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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD E. GROFF,)

Petitioner,)

v.) No. 22-174

LOUIS DEJOY, POSTMASTER GENERAL,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, April 18, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

AARON STRETT, ESQUIRE, Houston, Texas; on behalf of the Petitioner.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	AARON STREETT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	GEN. ELIZABETH B. PRELOGAR, ESQ.	
7	On behalf of the Respondent	50
8	REBUTTAL ARGUMENT OF:	
9	AARON STREETT, ESQ.	
10	On behalf of the Petitioner	119
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-174, Groff versus the Postmaster General, Louis DeJoy.

Mr. Streett.

ORAL ARGUMENT OF AARON STREETT
ON BEHALF OF THE PETITIONER

MR. STREETT: Mr. Chief Justice, and may it please the Court:

Title VII requires religious accommodations absent an undue hardship on the conduct of the employer's business. TWA versus Hardison violates the statute's promise that employees should not be forced to choose between their faith and their job. Hardison's de minimis test makes a mockery of the English language, and no party truly defends it today.

Fortunately, Hardison's test is dicta as to Title VII, so the Court can and should construe "undue hardship" according to its plain text to mean significant difficulty or expense.

But even if Hardison applied Title VII, its de minimis test lacks

1 precedential force because it was barely
2 considered by the Court, and its
3 neutrality-based rationale has been devastated
4 by Abercrombie.

5 The government's new patchwork test is
6 little better than Hardison's. It allows
7 employers to deny accommodations far short of
8 any fair meaning of "undue hardship." The
9 government believes undue hardship arises
10 whenever there is lost efficiency, weekly
11 payment of premium wages, or denial of a
12 coworker's shift preference.

13 Thus, under the government's test, a
14 diabetic employee could receive snack breaks
15 under Title VII -- under the ADA but not prayer
16 breaks under Title VII, for that might cause
17 lost efficiency. An employee could receive
18 weekly leave for pregnancy checkups but not to
19 attend mass, for that might require denying a
20 coworker's shift preference or paying premium
21 wages. There's no reason religious workers
22 should receive lesser protection than those
23 covered by other accommodation statutes.

24 We know a significant-difficulty-or-
25 expense test works because several states,

1 including New York and California, already apply
2 that test for religious accommodations. And
3 federal courts are well acquainted with applying
4 that test under the ADA and other similar
5 statutes.

6 The Court should establish a textual
7 test for undue hardship and reverse the judgment
8 below.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Just a couple of
11 cleanup questions.

12 What was actually decided was the law
13 being considered in Hardison? Was it the -- the
14 Title VII as amended, or was it a guideline?

15 MR. STREETT: It was the EEOC
16 guideline that implemented the pre-amendment
17 statute.

18 JUSTICE THOMAS: So the law actually
19 was not interpreted in -- in -- in Hardison --

20 MR. STREETT: That's correct --

21 JUSTICE THOMAS: -- this one?

22 MR. STREETT: -- Your Honor, because
23 the events in Hardison arose before the statute
24 was amended, and the Court squarely stated that
25 it was applying the guideline.

1 JUSTICE THOMAS: The other thing is
2 you say that the government is not making the
3 de minimis argument. So what is the daylight
4 between your argument now and the government's
5 argument?

6 MR. STREETT: Sure. It is best
7 explained by what the government thinks arises
8 to the level of an undue hardship. They use a
9 variety of different formulations. But, when
10 the rubber meets the road, that's where we see
11 the daylight. And we see that the government
12 believes that any loss of efficiency is going to
13 be an undue hardship. Any regular payment of
14 premium wages, for example, paying overtime to
15 one person per week to attract that person to
16 cover a Sabbatarian's shift, the denial of a
17 single coworker's secular preference, according
18 to the government, is an undue hardship.

19 So, when we take all of that together,
20 while the government's test might sound better
21 than Hardison's on its face, it would have the
22 effect of eviscerating certainly any Sabbatarian
23 observance, which was at the very core of what
24 the Court -- what the -- Congress was trying to
25 protect.

1 JUSTICE THOMAS: So the -- one final
2 question. The -- it seems a little odd that
3 under the ADA, we have the same term, "undue
4 hardship," and I know there's a definition of
5 "undue hardship" there, but it seems as though
6 that there would at least be some comparison to
7 the undue hardship -- the treatment of undue
8 hardship under ADA, and there would be some
9 similarity with Title VII.

10 So would you comment on that?

11 MR. STREETT: Yes, Your Honor.
12 There's right now a huge gap between the
13 accommodations allowed under the ADA and the
14 accommodations allowed under Hardison.

15 And to be clear, we'd be making the
16 same argument here if the ADA wasn't out there
17 --

18 JUSTICE THOMAS: Mm-hmm.

19 MR. STREETT: -- because we believe
20 the best plain text meaning of "undue hardship"
21 is significant difficulty or expense. But the
22 fact that the ADA and this other web of
23 accommodation statutes requires employers to
24 accommodate for a variety of reasons and they
25 know how to apply a significant-difficulty-or-

1 expense test bolsters our argument because
2 Congress understood the plain meaning of "undue
3 hardship" to mean significant difficulty or
4 expense, and that's what it wrote into those
5 statutes.

6 CHIEF JUSTICE ROBERTS: It's -- it
7 seems to me we might be getting a little ahead
8 of ourselves in talking about the ADA standard
9 or -- or some others. The first question
10 presented just says whether or not the test
11 applied in -- in Hardison is an appropriate
12 test, their interpretation of undue burden. We
13 don't have to address the second issue, do we?

14 MR. STREETT: Your Honor, certainly,
15 addressing Question Presented 1 will solve 90
16 percent of the problems. We do think the Court
17 should answer Question Presented 2 because that
18 establishes the yardstick against which the
19 quantum in QP 1 is going to be answered.

20 So there are seven or eight circuit
21 courts that have said that an undue hardship on
22 an employee or a coworker is itself an undue
23 hardship on the conduct of the business. The --
24 we believe this Court would -- would -- would
25 appropriately advise those lower courts that

1 that's not correct and that the correct metric
2 is the conduct of the business.

3 CHIEF JUSTICE ROBERTS: Well, there
4 might be -- there are differences between ADA
5 cases, USERRA cases, Pregnancy Work Act cases.
6 They apply to a fairly discrete category of
7 individuals.

8 Title VII, obviously, has a broader --
9 broader scope, and I'm wondering if that's the
10 sort of issue that we need to address here when
11 we -- it seems to me there's enough on our plate
12 perhaps with respect to the undue burden
13 standard.

14 MR. STREETT: Your Honor, we don't
15 disagree. We would be fine with an opinion that
16 doesn't say anything about the ADA or those
17 other statutes but just interprets the plain
18 text that the Court so clearly eviscerated in
19 Hardison.

20 And we think that, again, the ADA and
21 these other statutes just confirm the plain
22 meaning. While there are certainly differences
23 as to all of the types of accommodations under
24 the different statutes, Congress chose the same
25 basic undue hardship metric for all of them.

1 JUSTICE SOTOMAYOR: Excuse me. You
2 are really asking us to overrule not just the
3 de minimis test but the entire holdings of
4 Hardison. You appear to be saying that the
5 three holdings of Hardison, as I understood them
6 to be, one, that a employ -- it would be an
7 undue hardship if an employer has to breach its
8 collective bargaining agreement.

9 I didn't see you arguing that in your
10 brief, but you've just said it here today in
11 your opening. Am I correct? You want us to
12 overrule that part of Hardison?

13 MR. STREETT: No, Your Honor, because
14 we don't think that is the holding of Hardison.
15 Hardison is limited to seniority systems, and
16 that was based on a carve-out --

17 JUSTICE SOTOMAYOR: That's assuming
18 you're right on that, and that issue wasn't
19 addressed by the Third Circuit, whether the --
20 here was that.

21 But are you conceding that it's an
22 undue burden to violate a collective bargaining
23 agreement's seniority system?

24 MR. STREETT: Yes, Your Honor. We --

25 JUSTICE SOTOMAYOR: So you're ignoring

1 Hardison's language then that said any other
2 type of agreement would oppose -- violation of
3 any kind of agreement would violate -- would be
4 an -- would be a substantial burden?

5 MR. STREETT: While there is some
6 broader language in Hardison, we believe the
7 best reading of that --

8 JUSTICE SOTOMAYOR: So let me go to
9 the second, paying premium wage. You said that
10 even if they had to pay it year-round, that is
11 not an undue hard -- burden. That's not what
12 Hardison said. So you want us to overrule that?

13 MR. STREETT: We agree that is
14 inconsistent with the plain meaning of undue
15 hardship. We would not --

16 JUSTICE SOTOMAYOR: And, finally,
17 here's a man who applied for a job where he has
18 to work Saturdays, Sundays, and holidays, and he
19 applies and he says, well, now I'm not working
20 Sunday and I'm not working religious holidays
21 because that's consistent with me, with my --
22 with my religion, and it's not an undue burden
23 to force the employer to have to give other
24 employees greater work or to -- or to have to
25 cover more days than it would normally have to

1 cover or to force people who also have the same
2 job title to work every holiday and every
3 Sunday.

4 You're saying that can't be an undue
5 hardship.

6 MR. STREETT: That's not our position
7 because that's not the facts of this case, Your
8 Honor.

9 JUSTICE SOTOMAYOR: Well, he -- he
10 was -- he was an RCA. He was required to work
11 Saturday, Sunday, and holidays. And now he
12 doesn't want to work half the days he was hired
13 to work.

14 MR. STREETT: A few important factual
15 clarifications. First of all, when Mr. Groff
16 was hired, there was no Sunday delivery, but
17 that's a little bit beside the point.

18 The position of an RCA at -- is
19 defined at JA 144 in the record as being a
20 "non-career employee who fills in for career
21 employees whenever needed." It's not specific
22 to Sundays and holidays. That's actually a
23 different position within the Postal Service
24 known as ARCs.

25 JUSTICE SOTOMAYOR: That was Sunday

1 and holidays.

2 MR. STRETT: That was Sunday and
3 holidays. Mr. Groff's position is filling in
4 throughout the week when -- when another career
5 employee is absent. So he did not sign up for a
6 job specific to Sundays and holidays, and we
7 concede that would be a very different case.

8 With respect to the -- the factual
9 question of whether other employees were
10 required to -- to work more or work overtime,
11 there's no evidence in the record of that. The
12 evidence in the record is that individuals had
13 to work on Sundays when they would prefer not to
14 work. But that's just the nature of --

15 JUSTICE SOTOMAYOR: All right.

16 MR. STRETT: -- an accommodation.

17 JUSTICE SOTOMAYOR: So you want us to
18 overrule at least two of the three holdings of
19 Hardison?

20 MR. STRETT: Yes. We don't --

21 JUSTICE SOTOMAYOR: All right. Now --

22 MR. STRETT: -- think those two
23 holdings are consistent.

24 JUSTICE SOTOMAYOR: -- how do we
25 import the language of the other statutes in

1 defining "undue hardship" now when Congress, for
2 at least between 1994 and 2013, declined to
3 replace Hardison with significant difficulty or
4 expense?

5 So now we're going to take language
6 from another statute that and -- that Congress
7 has decided itself not to adopt and to import it
8 into the plain definition of "undue hardship."

9 MR. STREETT: Again, Your Honor, we're
10 not seeking to import that language. We'd be
11 making the exact same argument if those statutes
12 didn't exist.

13 But, on your question about
14 congressional acquiescence or -- or trying to
15 divine what Congress was up to there, there are
16 none of the strong indicia of congressional
17 acquiescence that this Court has looked to in
18 other stare decisis cases.

19 Congress did not amend the definition
20 of religion. Congress did not overhaul
21 Title VII while leaving Hardison intact.

22 JUSTICE SOTOMAYOR: Wait a minute.
23 But it has overhauled -- at least twice
24 overruled decisions of ours it didn't like. It
25 did it in Patterson, and it did it in Ledbetter.

1 So it has not been silent when it hasn't liked a
2 definition that we've given something --

3 MR. STREETT: In that --

4 JUSTICE SOTOMAYOR: -- in the Civil
5 Rights Act. Many other acts it remains silent,
6 but not on this one.

7 MR. STREETT: In Alexander versus
8 Sandoval, this Court described what happened to
9 Title VII as not being an overhaul of the
10 statute but only amendments as to selected
11 provisions from which there could not be any
12 inferences drawn.

13 JUSTICE SOTOMAYOR: Well, this is the
14 same --

15 JUSTICE KAGAN: Mr. Streett, we
16 don't --

17 JUSTICE SOTOMAYOR: Go ahead.

18 JUSTICE KAGAN: We don't really need
19 evidence of congressional acquiescence, do we?
20 I mean, this is a statutory decisis -- statutory
21 stare decisis case, and we've said over and over
22 that when there's a statute involved rather than
23 the Constitution, stare decisis is at its peak.
24 And this has been -- you know, for decades, this
25 has been the rule. Congress has had that

1 opportunity to change it. Congress has not done
2 so.

3 You can count on, like, a finger how
4 many times we have overruled a statutory ruling
5 in that context.

6 MR. STREETT: Two points on that, Your
7 Honor. First, the starting point should be
8 Footnote 1 in Patterson versus McLean, where the
9 Court says, in a stare decisis case, mere
10 congressional inaction is not sufficient for
11 this Court to abide by an erroneous
12 interpretation. And that's when the Court looks
13 to other indicia of congressional acquiescence.

14 JUSTICE KAGAN: That's a different
15 stare decisis rule than any I've ever heard. I
16 thought that our statutory decisis rule went
17 like this: It doesn't really matter whether the
18 thing is wrong. I mean, stare decisis only has
19 a role to play when the ruling is wrong. If the
20 ruling were right, we wouldn't need statute --
21 we wouldn't need stare decisis.

22 Stare decisis has a role to play even
23 when -- I mean only when a ruling is erroneous,
24 and -- and still we say Congress has had a
25 chance to, the ball was in Congress's court,

1 Congress has not done it for reasons of
2 predictability, for reliability, for reliance,
3 for reasons of the credibility of the judicial
4 system. We maintain what we said about what
5 statutes mean.

6 MR. STREETT: Even for statutory
7 stare decisis, this Court looks at the
8 enumerated factors, and this is the exceptional
9 case where every factor weighs in favor of
10 overruling, not just the exceptionally poor
11 quality of the reasoning in Hardison, not just
12 the congressional acquiescence, which I won't
13 hammer on any further, but the fact that the
14 government's not even defending either the test
15 and it's certainly not defending the rationale
16 of Hardison, which was all about treating
17 religious practices on a neutral level with
18 secular preferences.

19 JUSTICE KAGAN: Well, the SG can say
20 or not what she's defending and what she's not.
21 As I read the SG, she's saying that three words
22 do not represent the core of Hardison's
23 reasoning or the core of Hardison's holding but
24 that she is standing full square behind what she
25 understands to be Hardison's actual reasoning

1 and holding with respect to the facts there.

2 But putting that aside, because I'm
3 sure she will tell us about that, what -- what
4 factors are -- you -- you know, if the reasoning
5 is wrong, that's just another way of saying that
6 the decision is wrong. That doesn't count when
7 you're standing up there and saying that we
8 should overrule a 40-year-old statutory
9 precedent.

10 MR. STREETT: Happy to talk about the
11 factors, Your Honor.

12 First of all, whether or not the
13 government defends the test when it stands up
14 here today, it is not defending the rationale.
15 And a key factor this Court has looked at,
16 including in *Kimble versus Marvel*, is whether
17 the rationale has been eroded by later decisions
18 of this Court.

19 There is absolutely no good answer for
20 why *Abercrombie* has not devastated the
21 neutrality rationale.

22 JUSTICE KAGAN: *Abercrombie* just said
23 that Title VII insisted and required some kinds
24 of accommodations. And there's nothing in
25 *Hardison* that is inconsistent with that ruling.

1 Hardison says sometimes accommodations are
2 required, sometimes they're not.

3 Now you think that they should be
4 required more often. But there's nothing in
5 Abercrombie that's remotely inconsistent with
6 Hardison. They -- Abercrombie says sometimes
7 accommodations are required. So does Hardison.

8 MR. STREETT: I couldn't disagree
9 more, Your Honor. I think, if you read pages 83
10 and 84 in Hardison, the three sentences that
11 follow this Court's enunciation of the
12 de minimis test are all about that Title VII
13 requires neutrality and it's not appropriate to
14 give a preference for religious reasons for not
15 working on the weekend.

16 Abercrombie completely reversed that
17 understanding of Title VII. But, even if you're
18 not persuaded by that, Your Honor, certainly,
19 the reliance interests are very weak here.
20 They're even weaker than they were in Janice
21 because employers are always required to update
22 their HR manuals to adjust to this Court's
23 decisions.

24 JUSTICE ALITO: Do you -- Mr. Streett,
25 do you think that a change in this Court's

1 understanding of the meaning of the religion
2 clauses of the First Amendment is a relevant
3 factor in determining whether the statutory
4 interpretation in Hardison should be revisited?

5 It's really hard to understand the
6 decision in Hardison except as an exercise in
7 constitutional avoidance. Although the Court
8 didn't mention that concept in its opinion, that
9 was very prominent in the briefs and in the oral
10 arguments in Hardison.

11 And a way to understand the adoption
12 of the de minimis test was the view that the
13 Establishment Clause, as interpreted in Lemon,
14 which talked about anything that advances
15 religion, would be violated by any departure
16 from strict neutrality between employees who
17 wanted a secular exemption and those who wanted
18 a religious exemption.

19 But our -- Abercrombie and some of our
20 later cases do make it clear that that is an
21 incorrect interpretation of the Establishment
22 Clause.

23 So even though constitutional
24 avoidance is not mentioned there, do you think
25 that is a relevant factor?

1 MR. STRETT: Yes, it's important for
2 two reasons. First, the reason Your Honor
3 mentioned, which we completely agree with, which
4 is that there have been further erosions of the
5 doctrinal underpinnings that seem to motivate
6 Hardison.

7 But, second, and going back to the
8 idea of what was Congress thinking here, if
9 we're going to go down the path of trying to
10 guess what Congress was thinking, it may very
11 well have been that Congress felt hamstrung by
12 this Court's Establishment Clause jurisprudence
13 and didn't feel that it could adopt a heightened
14 standard for undue hardship. In fact, there
15 were witnesses in both of the hearings that
16 spoke about that very question.

17 JUSTICE KAGAN: Can I say --

18 JUSTICE KAVANAUGH: Can I ask you --

19 JUSTICE KAGAN: -- I think that that's
20 a -- I'm sorry.

21 JUSTICE KAVANAUGH: Go ahead.

22 JUSTICE KAGAN: No, please.

23 JUSTICE KAVANAUGH: No.

24 (Laughter.)

25 JUSTICE KAVANAUGH: You go first.

1 JUSTICE KAGAN: I mean, I think --

2 CHIEF JUSTICE ROBERTS: Justice Kagan.
3 Seniority.

4 JUSTICE KAVANAUGH: Seniority.

5 JUSTICE KAGAN: -- I think that that's
6 an unusual theory. It's good that Justice
7 Kavanaugh interrupted me because I would have
8 used a different word than "unusual."

9 (Laughter.)

10 JUSTICE KAGAN: I mean, you know,
11 we're -- now we're guessing as to what the Court
12 may have thought in *Hardison*, which it never
13 said in *Hardison*, or what Congress might have
14 thought, even though it never said it? You
15 know, that maybe we -- they -- everybody was
16 motivated by an erroneous view of the
17 Constitution, even though that erroneous view of
18 the Constitution, you know, doesn't appear in
19 any part of *Hardison* and doesn't appear in
20 anything that we can point to in the
21 Congressional Record, and that's why we're going
22 to overrule a statutory precedent? Because it
23 might be, using our sort of fortune teller
24 apparatus, that, you know -- or our, you know,
25 -- you know, soothsayer apparatus, that that

1 might have been what was in people's minds?

