, under a "significant difficulty or expense" test for undue hardship, Groff stands a strong chance of obtaining summary judgment in his favor and at least could identify fact issues that would preclude summary judgment for Respondent. At a bare minimum, Respondent's speculation about future outcomes is certainly not so unimpeachable that this Court should delay establishing the proper standard for Groff and employees seeking religious accommodations across the country.

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simply by defining the job to exclude the requested accommodation. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770 (2015) (employer could not avoid religious accommodation by invoking its "Look Policy," which prohibited headwear as "too informal for Abercrombie's desired image").

C. Whether federal employees could assert a claim under the Religious Freedom Restoration Act is irrelevant to the question presented

Respondent finally argues that the "potential availability" of a claim for federal employees under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, renders this case a poor vehicle for reconsidering *Hardison*. BIO 18. But the possibility that federal employees might be able to bring an *additional* claim is neither here nor there. As Respondent notes, Groff did not bring a RFRA claim. *Ibid.* Instead, he brought a religious-accommodation claim under Title VII, which Respondent acknowledges applies equally to private-sector and federal employees. *Id.* at 2. Accordingly, nothing about Groff's federal-sector employment counsels against revisiting *Hardison* and determining the proper standard for undue hardship under Title VII. Doing so will restore Title VII's promise not only for Groff, but also for millions of Americans working in the private and public sectors alike.

As fundamentally, courts have generally held that federal employees *cannot* bring RFRA claims. EEOC Compliance Manual on Religious Discrimination § 12-I(C)(3) (2021) ("[T]o date, appellate courts have uniformly held that Title VII preempts federal employees from bringing RFRA claims against their agency employer.").[4] Indeed, as Respondent admits, that had been the United States' longstanding position until last year. See BIO 17 n.*. Thus, the Court should reject Respondent's invitation to rely on potential RFRA claims to protect federal-employee rights.

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[4] https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_7993291401494161074874994 5.

II. THE SECOND QUESTION PRESENTED ALSO WARRANTS THIS COURT'S REVIEW

Respondent argues that the second question presented does not warrant review because the court of appeals never adopted the rule that employers may establish undue hardship merely by showing that an accommodation burdens the plaintiff's co-workers. BIO 19. As Judge Hardiman explained, the court below did precisely that. Pet. App. 27a. It held that "[e]xamples of undue hardship include negative impacts on the employer's operations, such as * * * increased workload on other employees" and "reduced employee morale." *Id.* at 22a. For this holding, the court of appeals relied upon numerous cases finding undue hardship based on co-worker impact without analyzing whether the "employer's business" was burdened as a result. *Id.* at 22a-23a (collecting cases); see 42 U.S.C. § 2000e(j) (requiring "undue hardship on the conduct of the *employer's business*") (emphasis added).

Respondent tries to salvage the court of appeals' reasoning by accurately observing that an accommodation's burden on co-workers can be relevant to the undue-hardship inquiry if it has a disruptive effect on the business's operations. BIO 20. But that is not what the court of appeals held. Instead, it automatically equated "increased workload on other employees" and "reduced employee morale" with "negative impacts on the employer's operations," Pet. App. 22a, and declined to independently analyze whether Respondent's business was hampered by the accommodation. On that relevant metric, significant evidence showed that Respondent's business was not meaningfully burdened, even if employees may have been inconvenienced. *Id.* at 26a-32a (Hardiman, J., dissenting).

Lastly, Respondent argues that review is unwarranted because there is no circuit split. BIO 20. But that demonstrates only that this indefensible view has become entrenched in the courts of appeals. See Pet. 28 (collecting cases). Some have blamed lower courts' adoption of this atextual rule on *Hardison*. See Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 392 (1997) ("Courts, often relying on *Hardison* * * * find that, if other employees would be negatively affected by a proposed accommodation, that accommodation would cause undue hardship to the employer."). Whatever the reason, lower courts have shown no sign of correcting this error on their own. The Court may therefore wish to review a question about *who* must suffer hardship, in conjunction with revisiting *Hardison*'s misunderstanding about the *quantum* of hardship that must be suffered.

Respectfully submitted.

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