2 MR. STREETT: Your Honors, we are not
3 the ones here asking for this Court to guess
4 about what Congress is doing. It's our position
5 that Congress -- congressional silence or
6 inaction does not get you off the starting
7 blocks. There has to be some affirmative
8 evidence of congressional acquiescence.

9 My point is just, if the Court's going
10 to go down that road and guess at what was going
11 on, that's as -- that -- that is at least as
12 plausible an explanation as that Congress agreed
13 with this Court's in Hard -- decision in
14 Hardison. Congress -- there's no house of
15 Congress taking a vote approving of the -- the
16 ruling in Hardison or, you know --

17 JUSTICE KAVANAUGH: Can I --

18 MR. STREETT: -- refusing to
19 disapprove of it.

20 JUSTICE KAVANAUGH: -- can I just ask
21 about Hardison itself? Because I think Hardison
22 has to be interpreted in light of four --
23 Footnote 14, which talks about not de minimis
24 costs but substantial expenditures or
25 substantial additional costs.

1 And if we assume, as the Solicitor
2 General, I think, seems to say, that we should
3 not use the term "de minimis costs" but we
4 should use what's in Hardison in Footnote 14,
5 "substantial costs," "substantial additional
6 costs," then that standard, "substantial costs,"
7 "substantial additional costs," is perfectly
8 appropriate. Your answer to that?

9 MR. STREETT: If you were just to say
10 the word "substantial costs" in a vacuum, that
11 sounds pretty good to me. The problem is when
12 you look at how that was applied in Hardison --

13 JUSTICE KAVANAUGH: Okay. So let --
14 I'm going to interrupt you there, because I
15 think there are two things going on here
16 clearly: the formulation of the words of the
17 test and "substantial," "significant" -- who
18 knows, you know, what those will mean.

19 Where it really matters -- and I think
20 you're pointing this out correctly -- is how do
21 we apply it to a situation where you have to pay
22 new workers, where you have to go short-shifted,
23 where you have to violate a collective
24 bargaining agreement or a memorandum of
25 understanding, and those specifics, I think, are

1 where it -- it cashes out, so to speak.

2 Do you agree with that?

3 MR. STREETT: I do agree with that,
4 Your Honor, and we're not just talking about, of
5 course, opportunities of short-shiftedness or
6 short-handedness or talking about hiring new
7 employees. We're talking about just paying
8 premium wages to get existing employees to
9 voluntarily work --

10 JUSTICE KAVANAUGH: Well --

11 MR. STREETT: -- or just scheduling.

12 JUSTICE KAVANAUGH: -- in this case
13 you're talking about?

14 MR. STREETT: Well, in this case and
15 in general. The government's position and the
16 -- the holding of Hardison has to do with paying
17 voluntary premium wages to attract somebody to
18 work with that.

19 JUSTICE KAVANAUGH: Well, right. In
20 this case, just to talk about that for a minute,
21 do you agree that the Post Office was violating
22 the MOU?

23 MR. STREETT: No, we don't, Your
24 Honor. And we --

25 JUSTICE KAVANAUGH: And why not?

1 MR. STREETT: -- we explain that in
2 our reply brief. Because the MOU does not spell
3 out an exclusive list of opportunities to avoid
4 Sunday scheduling, and so we think it should be
5 read in conjunction with the Title VII duty to
6 accommodate.

7 JUSTICE KAVANAUGH: If it did violate
8 the MOU, would you lose?

9 MR. STREETT: Oh, no, Your Honor,
10 because Congress knows how to carve out
11 provisions to -- to just declare them not to be
12 an unlawful employment practice. It did that
13 with the seniority systems in Section 703(g)
14 that Hardison talked about. It did not extend
15 that to all collective bargaining provisions.

16 JUSTICE KAVANAUGH: Then what about, I
17 guess in this case, again on the facts here,
18 that you had one employee quit, one employee
19 transfer, and another employee file a grievance
20 as a result of what Mr. Groff was receiving in
21 terms of treatment? How do we think about that?
22 Again, on applying whatever it is, "substantial
23 costs," how do we think about applying that to
24 that circumstance?

25 MR. STREETT: Sure. So just on the

1 facts of this case, a quick clarification.
2 There was one employee who transferred allegedly
3 because of Mr. Groff. There was no other
4 employee at his post office that transferred
5 because of Mr. Groff. That's a little bit
6 perhaps unclear in the government's brief. But
7 that's at JA 64.

8 But all the things Your Honor
9 mentioned would go into the evidentiary mix, and
10 the employer could use all of that evidence to
11 adduce whether, in fact, the employee's
12 operations are being disrupted, whether it's
13 unable to serve its customers, whether its
14 workforce is not producing.

15 JUSTICE KAVANAUGH: Yeah, and I guess,
16 what's the answer? That's -- that's the hard
17 thing.

18 MR. STREETT: Sure.

19 JUSTICE KAVANAUGH: That's why I think
20 I'm not -- going to the Chief Justice's maybe
21 first question, when we toss out a standard from
22 this case, "substantial costs" or -- from
23 Footnote 14, the hard thing's going to be how to
24 apply it. And I'm not sure we can give you a
25 full manual of how -- how it's going to play

1 out.

2 MR. STREETT: Sure, Your Honor, but
3 that's the words Congress chose in the statute.
4 Undue hardship is necessarily a flexible and
5 context-specific standard. That's one reason
6 we'd urge the Court to adopt this --

7 JUSTICE KAVANAUGH: So, if we just say
8 "substantial costs," read Footnote 14,
9 "substantial costs," go forth, courts?

10 MR. STREETT: We think the Court needs
11 to give more guidance than that. That's why we
12 like the significant-difficulty-or-expense test,
13 because you have New York and California and
14 other states already applying that test for
15 religious accommodations. There's case law out
16 there. It's workable. The -- if you read the
17 ADA guidelines and the ADA manual from the EEOC,
18 it's quite helpful in answering the questions
19 that Your Honor posed about the effect of
20 collective bargaining agreements, about the
21 effect of individuals quitting or supposedly
22 being overloaded with work.

23 And, again, those are going to be
24 fact-specific cases. Oftentimes, they're going
25 to go to a jury. But the -- the employee is not

1 always going to lose, and that's where we are
2 right now with Hardison.

3 JUSTICE BARRETT: Why shouldn't these
4 go to a jury? I mean, Judge Hardiman thought
5 they should. I mean, it seems to me the court
6 of appeals didn't reach the MOU issue, and, you
7 know, even if you assume that this is conduct to
8 a business and that, you know, effects on
9 coworkers don't automatically count, it's not --
10 there's not a record here that shows that -- you
11 know, that it wasn't a substantial cost to the
12 business.

13 I just don't understand why we would
14 decide that.

15 MR. STREETT: Two points on that, Your
16 Honor. First of all, of course, we would be
17 happy if this Court states the significant-
18 difficulty-or-expense test and remands for a
19 trial.

20 Second of all, there was substantial
21 evidence in the record here, including the
22 corporate representative's concession at pages
23 266 to 268 in the Joint Appendix, that
24 accommodating Mr. Groff was not causing an undue
25 hardship on the business. And you had the

1 Holtwood postmaster's contemporaneous email at
2 316 to 17 in the record that says accommodating
3 him is not causing an undue hardship; that would
4 only arise if we scheduled him knowing that
5 somebody else wouldn't show up.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Put aside the question
11 of whether it's legitimate to speculate about
12 the reason for the reasoning in Hardison. Do
13 you think that there's anything illegitimate
14 about discounting an argument of -- about
15 congressional acquiescence or congressional
16 inaction when there's good reason to believe
17 that a reasonable member of Congress would think
18 that there would be constitutional problems with
19 adopting the kind of remedial legislation that
20 is posited?

21 MR. STREETT: Yes, I think that would
22 be an appropriate reason to discount an argument
23 based on congressional inaction, particularly
24 when you had witnesses at those hearings warning
25 Congress that to adopt a significant-difficulty-

1 or-expense standard would call into question the
2 constitutionality of Title VII.

3 JUSTICE ALITO: Do you think it's
4 legitimate to lump together a request for
5 accommodation that would contravene seniority
6 rights with a request for accommodation that
7 would have nothing to do with seniority but
8 would arguably violate a collective bargaining
9 agreement or a memorandum of understanding? Are
10 they the same things?

11 MR. STREETT: No, Your Honor, they're
12 not the same things, most particularly because
13 Congress specifically carved out seniority
14 rights from the duty to accommodate. And we're
15 not challenging that holding here. It would be
16 quite concerning to expand that to CBAs because
17 that would allow unions and employers to
18 negotiate away religious accommodation rights
19 that are protected by the statute.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 JUSTICE KAGAN: Can I ask you a couple
25 of questions about how you think that your

1 standard plays out? And one is a clarification
2 question.

3 I thought that I understood you to say
4 that if an employer had to pay premium wages in
5 order to find employees who could pick up the
6 slack, so to speak, that that would not rise to
7 the level of significant difficulties. Is that
8 correct?

9 MR. STREETT: We do not articulate
10 that as a per se rule, Your Honor. But,
11 certainly, in the mine run of cases which
12 involve blue-collar workers, as our amici point
13 out, we're talking about a hundred, \$200 a week.
14 For a corporation of any significant size,
15 that's not going to be an undue hardship.

16 JUSTICE KAGAN: Okay. And then
17 thinking about this question about burdens on
18 coworkers, I mean, I basically understood you to
19 say that their burdens on coworkers again just
20 did not count as a significant difficulty or
21 expense. So let me just give you a hypo. It's
22 similar to the facts of this case, but we'll
23 just, you know, simplify it a little bit.

24 You know, there's a -- a -- a -- a
25 rural grocery store, let's say, and it has three

1 employees, and it's important to the grocery
2 store that it stay open on Sunday. And one of
3 the employees says, no, I'm a Sabbath observer.
4 But the other two employees are not thrilled
5 about the idea of working on Sunday either. I
6 mean, maybe they want to go to Little League
7 games with their kids or maybe they want to go
8 to church too, but they're not a Sabbath
9 observer and can't ask for this sort of
10 accommodation or maybe anything else.

11 And -- and so it's, you know, may --
12 maybe they quit or, even if they don't quit,
13 they -- their morale is very bad or -- or even
14 if they're just like great people and, you know,
15 they manage to keep a stiff upper lip and smile
16 every day, the employer just thinks, boy, this
17 is just an inequitable situation because all of
18 these people really want to take Sundays off.
19 And it's -- it's true that there's not a
20 religious observance in place, although, as I
21 said, there can be. I mean, some of these other
22 employees might want to go to church on Sunday
23 too.

24 But, like, none of that can count? An
25 employer -- it -- it's a three-person grocery

1 store, none of it can count?

2 MR. STREETT: Our position is not that
3 it should not count. So let me try to lay out
4 some background principles to answer that
5 question.

6 First of all, of course, Title VII
7 only kicks in at 15 employees, so that may or
8 may not ever arise, but --

9 JUSTICE KAGAN: Well, it's just like
10 this little post office. I mean, obviously, the
11 post office has more than 15 employees. But
12 this little post office did not have more than
13 15 employees. This little post office was a
14 rural post office with a few people trying to
15 deliver the mail.

16 MR. STREETT: But, when you look at
17 the broader context, that shows why this case is
18 different, because for 40 -- from your
19 hypothetical, because for 46 out of the 52 weeks
20 of the year, the post offices were combined for
21 purposes of assigning RCAs.

22 There were 40 RCAs available to be
23 assigned to 12 to 15 shifts each Sunday. So
24 accommodating Mr. Groff for 46 out of the 52
25 weeks of the year would only have reduced the

1 number of available assignees from 40 to 39.

2 That's -- that's de minimis.

3 Now you're asking about the six weeks
4 of the year. So it may be quite different for a
5 grocery store year-round having to accommodate
6 in that way. This is for six weeks out of the
7 year. And even then, the local post office was
8 able to borrow RCAs from other local post
9 offices just in the way it did the rest of the
10 year. So that's a very different hypothetical.

11 In your case --

12 JUSTICE KAGAN: So, as I understand
13 the -- what you just said to me, that seems like
14 a very different position from your brief. Your
15 brief seemed to me to be pretty hard-line about
16 you just can't take into account employ --
17 co-employee burdens.

18 Are you backing away from that now?

19 MR. STREETT: Well, we're not backing
20 away because that's never been our position. We
21 said that the effect on coworkers can be
22 relevant evidence of an effect on the conduct of
23 the business. So the employer can come forward
24 with evidence that the morale issues or the
25 quitting of an employee or the overburdened

1 nature of the employees' work can be put forward
2 as evidence, but it must show that there is some
3 disruption to the operation of the business.

4 That's the exact way the ADA applies
5 it, as we point out on pages 43 and 44 of our
6 brief. Beyond that, the employer --

7 JUSTICE KAGAN: I mean, isn't there
8 always going to be a disruption to the business,
9 or, you know, I mean, you -- employees conduct
10 the business, so if you're -- if employees are
11 burdened, that affects the business.

12 MR. STREETT: I -- I don't think
13 that's the right way to look at it for -- for
14 this reason, Your Honor.

15 The question is what's our yardstick
16 or what's our metric here. And, yes, as a
17 general rule, something that happens to an
18 employee is going to have some -- some effect at
19 some, you know, minuscule or marginal level
20 possibly or possibly a larger level.

21 But the question is what do we apply
22 the undue hardship standard to, and that has to
23 go to the business as a whole. The Court
24 shouldn't just leap from the fact that there's
25 an undue hardship on a particular employer or

1 employee to the fact that there's an undue
2 hardship on the conduct of the business.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: Well, one thing
8 about this case that I think makes it a little
9 more difficult is that there can be religious
10 interests on both sides, and I'll just pick up
11 on Justice Kagan's questions.

12 So you have a group of employees who
13 are all religious, let's say, but the Catholic
14 and the Baptist don't get it -- don't get the
15 Sunday off because they're told you're the wrong
16 religion or you have the wrong religious beliefs
17 versus the person who has the right religious
18 beliefs to get the Sunday off.

19 Does that matter?

20 MR. STREETT: If I'm understanding the
21 hypothetical correctly, you have one employee
22 who has a strong objection to working on Sunday
23 and others who do not, but they --

24 JUSTICE KAVANAUGH: One who has a
25 religious -- say your client, okay, and then you

1 have a Catholic who says, well, I -- I would
2 prefer not to work on Sunday either, but my
3 religion doesn't compel me not to work on
4 Sunday, and a Baptist says the same thing and a
5 Jewish employee says the same thing and -- you
6 know, on Saturday, and -- but that's -- that's
7 not good enough. So your -- your religion's not
8 good enough.

9 So there's a religious interests,
10 arguably, in that sense too, and some of the
11 amicus briefs point that out. I just wanted --
12 is that irrelevant? Should we think about that
13 at all?

14 It seems concerning that you're told,
15 in effect, you don't get Sunday off even though
16 you're religious. The other guy next to you
17 gets Sunday off because he's religious, but his
18 religion gives him a little more -- a little
19 more benefit there.

20 MR. STREETT: Certainly, the statute
21 does frame this in terms of the person who asks
22 for the accommodation and believes their
23 religious practice requires them to do
24 something.

25 So -- and I think Congress understood

1 that there is something different in -- in -- in
2 kind about asking somebody to surrender their
3 conscience or their job than it is about giving
4 up a preference, even if it's a religious
5 preference, but certainly as to secular
6 preferences as well.

7 Now, again, if that's -- if the
8 employees feel that that's unfair and they go to
9 their employer and they complain or they quit,
10 then that's something that the employer could
11 put forward as evidence that could ultimately
12 rise to the level of an undue hardship on the
13 business if they can show concrete evidence on
14 the operations of the business.

15 JUSTICE KAVANAUGH: So, if the --
16 those employees say this is unfair and morale
17 starts going down, they may complain, someone
18 leaves, that's the kind of thing that you agree
19 can be effect on the conduct of the business
20 and, therefore, the employer can take that into
21 account at that point?

22 MR. STREETT: It can be evidence of
23 effect on the conduct of the business, but
24 morale or -- or threats to quit or whatever the
25 case may be needs to have a concrete effect on

1 the operations of the business.

2 JUSTICE KAVANAUGH: And -- and I hate
3 to belabor this, but what exactly does that
4 mean?

5 MR. STREETT: So I think it's going to
6 be a context-specific --

7 JUSTICE KAVANAUGH: Okay.

8 MR. STREETT: -- case-by-case --

9 JUSTICE KAVANAUGH: What does that
10 mean?

11 MR. STREETT: -- analysis.

12 JUSTICE KAVANAUGH: What does -- yeah,
13 what does that mean?

14 (Laughter.)

15 MR. STREETT: So I think it means the
16 exact same thing. It means, in the ADA context,
17 we cite the guidelines at pages 43 to 44.

18 JUSTICE KAVANAUGH: I mean, anyone
19 running a business in America knows that morale
20 of the employees is critical to the success of
21 the operation.

22 MR. STREETT: Sure. And I think the
23 EEOC has rightly said in the A -- ADA guidelines
24 and the cases interpreting the ADA that morale
25 itself is not enough. You have to show the

1 morale's effect on how -- is the business
2 effectively being able to serve its customers?
3 Are the employees objectively overloaded such
4 that they can't do their job? There has to be
5 some actual evidence in the record that goes
6 beyond morale. And it certainly can't be what
7 we have here, where the post office had an
8 accommodation that was working and just
9 abandoned it.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Well, I mean, I have
14 some of those same concerns because it seems to
15 me in the ADA context, unlike this context, you
16 may have fewer accommodation requests. I mean,
17 you might have many religious people in a
18 workplace seeking the same accommodation for
19 Sundays off or -- or other kinds of
20 accommodations.

21 And I guess it seems to me, as Justice
22 Kavanaugh said, morale can be very important.
23 It kind of seems to me that you're defining
24 conduct of the business as the bottom line, like
25 you want a dollar amount on it. So, if you lose

1 efficiency and you want to measure, like, well,
2 we're not able to deliver as many Amazon
3 packages, so it's costing us some of our
4 contract. We're not as able to sell as many
5 groceries, or we have to close early on Sundays
6 because we can't cover it and we're losing the
7 sales in that point -- part of the shift.

8 I mean, what if -- you know, what if
9 it's -- just it's morale? You know, maybe
10 employees aren't -- I mean, and in things that
11 might be very difficult to prove and put a
12 dollar amount on, employees aren't as productive
13 because they're grumbling, they're not willing
14 to kind of go the extra mile, put their best
15 foot forward, those might be very difficult
16 things to put a dollar amount on, or the dollar
17 amount might be small.

18 But why wouldn't they be things that
19 affected the conduct of the business?

20 MR. STREETT: We do not advocate for a
21 dollar amount test. It just needs to be
22 concrete evidence that the employer is not able
23 to -- to carry out its operations, and that is
24 something that the employer has the burden to
25 prove.

1 But we wouldn't accept, for example,
2 in the ADA or in the Pregnant Workers Fairness
3 Act context, that workers are upset because
4 they're having to pick up a little bit of slack
5 for their pregnant coworker or for their
6 disabled coworker. That comes up in all the
7 cases, and the cases always say morale itself is
8 not enough because that just opens up the
9 floodgates.

10 JUSTICE BARRETT: So give me an
11 example of when it wouldn't be a dollar amount.
12 When you say "affect the operations of the
13 business," that -- that doesn't sound like -- I
14 -- I realize you're saying morale isn't enough,
15 but "affect the operation of the business," give
16 me an example of when the effect on coworkers
17 would do that.

18 MR. STREETT: Well, when a coworker
19 quits would be an obvious example.

20 JUSTICE BARRETT: Quits because of
21 morale, so it's just like morale has to get so
22 bad, the employer has to wait until morale is so
23 bad that employ -- that employees actually quit?

24 MR. STREETT: That's not our position,
25 Your Honor, but that is an example of when

1 morale would have a concrete effect, and we have
2 the benefit of looking to New York and
3 California, which has this test, and --

4 JUSTICE BARRETT: And when do they say
5 it's enough?

6 MR. STREETT: It's the -- similar to
7 what's the case in the ADA. It's not enough to
8 have morale issues. It's not enough to just
9 have grumbling. But, if you -- if the employee
10 become -- the employer becomes shorthanded or
11 the employees become so overburdened that they
12 can't carry out their job, then that has an
13 effect on the business. It doesn't need to be
14 quantifiable in dollars and cents. But these
15 are all context-specific cases.

16 JUSTICE BARRETT: But it sounds to me
17 like you're saying morale is not enough unless
18 someone actually quits. So, you know, if on
19 Friday it's very clear to the employer that
20 morale is at an all-time low, it -- it's not --
21 it's not good enough, but on Monday, after one
22 employee is actually driven to quit, then it's
23 enough?

24 MR. STREETT: No, Your Honor, the
25 dividing line would not just be quitting. It

1 would -- you know, there's -- we hear about --
2 about quiet quitting today or individuals who
3 are so overburdened by an accommodation that
4 they cannot do the work in -- in the course of
5 the day. So those would be --

6 JUSTICE BARRETT: Can that go to the
7 reasonableness of the accommodation? I mean, I
8 recognize, you know, that we've suggested that
9 reasonable accommodation means something that
10 eliminates the conflict between the religion and
11 the duty performed -- that needs to be
12 performed, but it seems to me that maybe this
13 goes to reasonableness of the accommodation.

14 If you're in the rural grocery store
15 and the two other employees have to pick up all
16 the shifts, maybe that's not reasonable, or does
17 it always have to be measured, in your view,
18 under that substantial or difficulty test?

19 MR. STREETT: I -- I think that's an
20 important point, Your Honor, that under the
21 reasonable accommodation prong, which, of
22 course, is not before the Court today --

23 JUSTICE BARRETT: Right.

24 MR. STREETT: -- but the employer has
25 flexibility to select an accommodation that's

1 not the religious employee's preferred
2 accommodation, and in -- as part of making that
3 reasonable accommodation, the employer can take
4 into account the effect on the coworkers or take
5 into account the effect on the business.

6 And, of course, that's what we had
7 here. This is not a get-out-of-work-free card
8 for Mr. Groff. He volunteered to work on
9 Saturdays. He volunteered to work on non-Sunday
10 holidays. And it simply shifted around the
11 shifts that individuals were working.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: Yes. Sorry. Can
16 you hear me?

17 Justice Kavanaugh asked you about the
18 government's substantial costs test, and I
19 thought I heard you say that sounds pretty good
20 to me, but the problem is in the application.

21 So I guess I'm trying to understand,
22 is there any daylight between the test that you
23 are advocating for, significant difficulty and
24 expense, and the government's test, substantial
25 costs? They seem pretty synonymous to me. So

1 can you help me figure out the difference?

2 MR. STREETT: Certainly, Your Honor.
3 We know what significant difficulty and expense
4 means because it's been applied under these
5 other statutes, which employers are already
6 applying every day and -- in New York and
7 California are applying.

8 I don't know what "substantial costs"
9 means because those are just two words on a
10 page. I -- the only way to tell what that means
11 is to look at how the government applied them
12 and how Hardison applied them.

13 JUSTICE JACKSON: So do you have an
14 example of -- I mean, the government has written
15 a brief. You've written a brief. There are two
16 different standards in them. Can you give us an
17 example of a case that would come out
18 differently under the different tests?

19 MR. STREETT: Certainly, Your Honor.
20 Paying a hundred dollars a week to somebody to
21 attract them to take on a Sabbath shift, that
22 would probably not be an undue hardship under
23 our test, especially for a larger employer. But
24 it -- it's -- that's the holding of Hardison,
25 and that would be an undue hardship under the

1 government's test.

2 Denying a single coworker's shift
3 preference, the government says that that's --
4 that's an undue hardship on --

5 JUSTICE JACKSON: Because of
6 substantial costs being the test?

7 MR. STREETT: Well, that's a question
8 for the government, I guess, how substantial
9 costs links up with its different --

10 JUSTICE JACKSON: All right. Let me
11 ask you another question then. Just one more.
12 With respect to the questions about the
13 Establishment Clause and the shifting views as
14 to what the Constitution permits, is there any
15 impediment to Congress's acting now? I mean,
16 setting aside the fact that there may have been
17 -- that there's been a change in terms of the
18 Court, presumably, Congress knows that and could
19 change the statute now, right?

20 MR. STREETT: Absolutely. Congress
21 could change the statute now, and the question
22 is just whether this Court should place on
23 Congress's shoulders the burden of this Court's
24 error in Hardison.

25 JUSTICE JACKSON: But -- but -- well,

1 that assumes that that's the reason why Congress
2 picked this particular test, but, I mean, isn't
3 -- isn't this a policy question at bottom for
4 Congress? And I guess I'm a little worried
5 about the -- the history of people going to
6 Congress and the many, many bills apparently --
7 you know, Hardison has been on Congress's radar
8 screen for a very long time, and they've never
9 changed it. And I guess I'm concerned that, you
10 know, a person could fail to get in Congress
11 what they want with respect to changing the
12 statutory standard and then just come to the
13 court and say you give it to us.

14 Why shouldn't we wait for Congress?
15 Now that the, you know, law has shifted, as
16 Justice Alito pointed out, why isn't this the
17 opportunity for them to act?

18 MR. STREETT: We agree wholeheartedly
19 that this is a policy question for Congress, but
20 Congress answered that question in 1972 when it
21 enacted the words "undue hardship on the conduct
22 of the employer's business."

23 JUSTICE JACKSON: So is that an
24 impediment for Congress to revisit it today?
25 What -- do they have a similar stare decisis

1 scenario?

2 MR. STREETT: No. Of course, Congress
3 could address it today, and the question before
4 the Court is, of course, under the stare decisis
5 factors, when the reasoning has been eroded,
6 when the government's not even defending the
7 reasoning of the test, whether this Court should
8 go to the text and interpret it in a -- in a way
9 according with plain meaning.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Prelogar.

14 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
15 ON BEHALF OF THE RESPONDENT

16 GENERAL PRELOGAR: Mr. Chief Justice,
17 and may it please the Court:

18 For almost 50 years, courts have
19 applied Hardison when analyzing undue hardship
20 under Title VII. A substantial body of case law
21 has developed to guide that context-dependent
22 analysis, and that case law provides meaningful
23 protection to religious observants.

24 Petitioner asks this Court to throw
25 all that away and overrule Hardison. But he

1 can't overcome the strong stare decisis weight
2 this Court gives to its statutory holdings. His
3 argument boils down to a claim that Hardison was
4 wrong because it insufficiently protects
5 religious employees.

6 But that is a policy argument that he
7 should direct to Congress. And it ultimately
8 reduces to the claim that it was wrongly
9 decided, which this Court has said over and over
10 again is not enough in the statutory
11 stare decisis context.

12 Petitioner is also wrong about
13 Hardison's effects. Lower courts and the EEOC
14 have applied the "more than de minimis cost"
15 language in light of Hardison's facts. That
16 means that employers aren't required to
17 regularly pay overtime wages or regularly
18 operate shorthanded. But the EEOC's guidelines
19 recognize that employers can be required to bear
20 other costs, like infrequent payment of premium
21 wages. And the burden rests at all times on the
22 employer to demonstrate undue hardship with
23 concrete evidence, not with speculation.

24 Applying those principles, lower
25 courts frequently deny undue hardship defenses.

1 So there is no justification now to dispense
2 with Hardison and discard all of that precedent.

3 Justice Kavanaugh, Justice Barrett,
4 you asked some questions about the facts here.
5 The lower courts correctly found an undue
6 hardship on these facts. Petitioner's job
7 specifically required him to work on Sundays.
8 Exempting him from work each and every Sunday
9 would have violated his coworkers' contractual
10 rights at the post office under that MOU as to
11 how to allocate those undesirable Sunday shifts.
12 And his absences created direct concrete burdens
13 on other carriers, who had to stay on their
14 shifts longer to get the mail delivered. That
15 caused problems with the timely delivery of
16 mail, and it actually produced employee
17 retention problems, with one carrier quitting
18 and another carrier transferring and another
19 carrier filing a union grievance.

20 That is an undue hardship under any
21 reasonable standard.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: General, this may be
24 a problem unique to me, but could you explain to
25 me why you think that Hardison decided the case

1 under the amended Title VII?

2 GENERAL PRELOGAR: Yes, of course.

3 JUSTICE THOMAS: When I look at the
4 court of appeals' opinion and the district court
5 opinion, they both refer to the regulations that
6 are being interpreted.

7 GENERAL PRELOGAR: So I think this
8 Court's decision in Hardison, Justice Thomas,
9 clearly resolved the meaning of the 1972 version
10 of the statute because there was an open
11 question in the case about which version of the
12 statute applied, whether 1972 or the predecessor
13 version, and both Hardison and the U.S.
14 Government in the case said there was an issue
15 of retroactivity, and the 1972 statute should be
16 applied in the case.

17 And the Court ultimately resolved that
18 issue by saying the 1972 statute and its undue
19 hardship standard carries the same meaning as
20 the predecessor version as interpreted in the
21 light of that EEOC guidance.

22 So it was essential to the Court's
23 decision that it didn't have to resolve
24 retroactivity, that it determined that the 1972
25 undue hardship standard had the same meaning as

1 the standard it was applying in Hardison itself.

2 And maybe another way to put this is
3 to say that if there was any possibility of
4 daylight with the 1972 statute having a -- a
5 higher burden on employers, a different undue
6 hardship standard, then the Court would have had
7 to resolve that issue. It couldn't have then
8 said it's unnecessary to determine which statute
9 actually applies here, because that could have
10 been the make-or-break difference in whether
11 Hardison prevailed.

12 So I just don't think there's any way
13 now to say that was dicta or this isn't a square
14 holding on the meaning of the 1972 version,
15 and -- and that's, of course, what this Court
16 itself has recognized in cases like Ansonia
17 Board of Education, where the Court treated
18 Hardison as a -- a -- an authoritative
19 interpretation --

20 JUSTICE THOMAS: Well --

21 GENERAL PRELOGAR: -- under the 1972
22 --

23 JUSTICE THOMAS: -- I just -- I'm -- I
24 just think it's difficult because, when I look
25 at the lower court opinions, they do not go

1 through these gymnastics. But -- but, that
2 aside, the -- if you just look at the words, the
3 plain meaning of -- of the words "undue burden,"
4 in any other context, it could be -- and -- and
5 some of our constitutional cases or even under
6 ADA, which I understand is -- is different -- is
7 defined differently, but how do you square that
8 term, "undue burden," with de minimis?

9 The -- the -- I don't know how
10 something -- you could say the standard is
11 de minimis and at the same time that captures
12 the undue burden standard that's in the statute.

13 GENERAL PRELOGAR: So I, of course,
14 acknowledge that if you focused only on those
15 terms more than de minimis in isolation,
16 divorced from all of the analysis in Hardison,
17 then I think it's imprecise and it could be
18 subject to this kind of confusion.

19 But our basic pitch here is that this
20 is a context-based inquiry that necessarily
21 requires the application of a standard like that
22 to a particular fact pattern. And, here,
23 Hardison has properly been implied in the
24 four-plus decades since in light of its facts.

25 This isn't some new interpretation

1 that I'm suggesting for purposes of this case.
2 This was the EEOC's determination just three
3 years after Hardison in 1980, when it published
4 its guidelines and said, we will interpret more
5 than de minimis in light of the particular
6 accommodations and the costs that the Court
7 confronted in Hardison.

8 And as Justice Kavanaugh noted, the
9 Court alternated. It described it at other
10 points in the opinion in 14 -- Footnote 14 as
11 substantial costs and substantial expenditures.

12 So that has been the way that the EEOC
13 and then the lower courts over 46 years have
14 essentially, we think, properly interpreted that
15 language in light of the context of the case.

16 JUSTICE ALITO: General, I'm really
17 struck by your statement that regardless of what
18 Hardison says, for the last 40 or 50 years, the
19 EEOC and the lower courts have interpreted the
20 decision in a way that properly respects the
21 rights of minority religions.

22 I'm really struck by that because we
23 have amicus briefs here by many representatives
24 of many minority religions -- Muslims, Hindus,
25 Orthodox Jews, Seventh Day Adventists -- and

1 they all say that that is just not true and that
2 Hardison has violated their right to religious
3 liberty.

4 Are they wrong? They don't -- they --
5 they miss -- they misunderstand what the lower
6 courts and the EEOC has done?

7 GENERAL PRELOGAR: In our view,
8 they're not accurately portraying how Hardison
9 has actually played out in the lower courts and
10 the substantial zone of protection for religious
11 exercise that lower courts have recognized in
12 light -- in light of Hardison.

13 And if you are looking for more
14 information to try to get a handle on the -- the
15 wealth of case law out there applying Hardison,
16 I'd urge the Court to consult the EEOC's
17 compliance manual.

18 We cite the manual throughout our
19 brief, and it provides, I think, an excellent
20 overview of the types of accommodation claims
21 that come up again and again and the types of
22 lines that courts have drawn through this
23 context-based approach, taking account of
24 Hardison's facts.

25 And it's just incorrect to say that

1 there is not a substantial amount of
2 accommodation happening and that courts are just
3 reflexively denying these claims.

4 JUSTICE ALITO: So all --

5 GENERAL PRELOGAR: That's not the --

6 JUSTICE ALITO: -- all of these -- all
7 of these groups -- groups actually misunderstand
8 the effect that Hardison has had on -- on their
9 members.

10 Let me ask you a question about
11 premium pay. I don't know whether that means
12 premium pay or premium pay or premium pay. I
13 don't know whether it's super-duper premium pay.

14 Let me give you a hypothetical. Say
15 Amazon has to offer a 16-hour -- \$16-an-hour
16 rate instead of \$15-an-hour rate to get a
17 consistent volunteer to take a Saturday --
18 Saturday shift for a Jehovah's Witness or an
19 Orthodox Jew.

20 Is that -- is that an undue hardship?

21 GENERAL PRELOGAR: So the line that we
22 understand Hardison to have drawn is based on
23 the idea that you would have to incur
24 substantial overtime costs on a regular ongoing
25 basis.

1 And I don't think that it depends
2 entirely on the ultimate at-the-end-of-the-day
3 out-of-pocket costs for the employer because I
4 acknowledge in the Amazon example, even if it
5 were a significant delta and it was much greater
6 wages, Amazon could probably afford that. But,
7 instead, I think that this has to go to the
8 nature of that type of accommodation.

9 JUSTICE ALITO: What's the answer to
10 my question? It's a dollar an hour more and
11 it's Amazon --

12 GENERAL PRELOGAR: I would want to
13 know --

14 JUSTICE ALITO: -- or it's Walmart or
15 it's the old TWA, but it's regular.

16 Is that -- is -- is -- is that an
17 undue hardship, yes or no?

18 GENERAL PRELOGAR: I'm not sure that
19 --

20 JUSTICE ALITO: Can you answer that
21 for me?

22 GENERAL PRELOGAR: -- it would be
23 proper to characterize a dollar-an-hour
24 difference as -- as premium overtime wages. I
25 think there would be an initial fact question

1 about the different levels at which Amazon
2 reimburses its employees.

3 JUSTICE ALITO: Okay. So premium --

4 GENERAL PRELOGAR: But if I could --

5 JUSTICE ALITO: -- premium --

6 GENERAL PRELOGAR: -- try to engage
7 with the person --

8 JUSTICE ALITO: -- really, General,
9 could you please answer my question? Premium
10 doesn't mean just anything above the regular
11 wage? Is that what you're saying?

12 GENERAL PRELOGAR: We're interpreting
13 it the way the Court focused on that in
14 Hardison. There, I believe it was time-and-a-
15 half or maybe double time to fill those shifts,
16 and the Court characterized that as a regular
17 payment of overtime wages that crossed the line.

18 But it's not just about the
19 out-of-pocket --

20 JUSTICE ALITO: So -- all right. I
21 take that -- I take that to mean that premium
22 pay is not just anything more than the ordinary
23 pay. It has to be substantially more than the
24 ordinary pay, right?

25 GENERAL PRELOGAR: I think that that

1 is consistent with the Court's decision in
2 Hardison, but I want to emphasize as well that
3 the way that an accommodation ordinarily
4 operates is to provide some kind of flexibility
5 that allows the employee to complete his work
6 requirements without having that conflict with
7 his religious belief.

8 And one of the reasons why I think the
9 Court drew this distinction with regular payment
10 of overtime wages is that it's a different type
11 of accommodation. It's exempting the employer
12 on an ongoing permanent basis from doing that
13 portion of his work.

14 So I think it actually tracks a little
15 bit with the kinds of questions that Justice
16 Barrett was asking about what's the nature of a
17 reasonable accommodation in the first place,
18 although I recognize that's not the -- the way
19 that the Court thought about the issue in
20 Hardison.

21 JUSTICE GORSUCH: General, I'd -- I'd
22 like to see if -- if there's some common ground
23 that we -- that we can work off of.

24 First, you -- you emphasize that any
25 inquiry under the test here should be

1 context-dependent.

2 GENERAL PRELOGAR: Yes.

3 JUSTICE GORSUCH: And I think your
4 friend on the other side agrees with that. It's
5 going to depend on the size of the employer, the
6 nature of the request, what reasonable options
7 are available to the employer, et cetera.

8 GENERAL PRELOGAR: That's right.

9 JUSTICE GORSUCH: So that's common
10 ground. Okay.

11 I think there's common ground too that
12 de minimis can't be the test, in isolation at
13 least, because Congress doesn't pass civil
14 rights legislation to have de minimis effect,
15 right? We don't think of the civil rights laws
16 as trifling, which is the definition of
17 de minimis. The law says, since time
18 immemorial, you know, that the law does not
19 concern itself with trifles.

20 So is that -- is that common ground as
21 well?

22 GENERAL PRELOGAR: Yes, it is common
23 ground. You should interpret that language in
24 light of the facts there.

25 JUSTICE GORSUCH: Okay. And so I

1 think then that takes us to a third question I
2 have, which is I think your test is the
3 substantial cost test, and your friend's is the
4 significant-difficulty-or-expense test.

5 Is that -- is that a fair summary of
6 kind of the nub of the dispute?

7 GENERAL PRELOGAR: So I think I might
8 be anticipating your next question, but I just
9 want to clarify that I wouldn't call it a
10 substantial cost test because we do have a
11 concern with the Court articulating some new
12 verbal formulation if that calls into question
13 the way that the Commission and the lower courts
14 have been applying Hardison for the past 46
15 years.

16 We think that those results are
17 consistent with the -- the facts of Hardison and
18 the Court's observation there that it's
19 substantial costs across the line, so I don't
20 want to resist that at all. That is common
21 ground.

22 But I do have concern with the Court
23 overruling Hardison or at least suggesting that
24 there is a -- a brand-new standard with all of
25 the details having to be filled in anew because

1 we think that already that case law is drawing
2 the right lines.

3 JUSTICE GORSUCH: And I think you are
4 anticipating my next question, as you usually
5 do.

6 (Laughter.)

7 JUSTICE GORSUCH: But so --
8 substantial costs, that at least it seems to me
9 in some abstract level is common ground, fair?

10 GENERAL PRELOGAR: Yes.

11 JUSTICE GORSUCH: Okay.

12 GENERAL PRELOGAR: I would concede it
13 at the abstract level.

14 JUSTICE GORSUCH: And -- and -- and
15 then the question becomes do we need to in this
16 case get into any verbal formulations, and
17 you're encouraging us not to do so.

18 GENERAL PRELOGAR: That's right.
19 And -- and -- and just to put it all out there,
20 my concern is that any verbal formulation the
21 Court might choose as a replacement could
22 potentially call into question this --

23 JUSTICE GORSUCH: Right.

24 GENERAL PRELOGAR: -- well-developed
25 body of law, but if you were searching for a --

1 JUSTICE GORSUCH: So, if we were -- if
2 we were simply to say that the courts -- some
3 courts have taken this de minimis language
4 rather seriously and no one before us defends it
5 and it wasn't even briefed in -- in Hardison
6 itself, that wasn't something that anybody
7 advocated for, even in Hardison, that maybe we
8 could do some -- a good day's work and put a
9 period at the end of it by saying that that is
10 not the law.

11 GENERAL PRELOGAR: I would agree with
12 that, and I think that that could be a useful
13 clarification for any courts that are led astray
14 by that de minimis language --

15 JUSTICE GORSUCH: And then just remand
16 --

17 GENERAL PRELOGAR: -- but I would urge
18 the Court --

19 JUSTICE GORSUCH: -- remand the matter
20 -- I'm sorry to interrupt, but just --

21 GENERAL PRELOGAR: Yeah.

22 JUSTICE GORSUCH: And then remand the
23 matter back and be done with it?

24 GENERAL PRELOGAR: If I could add one
25 small piece on the remand --

1 JUSTICE GORSUCH: Of course.

2 GENERAL PRELOGAR: -- which is to
3 please confirm that the EEOC has properly
4 understood Hardison in light of the facts --

5 JUSTICE GORSUCH: Well --

6 GENERAL PRELOGAR: -- and that the
7 Court is not overruling Hardison on its facts --
8 (Laughter.)

9 GENERAL PRELOGAR: -- because that --
10 I think that is really where the pressure point
11 is here.

12 JUSTICE GORSUCH: But -- but -- but do
13 we need to do -- I have the pressure point,
14 okay. So I guess I would just wonder whether
15 the Court needs to get into that today. If
16 there is so much common ground here between the
17 parties and really between the parties and
18 Hardison that, you know, some courts -- and it's
19 been a serious misunderstanding -- not all
20 courts, but some courts have taken this
21 "de minimis" language and run with it and say
22 anything more than a trifling will -- will --
23 will get the employer out of any concerns here,
24 and that's wrong and we all agree that's wrong,
25 why can't we just say that and be done with it

1 and be silent as to the rest of it?

2 GENERAL PRELOGAR: Well, I think
3 Petitioner is asking this Court to do much more.
4 He's asking the Court to overrule --

5 JUSTICE GORSUCH: And now you are --
6 and now you are too --

7 GENERAL PRELOGAR: I'm asking you to
8 reject --

9 JUSTICE GORSUCH: -- and I'm resisting
10 both of you.

11 GENERAL PRELOGAR: -- his arguments.

12 JUSTICE GORSUCH: Okay. And -- and
13 he's asking me to reject yours, and perhaps
14 maybe that's another day's problem for us. And
15 it's a -- it's a -- it's a significant problem,
16 but -- but does the Court need to go there? I
17 mean, is there any necessity for us to do -- do
18 that?

19 GENERAL PRELOGAR: I think, if this
20 Court made clear that the "de minimis" language
21 should not be taken literally to mean every
22 dollar above a trifle is immunizing the
23 employers from liability, that is absolutely a
24 correct statement of the law. It's consistent
25 with Hardison. It does not require overruling

1 Hardison. And I would be very happy with that
2 clarification.

3 JUSTICE KAGAN: Well, we do have to
4 reach a disposition line. So how do we reach
5 the disposition line on Justice Gorsuch's
6 suggestion?

7 GENERAL PRELOGAR: So our view is that
8 the facts here clearly qualify as an undue
9 hardship under Hardison and under any reasonable
10 understanding of the facts at issue in that
11 case, and it's for all of the reasons I tried to
12 explain.

13 You know, this was not some minor
14 inconvenience to the Postal Service. The
15 requested accommodation here had manifold
16 impacts both on coworkers and on USPS's ability
17 to deliver the mail.

18 JUSTICE KAGAN: So there would be no
19 basis for vacating and remand in light of this
20 universal agreement that we're not talking about
21 trifles?

22 GENERAL PRELOGAR: That's correct. I
23 -- there is -- there is no basis on which to
24 conclude that we won on a trifle. It was far,
25 far more significant than that.

1 JUSTICE BARRETT: But why wouldn't we
2 vacate and remand to let the Third Circuit know
3 -- like let's imagine that we took Justice
4 Gorsuch's approach and said, you know, to be
5 clear -- and I think lots of courts of appeals
6 are and, in fact, the EEOC guidelines for
7 employers, the more informal sheet, says
8 anything but minimal costs. That makes it sound
9 like trifling.

10 So why wouldn't it make sense to
11 vacate and remand and say, you know, to be
12 clear -- this is all assuming, right -- but, to
13 be clear, de minimis doesn't mean trifling
14 costs, any costs, minimal costs, unless you
15 were -- you know, maybe you were led astray by
16 that, and we want you to apply the Solicitor
17 General's correct understanding of Hardison,
18 which requires you to assess whether there's a
19 substantial -- what is it, substantial burden,
20 substantial hardship -- substantial hardship?

21 GENERAL PRELOGAR: At that point, I
22 would just use the statutory language, "undue
23 hardship." Justice Barrett, obviously, I
24 recognize that's an approach that's open to the
25 Court. I think that if you look at the Third

1 Circuit's decision, there is nothing in there to
2 indicate that the court's decision was driven by
3 this idea that anything over a trifle was too
4 much. Instead, the court carefully parsed the
5 evidence in the case and pointed to the really
6 significant impacts that I'm emphasizing here
7 about coworker burdens, people quitting, people
8 transferring. There was a threatened boycott on
9 one Sunday and union grievance filed.

10 So, you know, I think that,
11 ultimately, the Third Circuit would reach the
12 right result again on these facts, and I don't
13 think it's necessary to send them down that
14 road. But I, of course, acknowledge, if you
15 wanted to provide this clarification and send it
16 back, you could.

17 JUSTICE BARRETT: Let me ask you --

18 CHIEF JUSTICE ROBERTS: Well --

19 JUSTICE BARRETT: -- just one other
20 question. I guess one thing that -- that
21 concerns me about your proposed approach is
22 that, you know, as Justice Gorsuch said -- and
23 that's why basically no one's defending this --
24 I mean, we have an amicus brief from Americans
25 -- you know, Americans for Separation of Church

1 and State saying that Hardiman -- Hardison was
2 wrong.

3 Since no one's defending the test, and
4 I feel like you're going back and you're
5 rationalizing it and you're saying here's why
6 what the EEOC has said is consistent with a more
7 robust understanding of the de minimis test that
8 Hardison announced, you know, here's this
9 body -- I mean, are we supposed to go back and
10 look at this body of 40 years of court of
11 appeals' law and -- and assure ourselves that,
12 in fact, it's consistent with this test.

13 If this language, "de minimis," has
14 been leading courts of appeals astray, what is
15 the point of -- of retaining that formulation of
16 the standard, which everybody agrees has led
17 courts of appeals astray?

18 GENERAL PRELOGAR: So I -- I recognize
19 and don't want to suggest that I have particular
20 attachment to the -- the four words "more than
21 de minimis" in isolation, but I do have great
22 attachment to the body of law that has developed
23 in reliance on Hardison and using the costs and
24 the accommodations at issue there as one
25 benchmark to try to sort out going forward the

1 types of accommodations that will be required.

2 CHIEF JUSTICE ROBERTS: Well --

3 GENERAL PRELOGAR: And so the thing
4 I'm trying to avoid is this idea that the Court
5 would just throw it all up for grabs and say we
6 have to do this over under some new standard and
7 this case law is irrelevant for helping to guide
8 employers in understanding their obligations and
9 courts in applying the -- the statute in those
10 recurring fact patterns.

11 CHIEF JUSTICE ROBERTS: Well, you want
12 to look at the development of the law. Of
13 course, the law has developed in this area in
14 other respects too. It is not the case, as I
15 think people thought it was at -- at Hardison,
16 that it's -- you -- you can't treat people's
17 religious exercise any better than anyone else.

18 In other words, strict neutrality is
19 -- is no longer understood to be the law. It
20 was not the case when Hardison was decided that
21 you had cases like Hosanna-Tabor and Espinoza
22 and Carson saying there really is no
23 Establishment Clause problem if you make
24 accommodations for people's religious --
25 religious belief.

1 So, if you're going to look at this
2 under current law, it's not clear that those
3 cases would come out -- Hardison, for example --
4 would come out the same way. In other words, if
5 we're going to do this and say "de minimis"
6 doesn't really mean de minimis, it means
7 something more significant, and if you're
8 trying -- if you're in the lower courts and
9 you're trying to figure out, well, what exactly
10 does that mean, you will, of course, have to
11 take into account our religious jurisprudence as
12 it exists today, right?

13 GENERAL PRELOGAR: Yes, but I don't
14 think that there is any evidence that the lower
15 courts themselves have misunderstood Hardison to
16 apply a strict neutrality principle or to rest
17 on these kinds of Establishment Clause concerns
18 that appear nowhere on the face of the decision.
19 So I don't think that those developments in the
20 law call into question what the lower courts
21 have done, looking instead at that separate
22 question of, when do the particular burdens and
23 costs on an employer cross that line and are
24 rightly characterized as undue.

25 And, in fact, this kind of strict

1 neutrality principle, if it had really been what
2 the Court in Hardison intended, would have made
3 it wholly unnecessary to engage in any analysis
4 of undue hardship. So I don't think that that's
5 a tenable way to read the decision.

6 JUSTICE JACKSON: But, General --

7 CHIEF JUSTICE ROBERTS: Well, but --

8 JUSTICE JACKSON: Oh.

9 CHIEF JUSTICE ROBERTS: No, go ahead.

10 JUSTICE JACKSON: General, how do you
11 respond to counsel on the other side's point
12 that we have undue hardship working in other
13 statutes and that there's a whole body of law
14 related to the significant-difficulty-and-
15 expense test? So, if we're going to be
16 revisiting Hardison anyway, even to clarify it
17 in the way that Justice Gorsuch suggests, what's
18 your response to his suggestion that we take
19 that test since it also has case law that has
20 developed?

21 GENERAL PRELOGAR: So let me respond
22 with some practical concerns about trying to
23 transplant ADA case law to this area, but then
24 I'd also like to take a shot at describing why I
25 think that would be legally flawed here.

1 Just on the practical point, it's not
2 possible to pick up and uproot the ADA case law
3 and -- and transplant it in full to this new
4 context, and the reason for that is because
5 there are signals in the ADA itself that
6 Congress had in mind very different potential
7 types of accommodations, things like having to
8 modify your existing facilities and undergo
9 costly renovations to make them accessible to
10 those with disabilities or -- or hire an entire
11 additional employee to function as a sign
12 language interpreter.

13 And I don't think it would be
14 reasonable, given the differences in the
15 statutory structure, to say, well, that's not
16 available in Title VII, but we're still going to
17 say that the ADA case law carries its full
18 meaning.

19 Instead, what you'd have to do is
20 start over, and you could use significant
21 difficulty and expense, but at that point, you
22 recognize that there's daylight between the
23 statutes and it's a content-less standard.
24 You're still going to have to engage in all of
25 the hard work of deriving meaning by applying

1 the standard to repeat fact patterns.

2 That's the work that's already been
3 done under Hardison in a way that we think is
4 very much protecting religious exercise in the
5 workplace, so I don't think it makes sense to
6 start over under the ADA's standard.

7 JUSTICE JACKSON: So you don't think
8 there's confusion that is deriving from having
9 different undue burden standards operating with
10 respect to different types of alleged
11 discrimination?

12 GENERAL PRELOGAR: No, not at all, and
13 I think it could actually boomerang into
14 additional confusion if courts tried to take the
15 ADA standard but recognized that there were
16 pieces of that that are wholly inapplicable and
17 can't transfer over.

18 And just on the legal piece, if I
19 could finish up on that, you know, I think
20 there's a real problem here when we're in the
21 context of statutory stare decisis, where the
22 Court had already authoritatively interpreted
23 Title VII, and Congress then came along after
24 and enacted the ADA and recognized that its
25 definition of "undue hardship" was a departure

1 from what the Court had done and how Title VII
2 operated. It would then be particularly
3 anomalous for the Court to say, we're going to
4 go ahead and port over the ADA definition even
5 though Congress has been repeatedly asked to do
6 so with bills introduced in every Congress
7 between 1994 and 2013, many to codify this
8 precise standard, and Congress did not enact
9 those bills.

10 JUSTICE KAGAN: And, General, can I
11 take you back to something that you said to
12 Justice Gorsuch and Justice Barrett? Because,
13 when you were agreeing that this is not a -- a
14 line about, you know, trivialities, but then I
15 think you said at some point, but it would not
16 be a good thing just to say, oh, well -- what,
17 you know, so now it's a substantial burden test
18 going forward, and -- and leave it at that.

19 And why is that?

20 GENERAL PRELOGAR: Right. Our concern
21 with that is, if the Court were to announce a
22 new standard, I think it would come with all the
23 costs of destabilizing this area of the law and
24 unsettling whether the Court means to overrule
25 Hardison on its facts, for example, or

1 potentially call into question all of the
2 established areas of law that have developed
3 that we think have drawn the right lines here.

4 And if I could, there are really only
5 three categories where religious accommodation
6 requests come up again and again, and I think it
7 might be helpful to the Court if I provide a
8 really quick summary of those three categories,
9 because I think it shows how the law has
10 developed in this area.

11 The first category is scheduling
12 changes. That can include things like Sabbath
13 observance, obviously, but also things like
14 midday prayer breaks or wanting to come in later
15 on a Sunday to permit church service.

16 And in that area, courts regularly are
17 requiring employers to provide flexible work
18 schedules if the work can be shifted to a
19 different time of day. So you take your midday
20 prayer break, but then you make it up on the
21 back end. That is what courts are doing today.

22 Also, you can facilitate voluntary
23 shift swaps. That is a common way to deal with
24 Sabbath observance. And if those fail, you can
25 consider lateral job transfer to a different

1 position where there's not the Sabbath conflict
2 for that accommodation.

3 In the second category, it's dress and
4 grooming policies, and there today, courts are
5 regularly granting accommodations and rejecting
6 undue hardship defenses. The narrow category of
7 cases where that's not happening is when there's
8 a -- a legitimate safety concern, like you work
9 in a steel mill and you can't modify the dress
10 code because wearing a skirt will interfere with
11 operating the machinery, for example.

12 The third category involves religious
13 expression in the workplace. This can include
14 displaying a religious symbol or potentially
15 needing an exemption from employer-sponsored
16 religious speech in a meeting.

17 There too, courts are regularly
18 granting accommodations, and it's only in the
19 circumstances, for example, where the religious
20 speech would amount to harassment of coworkers
21 or customers that the undue hardship defense is
22 credited.

23 JUSTICE GORSUCH: And, General, you
24 think all three of those categories under a
25 proper understanding of the law, whatever

1 standard verbal formulation one chooses, are
2 required by Title VII?

3 GENERAL PRELOGAR: Yes, we think that
4 accommodations in those categories are -- are
5 frequently granted in line with Title VII.
6 Undue hardship defenses are frequently denied in
7 line with Title VII. And what I'm asking the
8 Court to do is not disrupt and -- and unsettle
9 that area of the law.

10 JUSTICE GORSUCH: And I don't think
11 your friend on the other side wants to unsettle
12 those decisions either, right? So that's again
13 a little more common ground amongst us.

14 GENERAL PRELOGAR: So I worry that he
15 does, because he is asking this Court to adopt a
16 brand-new standard. He has a different account.

17 He says -- his claim is that Hardison
18 has been a disaster on the ground.

19 We do not think that that is reflected
20 in the actual case law, certainly not in the
21 Commission's experience in this area.

22 JUSTICE GORSUCH: But -- but in
23 those -- I'm sorry to interrupt, but in those
24 three buckets, I think there's common ground
25 that the law would require those kinds of

1 accommodations you just outlined.

2 GENERAL PRELOGAR: So I'm -- I'm not
3 so sure. For example, let's take the facts of
4 this case. Petitioner obviously thinks that he
5 was entitled to an accommodation even though --

6 JUSTICE GORSUCH: I -- I -- actually,
7 I don't want to take the facts of this case. I
8 want to take your three buckets. I liked them.

9 GENERAL PRELOGAR: Yeah.

10 JUSTICE GORSUCH: Okay? And I'm
11 looking for common ground here, and it seems to
12 me that is common ground, that -- that -- that a
13 proper understanding of Title VII requires
14 those, even if sometimes they're more than
15 de minimis. All of those things could be more
16 than de minimis, and yet both sides agree that
17 that's what Title VII should require.

18 GENERAL PRELOGAR: Yes, and if
19 Petitioner is happy with the EEOC's guidance and
20 with the case law in this area that summarizes
21 those three buckets, then that is absolutely
22 common ground.

23 JUSTICE GORSUCH: But those three --

24 JUSTICE KAGAN: Is -- is this case in
25 the -- in the first bucket? Are you saying that

1 this case is in the first bucket?

2 GENERAL PRELOGAR: Exactly, a
3 requested scheduling change. So Sabbath cases
4 fall in the first bucket, and in all honesty --

5 JUSTICE KAGAN: So you're not saying,
6 like, all cases in the first bucket require an
7 accommodation. You're saying some cases in the
8 first bucket require an accommodation.

9 GENERAL PRELOGAR: Yes, of course. I
10 was trying to give a sensible --

11 JUSTICE KAGAN: And -- and then
12 there's a big difference as to which cases
13 require an accommodation. So I'm happy that
14 we're all kumbaya-ing together.

15 (Laughter.)

16 GENERAL PRELOGAR: My arguments don't
17 always go that way.

18 (Laughter.)

19 JUSTICE KAVANAUGH: But you're --

20 JUSTICE GORSUCH: Let me ask you just
21 --

22 JUSTICE KAVANAUGH: -- in the first --
23 go ahead.

24 JUSTICE GORSUCH: I'm sorry. Just --
25 I just wanted to follow up with one quick thing,

1 and that is just I know there are a number of
2 states -- we have a brief from, I think, 17
3 states -- that have something like a substantial
4 cost or a substantial burden and undue expense
5 test as a matter of state law.

6 Are you aware -- this is a practical,
7 on-the-ground question that the government might
8 be -- has there been any problem in the
9 administration of those -- those state law
10 tests?

11 GENERAL PRELOGAR: So I think it's far
12 fewer than 17. The examples that have been
13 cited are New York and Cal- --

14 JUSTICE GORSUCH: No, I think we have
15 17 states.

16 GENERAL PRELOGAR: Yes, pointing to
17 those laws.

18 JUSTICE GORSUCH: Pointing to those
19 laws.

20 GENERAL PRELOGAR: But it's a small
21 number of states that have those laws. New York
22 and California are the examples my friend has
23 cited.

24 We looked at every reported decision
25 in those cases, and there are just really few

1 decisions. Many of the -- the cases tend to
2 apply and draw on the Title VII standards that
3 already exist. So it's not clear that actually
4 the -- the courts in those states, even though
5 there's different language, are applying a
6 radically different standard.

7 JUSTICE GORSUCH: Okay. Thank you.

8 JUSTICE KAVANAUGH: In the follow-up
9 on these questions, in the first bucket, my
10 understanding is you want the line to be
11 "regularly paying premium wages" would be an
12 undue hardship.

13 GENERAL PRELOGAR: Or regularly
14 operating shorthanded was the other thing the
15 Court considered in Hardison.

16 JUSTICE KAVANAUGH: Okay. On
17 regularly operating shorthanded, I just want to
18 make sure, a lot of times in your brief it just
19 says "operating shorthanded." A few other times
20 it says "regularly operating shorthanded."

21 It's "regularly operating
22 shorthanded"?

23 GENERAL PRELOGAR: Yes. I'm glad to
24 have the chance to clear that up. The EEOC has
25 drawn a distinction between temporary

1 accommodations, including temporary --
2 temporarily being shorthanded, or paying premium
3 wages, for example.

4 JUSTICE KAVANAUGH: And, of course,
5 applying that to a particular set of facts is
6 challenging, as Justice Alito's questions and
7 others have pointed out, but that's the line you
8 would draw in the first bucket?

9 GENERAL PRELOGAR: That's right. The
10 -- those are some of the lines. Now, of course,
11 there are other types of requests that can come
12 in, and so I don't want to speak, you know --

13 JUSTICE KAVANAUGH: Yes.

14 GENERAL PRELOGAR: -- kind of
15 categorically here because it's so
16 context-dependent, but I was trying to give a
17 sense of the accommodations that are regularly
18 offered day in and day out and rightly so.

19 JUSTICE KAVANAUGH: And then, on what
20 you want us to say is the standard, you haven't
21 mentioned Footnote 14 a lot, but is four --
22 Footnote 14 equivalent to de minimis -- more
23 than de minimis costs in your view? Is that
24 what Hardison was saying, or what?

25 GENERAL PRELOGAR: Yes. I think

1 Hardison was alternating between describing
2 these costs in various formulations. It used
3 more than de minimis in the portion of the
4 opinion that, of course, this Court has now
5 focused on, but it also used substantial costs
6 in that footnote.

7 JUSTICE KAVANAUGH: And the
8 footnotes -- I'll wait.

9 CHIEF JUSTICE ROBERTS: You just
10 agreed, I think, with Justice Kavanaugh that
11 regularly paying premium wages would not be --
12 it would be an undue burden, is that right?

13 GENERAL PRELOGAR: That was the
14 holding in Hardison, yes.

15 CHIEF JUSTICE ROBERTS: But your
16 discussion earlier, I forget which -- with which
17 colleague of mine, you couldn't really tell us
18 what premium wages were, so your agreement on
19 that being -- an undue burden is not very
20 helpful for me unless we have some idea about
21 where the agreement is. So give me a test for
22 deciding whether something is a premium wage.

23 GENERAL PRELOGAR: So I would look to
24 the facts of Hardison, which we think are the
25 best indication here and, of course, is entitled

1 to statutory stare decisis effect.

2 If I'm recalling the facts correctly
3 there, the evidence was that you would have to
4 pay time-and-a-half on an ongoing basis for the
5 duration, and the Court said that's an undue
6 hardship.

7 And I acknowledge maybe there could be
8 hard questions in this context-dependent
9 analysis in the future about whether a \$1
10 bump-up in salary should be considered premium.
11 And we're not trying to make a global argument
12 here, but because it's so fact-dependent and
13 context-dependent, but I think that the EEOC has
14 rightly relied on the facts of Hardison to give
15 a benchmark.

16 JUSTICE SOTOMAYOR: General, isn't it
17 --

18 CHIEF JUSTICE ROBERTS: Justice --
19 Justice Thomas?

20 JUSTICE THOMAS: General, could you
21 point me to the part of Hardison that
22 synchronizes its consideration of the regulation
23 with the new statute, the amended statute?

24 GENERAL PRELOGAR: Yes. I am flipping
25 through the opinion here because it's in one of

1 the footnotes, Justice Thomas.

2 JUSTICE THOMAS: Well, that's okay.
3 You can do it later.

4 GENERAL PRELOGAR: Okay. It's -- it's
5 -- in our brief, we cite the relevant portion of
6 Hardison where the Court made clear that it was
7 interpreting both versions of the statute to
8 have parallel meanings, and that was the exact
9 reason why the Court didn't have to resolve the
10 issue of retroactivity.

11 I think it might be Footnote 11, but
12 I'm sorry, I'm not finding it.

13 JUSTICE THOMAS: That's okay. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Well, your three
17 buckets are quite helpful, and I think the
18 argument has been productive in finding points
19 of agreement. I just wanted to follow up on a
20 few things.

21 In your second bucket, you have
22 grooming standards. So let me take you back to
23 a situation like the one in Abercrombie. You
24 have an employer who generally prohibits
25 employees from wearing anything on their heads,

1 but a Muslim woman says, I am required for
2 religious reasons to wear a scarf on my head.
3 And this links up with the issue of the reaction
4 of coworkers.

5 Suppose that the employer gets a -- a
6 fierce reaction from coworkers if it -- when it
7 says that it's inclined to provide an
8 accommodation for that Muslim woman.

9 What would you make of that situation?

10 GENERAL PRELOGAR: So I would point to
11 the EEOC guidance, which directly addresses this
12 point and makes clear that mere coworker
13 grumbling or resentment or even overt hostility
14 to religious practice and expression in the
15 workplace is not itself cognizable to factor
16 into the undue hardship inquiry.

17 Instead, coworker effects are relevant
18 only when the accommodation is creating concrete
19 burdens on the coworkers that's materially
20 changing their terms and conditions --

21 JUSTICE ALITO: Okay. Suppose that
22 then the employer has more difficulty --
23 employees quit and say this -- this employer
24 accommodates Muslims, and so we're quitting, and
25 it has more difficulty hiring people. What

1 about that?

2 GENERAL PRELOGAR: So that also cannot
3 factor into the undue hardship analysis because
4 it would be giving effect to religious hostility
5 and animus, and the guidance on this point is
6 clear also.

7 JUSTICE ALITO: Would the employer
8 have to inquire into the reasons why these
9 employees are quitting? So, if the employees
10 say, we're quitting because we just want to wear
11 hats because it's fashionable, okay, you
12 couldn't take that into account, but they say,
13 we're quitting because we don't want to
14 accommodate Muslims, then that would not be
15 permissible?

16 GENERAL PRELOGAR: Actually, neither
17 of those should be taken into account. When the
18 -- the nature of the coworkers' dissatisfaction
19 is just the mere fact that an accommodation is
20 being provided on religious grounds, the
21 guidelines make clear that that's not a
22 cognizable form of hardship, and, instead, it's
23 only when the coworkers express this
24 dissatisfaction because they are actually being
25 asked to take on additional work or have more

1 undesirable shifts, for example, that that would
2 be relevant to undue hardship.

3 JUSTICE ALITO: Another question.
4 What in your view is the relevance of the fact
5 that a requested accommodation would be
6 inconsistent with a provision of a collective
7 bargaining agreement or a memorandum of
8 understanding that doesn't have anything to do
9 with seniority?

10 GENERAL PRELOGAR: So we think that
11 Hardison clearly held in the first holding that
12 I didn't previously understand Petitioner to be
13 challenging, but -- but maybe now at argument he
14 is, that it held that when there are terms of a
15 collective bargaining agreement that fix
16 employees' rights vis-à-vis one another,
17 including by assigning undesirable work through
18 a neutral system, whether that's seniority or
19 rotation or lottery, that it would be an undue
20 hardship to strip employees of their rights
21 under that kind of collective bargaining term.

22 JUSTICE ALITO: But Hardison did
23 actually say, "We agree that neither a
24 collective bargaining contract nor a seniority
25 system may be employed to violate the statute,"

1 right? And it could -- it's hard to see how it
2 could say -- put aside the question of
3 seniority, which is treated separately under
4 Title VII. It's hard to see how it could say
5 otherwise with respect to a collective
6 bargaining agreement or a memorandum of
7 understanding, right?

8 GENERAL PRELOGAR: Yes, of course.
9 And so it's not as though you could adopt an
10 overtly discriminatory term or even one that's
11 motivated by discriminatory animus and immunize
12 that from scrutiny in a collective bargaining
13 agreement. And -- and I think that Hardison
14 recognized that point in the sentence you --

15 JUSTICE ALITO: All right. Suppose
16 that a collective bargaining agreement or a
17 memorandum of understanding says the employer
18 will never grant a religious accommodation if it
19 requires anything more than a de minimis effect
20 on the employer.

21 GENERAL PRELOGAR: So I think --

22 JUSTICE ALITO: What about that?

23 GENERAL PRELOGAR: I would draw a
24 distinction, and I think this is supported by
25 Hardison, between terms in collective bargaining

1 agreements that are fixing the employees' rights
2 as it relates to one another, things like
3 allocating the scarce resource of weekends off,
4 on the one hand, and other terms that aren't
5 granting employees any rights and, therefore,
6 you wouldn't be taking their rights away but
7 rather are just the employer codifying certain
8 rules.

9 I don't understand Hardison to reach
10 your hypothetical or to reach that latter
11 category. Instead, the rationale of the Court
12 was that when you have a term of a collective
13 bargaining agreement that is essential to
14 maintaining labor peace, like figuring out which
15 employees are going to have to pick up these
16 undesirable shifts, they can legitimately rely
17 on the terms of that agreement and not have
18 their rights taken away.

19 JUSTICE ALITO: I -- I -- I'm not sure
20 I really understand that. So if -- this
21 provision, which requires strict neutrality and,
22 therefore, adopts the de minimis test, for all
23 it's worth, "de minimis" means "de minimis,"
24 that affects both the employers -- employees who
25 might want a religious accommodation and those

1 who don't want one and might want a comparable
2 accommodation for a secular reason.

3 GENERAL PRELOGAR: Well, I think that,
4 you know, to fit within Hardison's first
5 holding, it would be necessary for the term of
6 the bargaining agreement to vest certain
7 employees with particular rights. That's the
8 contractual right not to have to work those
9 shifts, for example. And if I'm understanding
10 your hypothetical, the provision in the
11 bargaining agreement would just be protecting
12 the employer. It wouldn't be giving the
13 employees themselves any kind of rights.

14 JUSTICE ALITO: All right. Suppose it
15 does give -- it says secular employees shall
16 have the same accommodation rights as those
17 employees -- employees who may request an
18 accommodation for a secular reason have exactly
19 the same rights as an employee who requests an
20 accommodation for a religious reason.

21 GENERAL PRELOGAR: So, at that point,
22 I think, if you're accommodating the religious
23 reason, it would just create a parallel or
24 matching right that the person who wants the
25 exemption from the dress code to wear the hat

1 can do so. You wouldn't be taking away the
2 right from the religious person.

3 JUSTICE ALITO: On the facts of this
4 case -- in your first bucket, you say voluntary
5 shifts are fine, okay. And if there are people
6 who will voluntarily shift out of the goodness
7 of their hearts, okay, great. What if there's
8 nobody who will do it for that reason, but they
9 will do it if they get a little bit more money?

10 So, on the facts of this case, do we
11 have any idea how much more it would have cost
12 the Postal Service, which is a huge employer, if
13 not a profitable one, a profit-making one, to
14 induce enough people to agree to cover -- to
15 cover the shifts? Do we know? Is it
16 irrelevant?

17 GENERAL PRELOGAR: So there wasn't
18 record evidence developed on this point, and
19 that wasn't an argument that Petitioner pressed
20 as far as I'm aware below about the payment of
21 overtime to try to incentivize additional
22 employees to volunteer.

23 But there was a -- a lot of record
24 evidence about all of the effort the post office
25 put in to try to arrange those voluntary shifts.

1 The postmaster, each and every Sunday that
2 Petitioner was scheduled, was calling around to
3 the other regional post offices trying to find
4 volunteers. And I acknowledge that it didn't
5 work each and every Sunday. That's why
6 Petitioner had the conflict. But the lower
7 courts correctly credited the good faith of the
8 Postal Service in trying to put into effect an
9 accommodation there.

10 JUSTICE ALITO: But doesn't this most
11 of the time come down to dollar and cent --
12 dollars and cents? So, if you're -- if the
13 employer is going to pay people to take a shift,
14 then the shift can be covered and everybody will
15 be happy. The employee who wants a religious
16 accommodation gets a religious accommodation,
17 and the other employees who cover the shift,
18 they get more money, and so they're happy.

19 So doesn't it come down to dollars and
20 cents and -- and don't we have to deal with the
21 issue of dollars and cents? Isn't that what
22 this mostly will come down to?

23 GENERAL PRELOGAR: Well there -- first
24 of all, there is certainly nothing that would
25 prohibit an employer from choosing to pay extra

1 to try to induce others to work those shifts and
2 cover them. So that's one available alternative
3 out there for certain employers that can afford
4 it and think that that would be a way to address
5 this issue.

6 But I guess the question then becomes,
7 what about the employers for whom that is going
8 to be a struggle or who don't think that that is
9 appropriate when they've hired someone
10 specifically to work and be available on
11 Sundays? Should the statute impose on them the
12 regular requirement in perpetuity for the length
13 of the employment to pay those extra wages?
14 Hardison said no, and I think that's entitled to
15 statutory stare decisis effect.

16 JUSTICE ALITO: Okay. I take that to
17 mean that if it would -- if it would be a
18 struggle, then the employer can't be required to
19 pay extra. But, if it wouldn't be a struggle,
20 then maybe the employer may be required to pay
21 extra, right?

22 GENERAL PRELOGAR: No. So --

23 JUSTICE ALITO: Is that what you just
24 said?

25 GENERAL PRELOGAR: No, and I'm sorry

1 if I was unclear on this point. We think that
2 this hypothetical fits squarely within
3 Hardison's first holding -- I'm sorry -- its --
4 its first holding about the -- the regular
5 payment of premium wages, having to pay
6 time-and-a-half on a regular basis in order to
7 fill that slot.

8 And the basic insight behind that, I
9 think, is that you have hired somebody to do a
10 specific job, and the nature of the conflict, if
11 you can't fix it with all of these other
12 solutions that I've -- I've offered in bucket
13 one, would then effectively mean the person
14 can't do a portion of the job they were hired to
15 perform, and it would transfer to the employer
16 the responsibility to pay a lot extra in order
17 to get that filled.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: What's clear to me
22 after all this discussion is that as much as
23 we -- some people might want to provide absolute
24 clarity, there is none we can give, is there?

25 GENERAL PRELOGAR: That's --

1 JUSTICE SOTOMAYOR: Because it's all
2 contextual.

3 GENERAL PRELOGAR: Yes.

4 JUSTICE SOTOMAYOR: And to that end,
5 there are going to be some cases where people
6 are going to be unhappy with the Court's result
7 and others where they are happy. The best we
8 can do is do what Congress told us to do, just
9 to say that undue hardship excuses an employer
10 from doing that, correct?

11 GENERAL PRELOGAR: Exactly. I think
12 you've put your finger --

13 JUSTICE SOTOMAYOR: Now --

14 GENERAL PRELOGAR: -- on it, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: And, regrettably,
17 yes, the post office hasn't run for a profit --
18 has not worked for a profit in many, many years.
19 There's even questions of closing it down. And
20 even that dollar extra could close it down.

21 And one could argue that paying a
22 premium wage by Amazon makes no difference.
23 But, at a certain point, we affect the
24 corporation's bottom line, and that's not our
25 choice to decide whether we want to do that,

1 because the economy needs to run on incentives
2 to make money, isn't -- doesn't it?

3 GENERAL PRELOGAR: Yes.

4 JUSTICE SOTOMAYOR: And so, you're
5 right, what Hardison said was there are certain
6 broad categories affecting someone's seniority
7 rights, affecting a premium -- regular premium
8 wage or regular short-handedness is going to
9 affect morale no matter how you look at it.
10 Anyone who's work -- seen delivery people work
11 during the holidays, if you pay any attention,
12 most of them are exhausted at the end of their
13 day. It costs to run extra hours, and it costs
14 to do more work, and that cost can't be
15 quantified always in money.

16 So, if we take the Hardison rules or
17 holdings, that's enough, isn't it?

18 GENERAL PRELOGAR: Yes, and you don't
19 have to speculate about how that applies on the
20 facts of this case because, here, the record
21 evidence showed that during the peak season,
22 when Petitioner was unavailable, it was one
23 other carrier who had to go out each and every
24 Sunday over the holidays to deliver the mail,
25 and when he was unavailable, it was the

1 postmaster himself who had to do it on three
2 occasions, and that led to real-world costs on
3 the other employees.

4 There was similar evidence in the
5 Lancaster hub. My friend suggested it was just
6 a de minimis burden there transferring as
7 between 40 and 39 employees. But the record
8 demonstrates that given the nature of the work
9 and the number of RCAs who had to be on duty,
10 they were working at least every other weekend,
11 and the testimony showed it was often two out of
12 three weekends.

13 And so, once you start taking away
14 their weekend off, that led to the unrest and
15 the disruption of the workflow that we saw here.
16 And when Petitioner was absent, they had to stay
17 on their routes longer and later, going out
18 after dark for routes that were unfamiliar to
19 get those packages delivered.

20 That counts as real-world impact and
21 undue hardship under any reasonable standard.

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: General, the EEOC
25 guidance is -- is -- it gives relatively clear

1 guidance as to this question of premium wages or
2 the opposite, does not give much guidance, at
3 least the portions that I've read, about how it
4 is that one is supposed to think about the
5 burdens on co-employees.

6 So could you tell me, like, what the
7 EEOC has done in this area, how it thinks about
8 this, and how that is different from
9 Petitioner's?

10 GENERAL PRELOGAR: Yes. So the first
11 line that the E -- EEOC has drawn is to
12 distinguish between the types of impacts on
13 coworkers that are relevant, and this goes back
14 to my responses to Justice Alito.

15 Mere coworker grumbling or resentment
16 that someone else is getting an exemption from a
17 neutral policy is not sufficient and cannot
18 factor into the analysis of undue hardship.
19 That's equally true for actual actions like
20 quitting or transferring if it's motivated by
21 just being unhappy that there's a religious
22 accommodation requirement out there or by actual
23 religious animus. So you take those impacts off
24 the table.

25 And then what the EEOC guidance

1 teaches is that this -- this, like everything
2 else, falls on a continuum, and so I can't give
3 you categorical bright lines of exactly the
4 point at which coworker impacts are going to
5 suffice to show undue hardship, but it's clearly
6 the case that it's going to be relevant how many
7 workers there are, how diffuse the burdens can
8 be spread, what are the actual -- what the
9 concrete evidence shows about how the other
10 coworkers are materially having their workplace
11 changed, and the way that that affects the
12 conduct of the business, whether you see things
13 like the disruption of the workflow and the
14 workspace here, as the lower courts credited.

15 So there -- as I have said many times,
16 and I realize I'm a broken record on this,
17 there's a lot of case law out there.

18 JUSTICE KAGAN: But, in this context
19 where we're talking about burdens on
20 co-employees, meaning that they'll have to work
21 more or they'll have to work different hours
22 than they otherwise would have, you know, what
23 is the difference between your view and Mr.
24 Streett's view on that?

25 GENERAL PRELOGAR: So I think I

1 understand him to say that that is -- perhaps he
2 would say it would rarely rise to the level,
3 although he holds open the possibility that you
4 could take that into account in -- in maybe
5 extreme cases.

6 You know, I don't know that he staked
7 out a clear position on exactly when those
8 impacts count other than to agree with us that,
9 of course, it's context-dependent.

10 And so I want to be clear that we're
11 not suggesting that anytime a coworker has to
12 pick up one extra shift in a blue moon that
13 that's going to show undue hardship.

14 It doesn't work that way. It's not a
15 categorical rule. But, as the burdens on
16 coworkers increase, as you have an identified
17 small pool of carriers in this little rural post
18 office, it's not surprising to see that the
19 burdens actually manifest into things like
20 quitting and transferring and filing grievances.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 JUSTICE GORSUCH: Just I hope a quick
25 question about premium wages. This case, of

1 course, involves the post office trying to serve
2 Amazon's needs on Sunday, and I understand the
3 post office's financial plight.

4 But what if -- what if the facts are
5 that an employer has to pay a premium wage to
6 get anybody to work on Saturday or Sunday, and
7 you do have a religious employee who wants to
8 take either Saturday or Sunday off because of
9 their sincerely held religious beliefs so that,
10 yes, the employer is always going to have to pay
11 a premium wage, but it's going to have to pay a
12 premium wage for Saturday and Sunday work no
13 matter what, because it's just hard to get
14 anybody to work those days because some people
15 want to go to church and others want to go to
16 their kids' soccer games.

17 Would that be proof enough for the
18 employer to escape undue burden under your --
19 under your test?

20 GENERAL PRELOGAR: No, not at all. If
21 the employer is paying the same amount
22 regardless, just because weekend days require
23 the payment of premium wages --

24 JUSTICE GORSUCH: Yeah.

25 GENERAL PRELOGAR: -- and if the

1 employer is able to secure someone else to fill
2 in for that portion of the work, then I don't
3 think the employer would have a valid undue
4 hardship defense.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Sorry. I have
9 several questions.

10 First of all, on substantial costs,
11 that was in Footnote 14, that's, I think,
12 responding to the dissent's concern in Hardison
13 and saying substantial costs.

14 Do you agree that that's the same as
15 more than de minimis costs for purposes of
16 Hardison?

17 GENERAL PRELOGAR: Yes, I think the
18 Court was using those terms interchangeably.

19 JUSTICE KAVANAUGH: Okay. And then
20 how exactly do we say that without destabilizing
21 the law is the concern you've raised. I guess
22 your answer to that is we need to say more about
23 the first bucket, regularly operating
24 shorthanded and regularly paying premium costs.

25 Is that how we solve the

1 destabilization concern from saying substantial
2 costs is the -- always been the test?

3 GENERAL PRELOGAR: So I think the way
4 to preserve stability in the law in this area
5 while also cleaning up at the margins any
6 confusion that's been produced by the de minimis
7 test, for the Court to say that Hardison is an
8 interpretation of undue hardship that is
9 inherently a -- a qualitative context-based
10 standard, and so the use of the language the
11 Court had there, which alternated between
12 substantial and more than de minimis, can only
13 actually take its greater meaning from looking
14 at the facts of that case.

15 The EEOC and the lower courts from
16 1980 onwards for more than 40 years have
17 properly applied Hardison in light of its facts.

18 And to Justice Gorsuch's point, to the
19 extent any courts out there are reading this
20 literally to mean de minimis means you never
21 have to accommodate, that is wrong, that is
22 inconsistent with the current state of the law,
23 and the Court makes clear that's not what
24 Hardison meant.

25 And then I think, you know, to fill in

1 the details, Justice Kavanaugh, I don't think
2 there's a way for this Court to try to top-down
3 do that with the limits of language that exist
4 in this context's space.

5 Instead, I think the way to preserve
6 stability is to make clear that you don't need
7 to redo all of the work that's been done for
8 five decades under the Hardison standard as
9 properly understood.

10 JUSTICE KAVANAUGH: Do you understand
11 "undue hardship" -- I understand that term in
12 the original statute to reflect a balance
13 between two important values: one, religious
14 liberty and the other the rights of American
15 businesses to thrive, and to thrive, you have to
16 be able to make money.

17 Is that how you understand "undue
18 hardship"?

19 GENERAL PRELOGAR: I certainly
20 understand it to recognize that there are
21 interests on both sides of the balance, but we
22 don't think that the standard requires trying to
23 measure the interests of the employer, for
24 example, as against the significance of the
25 employee's religious practice.

1 The concern with that is that it's
2 just incommensurable interests and there's no
3 real way for courts to conduct that balance.
4 And so I think the right way to think about it
5 is Congress struck the balance, it recognized
6 that it is important to protect religious
7 practice and liberty in the workplace, it
8 created this duty to accommodate, but up to the
9 line of undue hardship, and then to figure out
10 what's undue, you look only at the employer side
11 of things to figure out when the costs become
12 inappropriate or unwarranted.

13 JUSTICE KAVANAUGH: Two more. The
14 MOU -- the MOU, how does it apply in this case?
15 What's -- does it control this case?

16 GENERAL PRELOGAR: We think that it
17 absolutely controls this case. The district
18 court squarely held and there is no way to get
19 around the district court's factual findings
20 about the -- the -- or its understanding of the
21 meaning of the MOU in this case, because I think
22 that it's evident from its plain terms that the
23 MOU created the strict rotation system for
24 Amazon's Sunday delivery. It was carefully
25 negotiated with the bargaining unit of the

1 postal carriers because these were undesirable
2 shifts. And it sets out three exceptions, none
3 of which apply here.

4 My friend says maybe those aren't
5 exclusive. But the whole point in having
6 this -- this carefully delineated scheme is to
7 create these rights of employees so that they
8 can rely on it for purposes of knowing when they
9 have to work on Sunday.

10 JUSTICE KAVANAUGH: Last one. The
11 three buckets were helpful. I just want to
12 confirm, the second and third buckets, which
13 were dress and grooming and religious symbols
14 and the like, you were pretty clear there -- I
15 just want to double-check -- that offense by
16 coworkers is not a basis there for preventing
17 the employee from wearing certain symbols or
18 certain kinds of dress.

19 GENERAL PRELOGAR: So -- so that's --

20 JUSTICE KAVANAUGH: Maybe that's too
21 absolute.

22 GENERAL PRELOGAR: -- right in the
23 main -- right, that's a little too absolute --

24 JUSTICE KAVANAUGH: Yeah.

25 GENERAL PRELOGAR: -- because there

1 are situations --

2 JUSTICE KAVANAUGH: In the main.

3 GENERAL PRELOGAR: -- for example,
4 where you're the front doorman, and if you want
5 to put up a symbol, it could be attributed to
6 your employer, so if there's confusion about --

7 JUSTICE KAVANAUGH: I got it.

8 GENERAL PRELOGAR: -- whose speech it
9 is, that might be an exception, so I don't want
10 to speak too categorically.

11 I just wanted to emphasize that to the
12 extent Petitioner is painting a picture here
13 that you just can never do any of this and none
14 of it's accommodated, that is wrong.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: So you've said a
19 number of times and it seems clear that this is
20 a contextual inquiry. But it seems to me that
21 there's one bright line that you are asking for
22 that you're pulling out of Hardison, and that's
23 money.

24 And -- and I understand your answers
25 to some of the questions, especially to Justice

1 Alito, to be anything more than you would
2 otherwise pay, even if it's \$1 an hour, to the
3 Amazon person, under Hardison, it's your
4 understanding that that's a premium wage because
5 it's more than they would otherwise receive.

6 GENERAL PRELOGAR: So I appreciate the
7 chance to clarify. I don't think I would draw
8 the line quite that bright, but I do understand
9 Hardison to have suggested that that is an
10 inappropriate and unwarranted type of
11 accommodation. And I think it's not just
12 because of the cost. In fact, you can imagine
13 scenarios like the one Justice Alito posited
14 where maybe the costs don't seem that
15 significant.

16 Instead, I think it really goes to
17 what I was trying to say earlier, that it's
18 about the nature of the accommodation. You're
19 just excusing someone from doing part of their
20 job, and you're transferring to the employer the
21 ongoing requirement to have to fill that spot
22 and pay more to do so in getting a replacement
23 worker in there.

24 JUSTICE BARRETT: Well, I guess I
25 don't see why it's ongoing. I mean, a

1 contextual inquiry would say we might treat the
2 rural grocery store differently than we would
3 treat Amazon, or -- or maybe our, you know,
4 financially floundering post office gets treated
5 differently than Amazon. But circumstances can
6 change. The contexts can change. And why can't
7 the employer come back and say, well, I've been
8 accommodating you by paying someone else a
9 dollar extra an hour or time-and-a-half or
10 whatever it is, but things have changed and I
11 can no longer offer you that accommodation? Why
12 isn't that -- why does it have to be in
13 perpetuity?

14 GENERAL PRELOGAR: So I certainly
15 think, if there were evidence to suggest that
16 this is just going to be a temporary problem,
17 you know, you have new people who are starting
18 two months down the road and you can see that at
19 that point you're going to be able to get
20 voluntary shift swaps or something like that, of
21 course, that can be taken into account.

22 And so I don't mean to suggest that
23 those types of contextual considerations are off
24 limits. It's just that to the extent that it's
25 a request for an accommodation in perpetuity

1 that requires payment of overtime wages, I think
2 Hardison was trying to shut the door on that.

3 JUSTICE BARRETT: Well, I guess my --
4 my question, my follow-up question to that
5 response would be, so you're saying that
6 requiring the employer and saying that the law
7 requires the employer to pay if it's temporary
8 because it's going to be for two months only,
9 that that might not be, you know, an undue
10 hardship; however, if the employer says, yes,
11 I'm going to make this reasonable -- this
12 accommodation is reasonable, it's not an undue
13 hardship for now, but six months from now
14 there's an unanticipated change of circumstances
15 -- I guess what I'm saying is it seems to me
16 like it would always be implicit that I will
17 offer you this accommodation so long as it's not
18 an undue hardship, but how can anyone anticipate
19 that maybe in six months' time suddenly they
20 would be short-staffed and shorthanded?

21 So I -- I -- I guess your argument has
22 a lot more force if you assume that it
23 necessarily would be in perpetuity, as opposed
24 to something that could be revised if
25 circumstances changed.

1 GENERAL PRELOGAR: Well, certainly, in
2 your hypothetical, I think that the employee
3 would get the accommodation because it's not an
4 undue hardship at time one, and then the --

5 JUSTICE BARRETT: Even if it's
6 time-and-a-half?

7 GENERAL PRELOGAR: Oh, so I understood
8 you to be saying that the employer -- if the
9 employer is choosing voluntarily --

10 JUSTICE BARRETT: No, no, no, no.

11 GENERAL PRELOGAR: -- to supply the
12 accommodation.

13 JUSTICE BARRETT: No, no, no, no.
14 Well, I'm saying even if -- even if it winds up
15 being court-ordered, you're -- because you're
16 saying that the Court could never say that
17 that's what was required because any premium
18 wage, and a premium wage is any money more, \$5
19 more, \$5 a week, you're paying more than you
20 might otherwise pay? So it's -- I understand
21 you to be saying it's a bright line if there's
22 not an end date on it that's pretty short. Am I
23 misunderstanding?

24 GENERAL PRELOGAR: So that's, I
25 think -- so I think the reading of Hardison is

1 that the regular payment of time-and-a-half --
2 that was the premium wage at issue there -- the
3 Court determined was an undue hardship. And --

4 JUSTICE BARRETT: But, in -- in
5 Footnote -- Justice Kavanaugh was talking about
6 Footnote 14. In Footnote 15, the Court also
7 says that the argument that that money was --
8 "the dissent's argument that that money wasn't a
9 problem also fails to take account of the
10 likelihood that a company as large as TWA may
11 have many employees whose religious observances
12 require that accommodation." So it wasn't about
13 just the one. It was about the possibility that
14 there would be many.

15 And -- and maybe there would be; maybe
16 there wouldn't be. I mean, it was different for
17 the post office to try to accommodate his
18 Sabbath request in this rural office than it
19 might be in, you know, New York City. So I -- I
20 guess I'm just wondering why we have to make the
21 line as bright as you're asking us to make it.
22 That seems contextual.

23 GENERAL PRELOGAR: So I certainly
24 agree that one of the relevant contextual
25 considerations is how many employees need the

1 accommodation based on, you know, not just
2 speculation but -- but concrete evidence. And
3 that is reflected in the EEOC's guidance.

4 I interpret that part of Hardison to
5 say -- that comes after the Court had already
6 said that on these facts Hardison was demanding
7 something that would cost substantial costs
8 associated with the regular payment of overtime
9 or stripping other employees of their -- of
10 their contractually bargained-for seniority
11 rights. And so this point about other employees
12 was just an -- an additional fortifying
13 consideration that it would be undue for TWA
14 given the prospect that other employees would
15 likewise need the accommodation.

16 JUSTICE BARRETT: Okay.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: So it sounds to me
20 similar to what Justice Sotomayor said, that
21 whether any kind of accommodation is going to be
22 required under any set of circumstances, you
23 know, the answer is it depends. Is -- is that
24 right? I mean, it's all context-specific. And
25 so can you just answer, your responses to all of

1 the various hypotheticals that we've asked you
2 about, are they coming from your understanding
3 of how Hardison has been applied by the EEOC and
4 the courts? It's not just you standing there
5 saying this is what I think about a particular
6 scenario, right?

7 GENERAL PRELOGAR: Yes, absolutely. I
8 am replying -- relying heavily on and drawing
9 from the EEOC's guidance and its lived
10 experience with implementing Hardison for the
11 past 50 years, as well as the -- the body of
12 case law that's reflected in the EEOC guidance
13 that I keep pointing to.

14 JUSTICE JACKSON: So we may find, if
15 we were to delve into that body of case law, the
16 answers to some of these questions or at least
17 what the EEOC thinks about how this should be
18 applied, and your concern is destabilizing that
19 set of -- of determinations?

20 GENERAL PRELOGAR: Exactly. And it --
21 and it gets to the colloquies we've been having
22 about the limits of language in trying to
23 articulate a standard in this context. No
24 matter what, as your question touched on,
25 Justice Jackson, this is context-dependent, and

1 it is going to require an assessment of that
2 individual employer's facts and circumstances.
3 And I think that that hard work of filling in
4 the details has largely been done and that the
5 Court should not take steps to unsettle it now.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Streett?

10 REBUTTAL ARGUMENT OF AARON STREETT

11 ON BEHALF OF THE PETITIONER

12 MR. STREETT: This Court should not
13 apply the strong medicine of statutory
14 stare decisis where it's, at best, unclear that
15 the Court had before it in Hardison the current
16 version of the statute, and it certainly should
17 not apply those doctrines when the government is
18 not even defending the test by its terms or
19 defending the neutrality rationale of Hardison.

20 So the question before the Court is
21 then, which new test is going to be applied? I
22 wish I could agree with the government's rosy
23 view of how lower courts have applied Hardison.
24 A lot of that view seems to be coming from the
25 EEOC, but it's quite notable that the EEOC has

1 not joined this brief, as it has in many other
2 civil rights cases.

3 This Court should reject the
4 government's watered-down test for undue
5 hardship. It will provide inadequate protection
6 for religious liberty in the workplace, and it
7 will even gut Sabbath accommodations, the very
8 accommodation that was at the center of the 1972
9 amendment.

10 And the reason is because that test is
11 still inextricably tied to Hardison's
12 "de minimis" language and to Hardison's
13 holdings. My friend has repeatedly defending
14 those holdings -- defended those holdings as
15 written. Therefore, they're defending at least
16 three propositions: weekly overtime for a
17 single employee -- employee to substitute for a
18 Sabbath observer is an undue hardship. That's
19 the holding of Hardison, even in the context of
20 Trans World Airlines. That does not line up
21 with any statutory meaning of undue hardship.

22 Denial of any coworker's shift
23 preference is an undue hardship under the
24 government's position because that would require
25 compelling somebody to work when they don't want

1 to.

2 And maybe the most striking is that my
3 friend says that any alteration of a CBA is
4 going to be a per se undue hardship. So that
5 means, as -- as Justice Alito elicited, if the
6 employer and the union simply frame their CBA as
7 being a rotation system, there will be no
8 accommodation for Sabbath observers to be able
9 to take their day of rest.

10 My friend refers to the destabilizing
11 of case law, but she admits that the case law
12 has already gone off the rails. At least in
13 many courts are -- are not protecting religious
14 liberty because they're taking the de minimis
15 test by its terms.

16 So we're just left with which new test
17 is going to be applied. And we think the right
18 answer is to go to the plain meaning text of the
19 statute.

20 I have not heard a single word about
21 the text of undue hardship. I have not heard
22 any textual analysis from the government. I've
23 heard a lot about buckets. I've heard a lot
24 about different scenarios and holdings of
25 Hardison. But that cannot be defended as a

1 matter of the text.

2 In the United States today, employers
3 are already applying a web of accommodations
4 under a variety of statutes: the Americans with
5 Disabilities Act, the Pregnant Workers Fairness
6 Act, USERRA. These employers know how to apply
7 the significant-difficulty-and-expense standard,
8 and it will not be a problem for them to apply
9 that to religious employees, including as to
10 morale issues.

11 And the government today has not given
12 us any reason why religious employees should
13 have less accommodation than all of those other
14 individuals protected under the other statutes
15 that share the same reasonable accommodation and
16 undue hardship framework.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:56 a.m., the case
20 was submitted.)

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Official

\$	A			
\$1 [2] 87:9 112:2	a.m [3] 1:15 3:2 122:19	30:15	1	another [12] 13:4 14:6 18:5
\$15-an-hour [1] 58:16	AARON [5] 1:18 2:3,9 3:8	across [1] 63:19	agrees [2] 62:4 71:16	26:19 48:11 52:18,18 54:2
\$16-an-hour [1] 58:15	119:10	Act [6] 9:5 15:5 43:3 49:17	ahead [6] 8:7 15:17 21:21	67:14 91:3,16 93:2
\$200 [1] 32:13	abandoned [1] 41:9	122:5,6	74:9 77:4 82:23	Ansonia [1] 54:16
\$5 [2] 115:18,19	Abercrombie [8] 4:4 18:	acting [1] 48:15	Airlines [1] 120:20	answer [12] 8:17 18:19 24:
1	20,22 19:5,6,16 20:19 88:	actions [1] 102:19	Alexander [1] 15:7	8 27:16 34:4 59:9,20 60:9
1 [3] 8:15,19 16:8	23	acts [1] 15:5	ALITO [35] 19:24 30:9,10	106:22 117:23,25 121:18
10:08 [2] 1:15 3:2	abide [1] 16:11	actual [6] 17:25 41:5 80:20	31:3,20 49:16 56:16 58:4,	answered [2] 8:19 49:20
11 [1] 88:11	ability [1] 68:16	102:19,22 103:8	6 59:9,14,20 60:3,5,8,20	answering [1] 28:18
11:56 [1] 122:19	able [9] 35:8 41:2 42:2,4,22	actually [19] 5:12,18 12:22	88:15,16 89:21 90:7 91:3,	answers [2] 111:24 118:16
119 [1] 2:10	106:1 108:16 113:19 121:	43:23 44:18,22 52:16 54:9	22 92:15,22 93:19 94:14	anticipate [1] 114:18
12 [1] 34:23	8	57:9 58:7 61:14 76:13 81:	95:3 96:10 97:16,23 98:18	anticipating [2] 63:8 64:4
14 [10] 23:23 24:4 27:23 28:	above [2] 60:10 67:22	6 84:3 90:16,24 91:23 104:	102:14 112:1,13 121:5	anybody [3] 65:6 105:6,14
8 56:10,10 85:21,22 106:	above-entitled [1] 1:13	19 107:13	Alito's [1] 85:6	anytime [1] 104:11
11 116:6	absences [1] 52:12	ADA [28] 4:15 5:4 7:3,8,13,	all-time [1] 44:20	anyway [1] 74:16
144 [1] 12:19	absent [3] 3:13 13:5 101:	16,22 8:8 9:4,16,20 28:17,	alleged [1] 76:10	apparatus [2] 22:24,25
15 [5] 34:7,11,13,23 116:6	16	17 36:4 40:16,23,24 41:15	allegedly [1] 27:2	apparently [1] 49:6
16-hour [1] 58:15	absolute [3] 98:23 110:21,	43:2 44:7 55:6 74:23 75:2,	allocate [1] 52:11	appeals [4] 29:6 69:5 71:
17 [4] 30:2 83:2,12,15	23	5,17 76:15,24 77:4	allocating [1] 93:3	14,17
18 [1] 1:11	absolutely [6] 18:19 48:20	ADA's [1] 76:6	allow [1] 31:17	appeals' [2] 53:4 71:11
1972 [10] 49:20 53:9,12,15,	67:23 81:21 109:17 118:7	add [1] 65:24	allowed [2] 7:13,14	appear [4] 10:4 22:18,19
18,24 54:4,14,21 120:8	abstract [2] 64:9,13	additional [8] 23:25 24:5,7	allows [2] 4:6 61:5	73:18
1980 [2] 56:3 107:16	accept [1] 43:1	75:11 76:14 90:25 95:21	almost [1] 50:18	APPEARANCES [1] 1:17
1994 [2] 14:2 77:7	access [1] 43:1	117:12	already [10] 5:1 28:14 47:5	Appendix [1] 29:23
2	accessible [1] 75:9	address [4] 8:13 9:10 50:3	64:1 76:2,22 84:3 117:5	application [2] 46:20 55:
2 [1] 8:17	accommodate [8] 7:24 26:	97:4	121:12 122:3	21
2013 [2] 14:2 77:7	6 31:14 35:5 90:14 107:21	addressed [1] 10:19	alteration [1] 121:3	applied [17] 3:24 8:11 11:
2023 [1] 1:11	109:8 116:17	addresses [1] 89:11	alternated [2] 56:9 107:11	17 24:12 47:4,11,12 50:19
22-174 [1] 3:4	accommodated [1] 111:	addressing [1] 8:15	alternating [1] 86:1	51:14 53:12,16 107:17
266 [1] 29:23	14	adduce [1] 27:11	alternative [1] 97:2	118:3,18 119:21,23 121:17
268 [1] 29:23	accommodates [1] 89:24	adjust [1] 19:22	Although [4] 20:7 33:20	applies [4] 11:19 36:4 54:9
3	accommodating [5] 29:	administration [1] 83:9	61:18 104:3	100:19
3 [1] 2:4	24 30:2 34:24 94:22 113:8	admits [1] 121:11	Amazon [10] 42:2 58:15 59:	apply [15] 5:1 7:25 9:6 24:
316 [1] 30:2	accommodation [62] 4:23	adopt [6] 14:7 21:13 28:6	4,6,11 60:1 99:22 112:3	21 27:24 36:21 69:16 73:
39 [2] 35:1 101:7	7:23 13:16 31:5,6,18 33:	30:25 80:15 92:9	113:3,5	16 84:2 109:14 110:3 119:
4	10 38:22 41:8,16,18 45:3,7,	adopting [1] 30:19	Amazon's [2] 105:2 109:	13,17 122:6,8
40 [7] 34:18,22 35:1 56:18	9,13,21,25 46:2,3 57:20 58:	adoption [1] 20:11	24	applying [16] 5:3,25 26:22,
71:10 101:7 107:16	2 59:8 61:3,11,17 68:15	adopts [1] 93:22	amend [1] 14:19	23 28:14 47:6,7 51:24 54:
40-year-old [1] 18:8	78:5 79:2 81:5 82:7,8,13	advances [1] 20:14	amended [4] 5:14,24 53:1	1 57:15 63:14 72:9 75:25
43 [2] 36:5 40:17	89:8,18 90:19 91:5 92:18	Adventists [1] 56:25	87:23	84:5 85:5 122:3
44 [2] 36:5 40:17	93:25 94:2,16,18,20 96:9,	advise [1] 8:25	Amendment [2] 20:2 120:	appreciate [1] 112:6
46 [4] 34:19,24 56:13 63:14	16,16 102:22 112:11,18	advocate [1] 42:20	9	approach [4] 57:23 69:4,
5	113:11,25 114:12,17 115:3,	advocated [1] 65:7	amendments [1] 15:10	24 70:21
50 [4] 2:7 50:18 56:18 118:	12 116:12 117:1,15,21 120:	advocating [1] 46:23	America [1] 40:19	appropriate [5] 8:11 19:13
11	8 121:8 122:13,15	affect [4] 43:12,15 99:23	American [1] 108:14	24:8 30:22 97:9
52 [2] 34:19,24	accommodations [24] 3:	100:9	Americans [3] 70:24,25	appropriately [1] 8:25
6	13 4:7 5:2 7:13,14 9:23 18:	affected [1] 42:19	122:4	approving [1] 23:15
64 [1] 27:7	24 19:1,7 28:15 41:20 56:	affecting [2] 100:6,7	amici [1] 32:12	April [1] 1:11
7	6 71:24 72:1,24 75:7 79:5,	affects [3] 36:11 93:24 103:	amicus [3] 38:11 56:23 70:	ARCs [1] 12:24
703(g) [1] 26:13	18 80:4 81:1 85:1,17 120:	11	24	area [10] 72:13 74:23 77:23
8	7 122:3	affirmative [1] 23:7	amongst [1] 80:13	78:10,16 80:9,21 81:20
83 [1] 19:9	according [3] 3:22 6:17 50:	afford [2] 59:6 97:3	amount [9] 41:25 42:12,16,	102:7 107:4
84 [1] 19:10	9	agree [16] 11:13 21:3 25:2,	17,21 43:11 58:1 79:20	areas [1] 78:2
9	account [12] 35:16 39:21	3,21 39:18 49:18 65:11 66:	105:21	aren't [5] 42:10,12 51:16
90 [1] 8:15	46:4,5 57:23 73:11 80:16	8 106:14 116:24 119:22	analysis [8] 40:11 50:22	93:4 110:4
	90:12,17 104:4 113:21	agreed [2] 23:12 86:10	55:16 74:3 87:9 90:3 102:	arguably [2] 31:8 38:10
	116:9	agreeing [1] 77:13	18 121:22	argue [1] 99:21
	accurately [1] 57:8	agreement [18] 10:8 11:2,	analyzing [1] 50:19	arguing [1] 10:9
	acknowledge [5] 55:14 59:	3 24:24 31:9 68:20 86:18,	anew [1] 63:25	argument [25] 1:14 2:2,5,8
	4 70:14 87:7 96:4	21 88:19 91:7,15 92:6,13,	animus [3] 90:5 92:11 102:	3:4,8 6:3,4,5 7:16 8:1 14:
	acquainted [1] 5:3	16 93:13,17 94:6,11	23	11 30:14,22 50:14 51:3,6
	acquiescence [7] 14:14,	agreement's [1] 10:23	announce [1] 77:21	87:11 88:18 91:13 95:19
	17 15:19 16:13 17:12 23:8	agreements [2] 28:20 93:	announced [1] 71:8	114:21 116:7,8 119:10
			anomalous [1] 77:3	arguments [3] 20:10 67:

Official

<p>11 82:16 arise [2] 30:4 34:8 arises [2] 4:9 6:7 arose [1] 5:23 around [3] 46:10 96:2 109:19 arrange [1] 95:25 articulate [2] 32:9 118:23 articulating [1] 63:11 aside [5] 18:2 30:10 48:16 55:2 92:2 asks [2] 38:21 50:24 assess [1] 69:18 assessment [1] 119:1 assigned [1] 34:23 assignees [1] 35:1 assigning [2] 34:21 91:17 associated [1] 117:8 assume [3] 24:1 29:7 114:22 assumes [1] 49:1 assuming [2] 10:17 69:12 assure [1] 71:11 astray [4] 65:13 69:15 71:14,17 at-the-end-of-the-day [1] 59:2 attachment [2] 71:20,22 attend [1] 4:19 attention [1] 100:11 attract [3] 6:15 25:17 47:21 attributed [1] 111:5 authoritative [1] 54:18 authoritatively [1] 76:22 automatically [1] 29:9 available [6] 34:22 35:1 62:7 75:16 97:2,10 avoid [2] 26:3 72:4 avoidance [2] 20:7,24 aware [2] 83:6 95:20 away [8] 31:18 35:18,20 50:25 93:6,18 95:1 101:13</p> <hr/> <p style="text-align: center;">B</p> <p>back [10] 21:7 65:23 70:16 71:4,9 77:11 78:21 88:22 102:13 113:7 background [1] 34:4 backing [2] 35:18,19 bad [3] 33:13 43:22,23 balance [4] 108:12,21 109:3,5 ball [1] 16:25 Baptist [2] 37:14 38:4 barely [1] 4:1 bargained-for [1] 117:10 bargaining [18] 10:8,22 24:24 26:15 28:20 31:8 91:7,15,21,24 92:6,12,16,25 93:13 94:6,11 109:25 BARRETT [26] 29:3 41:12,13 43:10,20 44:4,16 45:6,23 46:12 52:3 61:16 69:1,23 70:17,19 77:12 111:17,</p>	<p>18 112:24 114:3 115:5,10,13 116:4 117:16 based [4] 10:16 30:23 58:22 117:1 basic [3] 9:25 55:19 98:8 basically [2] 32:18 70:23 basis [7] 58:25 61:12 68:19,23 87:4 98:6 110:16 bear [1] 51:19 become [3] 44:10,11 109:11 becomes [3] 44:10 64:15 97:6 behalf [8] 1:18,21 2:4,7,10 3:9 50:15 119:11 behind [2] 17:24 98:8 belabor [1] 40:3 belief [2] 61:7 72:25 beliefs [3] 37:16,18 105:9 believe [5] 7:19 8:24 11:6 30:16 60:14 believes [3] 4:9 6:12 38:22 below [2] 5:8 95:20 benchmark [2] 71:25 87:15 benefit [2] 38:19 44:2 beside [1] 12:17 best [7] 6:6 7:20 11:7 42:14 86:25 99:7 119:14 better [3] 4:6 6:20 72:17 between [20] 3:16 6:4 7:12 9:4 14:2 20:16 45:10 46:22 66:16,17 75:22 77:7 84:25 86:1 92:25 101:7 102:12 103:23 107:11 108:13 Beyond [2] 36:6 41:6 big [1] 82:12 bills [3] 49:6 77:6,9 bit [6] 12:17 27:5 32:23 43:4 61:15 95:9 blocks [1] 23:7 blue [1] 104:12 blue-collar [1] 32:12 Board [1] 54:17 body [8] 50:20 64:25 71:9,10,22 74:13 118:11,15 boils [1] 51:3 bolsters [1] 8:1 boomerang [1] 76:13 borrow [1] 35:8 both [10] 21:15 37:10 53:5,13 67:10 68:16 81:16 88:7 93:24 108:21 bottom [3] 41:24 49:3 99:24 boy [1] 33:16 boycott [1] 70:8 brand-new [2] 63:24 80:16 breach [1] 10:7 break [1] 78:20 breaks [3] 4:14,16 78:14 brief [14] 10:10 26:2 27:6 35:14,15 36:6 47:15,15 57:19 70:24 83:2 84:18 88:5,</p>	<p>120:1 briefed [1] 65:5 briefs [3] 20:9 38:11 56:23 bright [5] 103:3 111:21 112:8 115:21 116:21 broad [1] 100:6 broader [4] 9:8,9 11:6 34:17 broken [1] 103:16 bucket [11] 81:25 82:1,4,6,8 84:9 85:8 88:21 95:4 98:12 106:23 buckets [7] 80:24 81:8,21 88:17 110:11,12 121:23 bump-up [1] 87:10 burden [21] 8:12 9:12 10:22 11:4,11,22 42:24 48:23 51:21 54:5 55:3,8,12 69:19 76:9 77:17 83:4 86:12,19 101:6 105:18 burdened [1] 36:11 burdens [12] 32:17,19 35:17 52:12 70:7 73:22 89:19 102:5 103:7,19 104:15,19 business [28] 3:14 8:23 9:2 29:8,12,25 35:23 36:3,8,10,11,23 37:2 39:13,14,19,23 40:1,19 41:1,24 42:19 43:13,15 44:13 46:5 49:22 103:12 businesses [1] 108:15</p> <hr/> <p style="text-align: center;">C</p> <p>Cal [1] 83:13 California [5] 5:1 28:13 44:3 47:7 83:22 call [5] 31:1 63:9 64:22 73:20 78:1 calling [1] 96:2 calls [1] 63:12 came [2] 1:13 76:23 cannot [4] 45:4 90:2 102:17 121:25 captures [1] 55:11 card [1] 46:7 career [2] 12:20 13:4 carefully [3] 70:4 109:24 110:6 carrier [4] 52:17,18,19 100:23 carriers [3] 52:13 104:17 110:1 carries [2] 53:19 75:17 carry [2] 42:23 44:12 Carson [1] 72:22 carve [1] 26:10 carve-out [1] 10:16 carved [1] 31:13 Case [63] 3:4 12:7 13:7 15:21 16:9 17:9 25:12,14,20 26:17 27:1,22 28:15 32:22 34:17 35:11 37:8 39:25 44:7 47:17 50:20,22 52:25 53:11,14,16 56:1,15 57:15 64:</p>	<p>1,16 68:11 70:5 72:7,14,20 74:19,23 75:2,17 80:20 81:4,7,20,24 82:1 95:4,10 100:20 103:6,17 104:25 107:14 109:14,15,17,21 118:12,15 121:11,11 122:18,19 case-by-case [1] 40:8 cases [25] 9:5,5,5 14:18 20:20 28:24 32:11 40:24 43:7,7 44:15 54:16 55:5 72:21 73:3 79:7 82:3,6,7,12 83:25 84:1 99:5 104:5 120:2 cashes [1] 25:1 categorical [2] 103:3 104:15 categorically [2] 85:15 111:10 categories [5] 78:5,8 79:24 80:4 100:6 category [6] 9:6 78:11 79:3,6,12 93:11 Catholic [2] 37:13 38:1 cause [1] 4:16 caused [1] 52:15 causing [2] 29:24 30:3 CBA [2] 121:3,6 CBAs [1] 31:16 cent [1] 96:11 center [1] 120:8 cents [4] 44:14 96:12,20,21 certain [7] 93:7 94:6 97:3 99:23 100:5 110:17,18 certainly [18] 6:22 8:14 9:22 17:15 19:18 32:11 38:20 39:5 41:6 47:2,19 80:20 96:24 108:19 113:14 115:1 116:23 119:16 cetera [1] 62:7 challenging [3] 31:15 85:6 91:13 chance [3] 16:25 84:24 112:7 change [9] 16:1 19:25 48:17,19,21 82:3 113:6,6 114:14 changed [4] 49:9 103:11 113:10 114:25 changes [1] 78:12 changing [2] 49:11 89:20 characterize [1] 59:23 characterized [2] 60:16 73:24 checkups [1] 4:18 CHIEF [30] 3:3,10 8:6 9:3 22:2 27:20 30:6 31:21 37:4 41:11 46:13 50:11,16 70:18 72:2,11 74:7,9 86:9,15 87:18 88:15 98:19 101:23 104:22 106:6 111:16 117:17 119:7 122:17 choice [1] 99:25 choose [2] 3:16 64:21 chooses [1] 80:1 choosing [2] 96:25 115:9</p>	<p>chose [2] 9:24 28:3 church [5] 33:8,22 70:25 78:15 105:15 circuit [4] 8:20 10:19 69:2 70:11 Circuit's [1] 70:1 circumstance [1] 26:24 circumstances [6] 79:19 113:5 114:14,25 117:22 119:2 cite [3] 40:17 57:18 88:5 cited [2] 83:13,23 City [1] 116:19 Civil [4] 15:4 62:13,15 120:2 claim [3] 51:3,8 80:17 claims [2] 57:20 58:3 clarification [5] 27:1 32:1 65:13 68:2 70:15 clarifications [1] 12:15 clarify [3] 63:9 74:16 112:7 clarity [1] 98:24 Clause [6] 20:13,22 21:12 48:13 72:23 73:17 clauses [1] 20:2 cleaning [1] 107:5 cleanup [1] 5:11 clear [22] 7:15 20:20 44:19 67:20 69:5,12,13 73:2 84:3,24 88:6 89:12 90:6,21 98:21 101:25 104:7,10 107:23 108:6 110:14 111:19 clearly [6] 9:18 24:16 53:9 68:8 91:11 103:5 client [1] 37:25 close [2] 42:5 99:20 closing [1] 99:19 co-employee [1] 35:17 co-employees [2] 102:5 103:20 code [2] 79:10 94:25 codify [1] 77:7 codifying [1] 93:7 cognizable [2] 89:15 90:22 colleague [1] 86:17 collective [15] 10:8,22 24:23 26:15 28:20 31:8 91:6,15,21,24 92:5,12,16,25 93:12 colloquies [1] 118:21 combined [1] 34:20 come [14] 35:23 47:17 49:12 57:21 73:3,4 77:22 78:6,14 85:11 96:11,19,22 113:7 comes [2] 43:6 117:5 coming [2] 118:2 119:24 comment [1] 7:10 Commission [1] 63:13 Commission's [1] 80:21 common [14] 61:22 62:9,11,20,22 63:20 64:9 66:16</p>
---	---	---	---	--

Official

78:23 80:13,24 81:11,12, 22 company [1] 116:10 comparable [1] 94:1 comparison [1] 7:6 compel [1] 38:3 compelling [1] 120:25 complain [2] 39:9,17 complete [1] 61:5 completely [2] 19:16 21:3 compliance [1] 57:17 concede [2] 13:7 64:12 conceding [1] 10:21 concept [1] 20:8 concern [11] 62:19 63:11, 22 64:20 77:20 79:8 106: 12,21 107:1 109:1 118:18 concerned [1] 49:9 concerning [2] 31:16 38: 14 concerns [5] 41:14 66:23 70:21 73:17 74:22 concession [1] 29:22 conclude [1] 68:24 concrete [9] 39:13,25 42: 22 44:1 51:23 52:12 89:18 103:9 117:2 conditions [1] 89:20 conduct [14] 3:14 8:23 9:2 29:7 35:22 36:9 37:2 39: 19,23 41:24 42:19 49:21 103:12 109:3 confirm [3] 9:21 66:3 110: 12 conflict [5] 45:10 61:6 79:1 96:6 98:10 confronted [1] 56:7 confusion [5] 55:18 76:8, 14 107:6 111:6 Congress [47] 6:24 8:2 9: 24 14:1,6,15,19,20 15:25 16:1,24 17:1 21:8,10,11 22:13 23:4,5,12,14,15 26: 10 28:3 30:17,25 31:13 38: 25 48:18,20 49:1,4,6,10,14, 19,20,24 50:2 51:7 62:13 75:6 76:23 77:5,6,8 99:8 109:5 Congress's [4] 16:25 48: 15,23 49:7 congressional [12] 14:14, 16 15:19 16:10,13 17:12 22:21 23:5,8 30:15,15,23 conjunction [1] 26:5 conscience [1] 39:3 consider [1] 78:25 consideration [2] 87:22 117:13 considerations [2] 113:23 116:25 considered [4] 4:2 5:13 84:15 87:10 consistent [8] 11:21 13:23 58:17 61:1 63:17 67:24 71:	6,12 Constitution [4] 15:23 22: 17,18 48:14 constitutional [4] 20:7,23 30:18 55:5 constitutionality [1] 31:2 construe [1] 3:22 consult [1] 57:16 contemporaneous [1] 30: 1 content-less [1] 75:23 context [14] 16:5 34:17 40: 16 41:15,15 43:3 51:11 55: 4 56:15 75:4 76:21 103:18 118:23 120:19 context's [1] 108:4 context-based [3] 55:20 57:23 107:9 context-dependent [7] 50:21 62:1 85:16 87:8,13 104:9 118:25 context-specific [4] 28:5 40:6 44:15 117:24 contexts [1] 113:6 contextual [6] 99:2 111:20 113:1,23 116:22,24 continuum [1] 103:2 contract [2] 42:4 91:24 contractual [2] 52:9 94:8 contractually [1] 117:10 contravene [1] 31:5 control [1] 109:15 controls [1] 109:17 core [3] 6:23 17:22,23 corporate [1] 29:22 corporation [1] 32:14 corporation's [1] 99:24 correct [9] 5:20 9:1,1 10: 11 32:8 67:24 68:22 69:17 99:10 correctly [5] 24:20 37:21 52:5 87:2 96:7 cost [9] 29:11 51:14 63:3, 10 83:4 95:11 100:14 112: 12 117:7 costing [1] 42:3 costly [1] 75:9 costs [45] 23:24,25 24:3,5, 6,6,7,10 26:23 27:22 28:8, 9 46:18,25 47:8 48:6,9 51: 20 56:6,11 58:24 59:3 63: 19 64:8 69:8,14,14,14 71: 23 73:23 77:23 85:23 86:2, 5 100:13,13 101:2 106:10, 13,15,24 107:2 109:11 112: 14 117:7 couldn't [4] 19:8 54:7 86: 17 90:12 counsel [5] 30:7 50:12 74: 11 119:8 122:18 count [8] 16:3 18:6 29:9 32: 20 33:24 34:1,3 104:8 counts [1] 101:20 couple [2] 5:10 31:24	course [24] 25:5 29:16 34: 6 45:4,22 46:6 50:2,4 53:2 54:15 55:13 66:1 70:14 72: 13 73:10 82:9 85:4,10 86: 4,25 92:8 104:9 105:1 113: 21 COURT [96] 1:1,14 3:11,21 4:2 5:6,24 6:24 8:16,24 9: 18 14:17 15:8 16:9,11,12, 25 17:7 18:15,18 20:7 22: 11 23:3 28:6,10 29:5,17 36:23 45:22 48:18,22 49: 13 50:4,7,17,24 51:2,9 53: 4,4,17 54:6,15,17,25 56:6, 9 57:16 60:13,16 61:9,19 63:11,22 64:21 65:18 66:7, 15 67:3,4,16,20 69:25 70:4 71:10 72:4 74:2 76:22 77: 1,3,21,24 78:7 80:8,15 84: 15 86:4 87:5 88:6,9 93:11 106:18 107:7,11,23 108:2 109:18 115:16 116:3,6 117:5 119:5,12,15,20 120: 3 Court's [16] 5:9 19:11,22, 25 21:12 23:9,13 48:23 52: 22 53:8,22 61:1 63:18 70: 2 99:6 109:19 court-ordered [1] 115:15 courts [43] 5:3 8:21,25 28: 9 50:18 51:13,25 52:5 56: 13,19 57:6,9,11,22 58:2 63: 13 65:2,3,13 66:18,20,20 69:5 71:14,17 72:9 73:8, 15,20 76:14 78:16,21 79:4, 17 84:4 96:7 103:14 107: 15,19 109:3 118:4 119:23 121:13 cover [8] 6:16 11:25 12:1 42:6 95:14,15 96:17 97:2 covered [2] 4:23 96:14 coworker [10] 8:22 43:5,6, 18 70:7 89:12,17 102:15 103:4 104:11 coworker's [5] 4:12,20 6: 17 48:2 120:22 coworkers [16] 29:9 32:18, 19 35:21 43:16 46:4 68:16 79:20 89:4,6,19 90:23 102: 13 103:10 104:16 110:16 coworkers' [2] 52:9 90:18 create [2] 94:23 110:7 created [3] 52:12 109:8,23 creating [1] 89:18 credibility [1] 17:3 credited [3] 79:22 96:7 103:14 critical [1] 40:20 cross [1] 73:23 crossed [1] 60:17 current [3] 73:2 107:22 119:15 customers [3] 27:13 41:2 79:21	D D.C. [2] 1:10,21 dark [1] 101:18 date [1] 115:22 day [9] 33:16 45:5 47:6 56: 25 78:19 85:18,18 100:13 121:9 day's [2] 65:8 67:14 daylight [5] 6:3,11 46:22 54:4 75:22 days [4] 11:25 12:12 105: 14,22 de [43] 3:18,25 6:3 10:3 19: 12 20:12 23:23 24:3 35:2 51:14 55:8,11,15 56:5 62: 12,14,17 65:3,14 66:21 67: 20 69:13 71:7,13,21 73:5,6 81:15,16 85:22,23 86:3 92: 19 93:22,23,23 101:6 106: 15 107:6,12,20 120:12 121: 14 deal [2] 78:23 96:20 decades [3] 15:24 55:24 108:8 decide [2] 29:14 99:25 decided [5] 5:12 14:7 51:9 52:25 72:20 deciding [1] 86:22 decision [12] 18:6 20:6 23: 13 53:8,23 56:20 61:1 70: 1,2 73:18 74:5 83:24 decisions [5] 14:24 18:17 19:23 80:12 84:1 decisis [19] 14:18 15:20,21, 23 16:9,15,16,18,21,22 17: 7 49:25 50:4 51:1,11 76: 21 87:1 97:15 119:14 declare [1] 26:11 declined [1] 14:2 defended [2] 120:14 121: 25 defending [11] 17:14,15,20 18:14 50:6 70:23 71:3 119: 18,19 120:13,15 defends [3] 3:19 18:13 65: 4 defense [2] 79:21 106:4 defenses [3] 51:25 79:6 80:6 defined [2] 12:19 55:7 defining [2] 14:1 41:23 definition [7] 7:4 14:8,19 15:2 62:16 76:25 77:4 DEJOY [2] 1:6 3:6 delineated [1] 110:6 deliver [4] 34:15 42:2 68: 17 100:24 delivered [2] 52:14 101:19 delivery [4] 12:16 52:15 100:10 109:24 delta [1] 59:5 delve [1] 118:15 demanding [1] 117:6	demonstrate [1] 51:22 demonstrates [1] 101:8 denial [3] 4:11 6:16 120:22 denied [1] 80:6 deny [2] 4:7 51:25 denying [3] 4:19 48:2 58:3 Department [1] 1:21 departure [2] 20:15 76:25 depend [1] 62:5 depends [2] 59:1 117:23 deriving [2] 75:25 76:8 described [2] 15:8 56:9 describing [2] 74:24 86:1 destabilization [1] 107:1 destabilizing [4] 77:23 106:20 118:18 121:10 details [3] 63:25 108:1 119: 4 determination [1] 56:2 determinations [1] 118: 19 determine [1] 54:8 determined [2] 53:24 116: 3 determining [1] 20:3 devastated [2] 4:3 18:20 developed [7] 50:21 71:22 72:13 74:20 78:2,10 95:18 development [1] 72:12 developments [1] 73:19 diabetic [1] 4:14 dicta [2] 3:20 54:13 difference [6] 47:1 54:10 59:24 82:12 99:22 103:23 differences [3] 9:4,22 75: 14 different [30] 6:9 9:24 12: 23 13:7 16:14 22:8 34:18 35:4,10,14 39:1 47:16,18 48:9 54:5 55:6 60:1 61:10 75:6 76:9,10 78:19,25 80: 16 84:5,6 102:8 103:21 116:16 121:24 differently [4] 47:18 55:7 113:2,5 difficult [4] 37:9 42:11,15 54:24 difficulties [1] 32:7 difficulty [11] 3:23 7:21 8:3 14:3 32:20 45:18 46:23 47: 3 75:21 89:22,25 difficulty-or-expense [1] 29:18 diffuse [1] 103:7 direct [2] 51:7 52:12 directly [1] 89:11 disabilities [2] 75:10 122: 5 disabled [1] 43:6 disagree [2] 9:15 19:8 disapprove [1] 23:19 disaster [1] 80:18 discard [1] 52:2 discount [1] 30:22
---	--	--	---	---

Official

<p>discounting ^[1] 30:14 discrete ^[1] 9:6 discrimination ^[1] 76:11 discriminatory ^[2] 92:10, 11 discussion ^[2] 86:16 98:22 dispende ^[1] 52:1 displaying ^[1] 79:14 disposition ^[2] 68:4,5 dispute ^[1] 63:6 disrupt ^[1] 80:8 disrupted ^[1] 27:12 disruption ^[4] 36:3,8 101:15 103:13 dissatisfaction ^[2] 90:18, 24 dissent's ^[2] 106:12 116:8 distinction ^[3] 61:9 84:25 92:24 distinguish ^[1] 102:12 district ^[3] 53:4 109:17,19 dividing ^[1] 44:25 divine ^[1] 14:15 divorced ^[1] 55:16 doctrinal ^[1] 21:5 doctrines ^[1] 119:17 doing ^[5] 23:4 61:12 78:21 99:10 112:19 dollar ^[1] 41:25 42:12,16, 16,21 43:11 59:10 67:22 96:11 99:20 113:9 dollar-an-hour ^[1] 59:23 dollars ^[5] 44:14 47:20 96:12,19,21 done ^[11] 16:1 17:1 57:6 65:23 66:25 73:21 76:3 77:1 102:7 108:7 119:4 door ^[1] 114:2 doorman ^[1] 111:4 double ^[1] 60:15 double-check ^[1] 110:15 down ^[11] 21:9 23:10 39:17 51:3 70:13 96:11,19,22 99:19,20 113:18 draw ^[4] 84:2 85:8 92:23 112:7 drawing ^[2] 64:1 118:8 drawn ^[6] 15:12 57:22 58:22 78:3 84:25 102:11 dress ^[5] 79:3,9 94:25 110:13,18 drew ^[1] 61:9 driven ^[2] 44:22 70:2 duration ^[1] 87:5 during ^[2] 100:11,21 duty ^[5] 26:5 31:14 45:11 101:9 109:8</p> <hr/> <p style="text-align: center;">E</p> <p>each ^[5] 34:23 52:8 96:1,5 100:23 earlier ^[2] 86:16 112:17 early ^[1] 42:5</p>	<p>economy ^[1] 100:1 Education ^[1] 54:17 EEOC ^[24] 5:15 28:17 40:23 51:13 53:21 56:12,19 57:6 66:3 69:6 71:6 84:24 87:13 89:11 101:24 102:7, 11,25 107:15 118:3,12,17 119:25,25 EEOC's ^[6] 51:18 56:2 57:16 81:19 117:3 118:9 effect ^[23] 6:22 28:19,21 35:21,22 36:18 38:15 39:19, 23,25 41:1 43:16 44:1,13 46:4,5 58:8 62:14 87:1 90:4 92:19 96:8 97:15 effectively ^[2] 41:2 98:13 effects ^[3] 29:8 51:13 89:17 efficiency ^[4] 4:10,17 6:12 42:1 effort ^[1] 95:24 eight ^[1] 8:20 either ^[5] 17:14 33:5 38:2 80:12 105:8 elicited ^[1] 121:5 eliminates ^[1] 45:10 ELIZABETH ^[3] 1:20 2:6 50:14 email ^[1] 30:1 emphasize ^[3] 61:2,24 111:11 emphasizing ^[1] 70:6 employ ^[3] 10:6 35:16 43:23 employed ^[1] 91:25 employee ^[28] 4:14,17 8:22 12:20 13:5 26:18,18,19 27:2,4 28:25 35:25 36:18 37:1,21 38:5 44:9,22 52:16 61:5 75:11 94:19 96:15 105:7 110:17 115:2 120:17,17 employee's ^[3] 27:11 46:1 108:25 employees ^[54] 3:16 11:24 12:21 13:9 20:16 25:7,8 32:5 33:1,3,4,22 34:7,11, 13 36:9,10 37:12 39:8,16 40:20 41:3 42:10,12 43:23 44:11 45:15 51:5 60:2 88:25 89:23 90:9,9 91:20 93:5,15,24 94:7,13,15,17,17 95:22 96:17 101:3,7 110:7 116:11,25 117:9,11,14 122:9,12 employees' ^[3] 36:1 91:16 93:1 employer ^[60] 10:7 11:23 27:10 32:4 33:16,25 35:23 36:6,25 39:9,10,20 42:22, 24 43:22 44:10,19 45:24 46:3 47:23 51:22 59:3 61:11 62:5,7 66:23 73:23 88:24 89:5,22,23 90:7 92:17,</p>	<p>20 93:7 94:12 95:12 96:13, 25 97:18,20 98:15 99:9 105:5,10,18,21 106:1,3 108:23 109:10 111:6 112:20 113:7 114:6,7,10 115:8, 9 121:6 employer's ^[3] 3:14 49:22 119:2 employer-sponsored ^[1] 79:15 employers ^[17] 4:7 7:23 19:21 31:17 47:5 51:16,19 54:5 67:23 69:7 72:8 78:17 93:24 97:3,7 122:2,6 employment ^[2] 26:12 97:13 enact ^[1] 77:8 enacted ^[2] 49:21 76:24 encouraging ^[1] 64:17 end ^[5] 65:9 78:21 99:4 100:12 115:22 engage ^[3] 60:6 74:3 75:24 English ^[1] 3:18 enough ^[16] 9:11 38:7,8 40:25 43:8,14 44:5,7,8,17,21, 23 51:10 95:14 100:17 105:17 entire ^[2] 10:3 75:10 entirely ^[1] 59:2 entitled ^[3] 81:5 86:25 97:14 enumerated ^[1] 17:8 enunciation ^[1] 19:11 equally ^[1] 102:19 equivalent ^[1] 85:22 eroded ^[2] 18:17 50:5 erosions ^[1] 21:4 erroneous ^[4] 16:11,23 22:16,17 error ^[1] 48:24 escape ^[1] 105:18 especially ^[2] 47:23 111:25 Espinoza ^[1] 72:21 ESQ ^[3] 2:3,6,9 ESQUIRE ^[1] 1:18 essential ^[2] 53:22 93:13 essentially ^[1] 56:14 establish ^[1] 5:6 established ^[1] 78:2 establishes ^[1] 8:18 Establishment ^[6] 20:13, 21 21:12 48:13 72:23 73:17 et ^[1] 62:7 even ^[37] 3:24 11:10 16:22 17:6,14 19:17,20 20:23 22:14,17 29:7 33:12,13 35:7 38:15 39:4 50:6 55:5 59:4 65:5,7 74:16 77:4 81:5,14 84:4 89:13 92:10 99:19,20 112:2 115:5,14,14 119:18 120:7,19 events ^[1] 5:23</p>	<p>everybody ^[3] 22:15 71:16 96:14 everything ^[1] 103:1 evidence ^[25] 13:11,12 15:19 23:8 27:10 29:21 35:22, 24 36:2 39:11,13,22 41:5 42:22 51:23 70:5 73:14 87:3 95:18,24 100:21 101:4 103:9 113:15 117:2 evident ^[1] 109:22 evidentiary ^[1] 27:9 eviscerated ^[1] 9:18 eviscerating ^[1] 6:22 exact ^[4] 14:11 36:4 40:16 88:8 exactly ^[9] 40:3 73:9 82:2 94:18 99:11 103:3 104:7 106:20 118:20 example ^[19] 6:14 43:1,11, 16,19,25 47:14,17 59:4 73:3 77:25 79:11,19 81:3 85:3 91:1 94:9 108:24 111:3 examples ^[2] 83:12,22 excellent ^[1] 57:19 except ^[1] 20:6 exception ^[1] 111:9 exceptional ^[1] 17:8 exceptionally ^[1] 17:10 exceptions ^[1] 110:2 exclusive ^[2] 26:3 110:5 Excuse ^[1] 10:1 excuses ^[1] 99:9 excusing ^[1] 112:19 Exempting ^[2] 52:8 61:11 exemption ^[5] 20:17,18 79:15 94:25 102:16 exercise ^[4] 20:6 57:11 72:17 76:4 exhausted ^[1] 100:12 exist ^[3] 14:12 84:3 108:3 existing ^[2] 25:8 75:8 exists ^[1] 73:12 expand ^[1] 31:16 expenditures ^[2] 23:24 56:11 expense ^[12] 3:23 4:25 7:21 8:1,4 14:4 32:21 46:24 47:3 74:15 75:21 83:4 experience ^[2] 80:21 118:10 explain ^[3] 26:1 52:24 68:12 explained ^[1] 6:7 explanation ^[1] 23:12 express ^[1] 90:23 expression ^[2] 79:13 89:14 extend ^[1] 26:14 extent ^[3] 107:19 111:12 113:24 extra ^[10] 42:14 96:25 97:13,19,21 98:16 99:20 100:13 104:12 113:9 extreme ^[1] 104:5</p>	<p style="text-align: center;">F</p> <p>face ^[2] 6:21 73:18 facilitate ^[1] 78:22 facilities ^[1] 75:8 fact ^[17] 7:22 17:13 21:14 27:11 36:24 37:1 48:16 55:22 59:25 69:6 71:12 72:10 73:25 76:1 90:19 91:4 112:12 fact-dependent ^[1] 87:12 fact-specific ^[1] 28:24 factor ^[7] 17:9 18:15 20:3, 25 89:15 90:3 102:18 factors ^[4] 17:8 18:4,11 50:5 facts ^[32] 12:7 18:1 26:17 27:1 32:22 51:15 52:4,6 55:24 57:24 62:24 63:17 66:4,7 68:8,10 70:12 77:25 81:3,7 85:5 86:24 87:2, 14 95:3,10 100:20 105:4 107:14,17 117:6 119:2 factual ^[3] 12:14 13:8 109:19 fail ^[2] 49:10 78:24 fails ^[1] 116:9 fair ^[3] 4:8 63:5 64:9 fairly ^[1] 9:6 Fairness ^[2] 43:2 122:5 faith ^[2] 3:17 96:7 fall ^[1] 82:4 falls ^[1] 103:2 far ^[5] 4:7 68:24,25 83:11 95:20 fashionable ^[1] 90:11 favor ^[1] 17:9 federal ^[1] 5:3 feel ^[3] 21:13 39:8 71:4 felt ^[1] 21:11 few ^[5] 12:14 34:14 83:25 84:19 88:20 fewer ^[2] 41:16 83:12 fierce ^[1] 89:6 figure ^[4] 47:1 73:9 109:9, 11 figuring ^[1] 93:14 file ^[1] 26:19 filed ^[1] 70:9 filing ^[2] 52:19 104:20 fill ^[5] 60:15 98:7 106:1 107:25 112:21 filled ^[2] 63:25 98:17 filling ^[2] 13:3 119:3 fills ^[1] 12:20 final ^[1] 7:1 finally ^[1] 11:16 financial ^[1] 105:3 financially ^[1] 113:4 find ^[3] 32:5 96:3 118:14 finding ^[2] 88:12,18 findings ^[1] 109:19 fine ^[2] 9:15 95:5 finger ^[2] 16:3 99:12</p>
--	---	--	--	--

Official

<p>finish ^[1] 76:19</p> <p>first ^[3] 3:4 8:9 12:15 16:7 18:12 20:2 21:2,25 27:21 29:16 34:6 61:17,24 78:11 81:25 82:1,4,6,8,22 84:9 85:8 91:11 94:4 95:4 96:23 98:3,4 102:10 106:10, 23</p> <p>fit ^[1] 94:4</p> <p>fits ^[1] 98:2</p> <p>five ^[1] 108:8</p> <p>fix ^[2] 91:15 98:11</p> <p>fixing ^[1] 93:1</p> <p>flawed ^[1] 74:25</p> <p>flexibility ^[2] 45:25 61:4</p> <p>flexible ^[2] 28:4 78:17</p> <p>flipping ^[1] 87:24</p> <p>floodgates ^[1] 43:9</p> <p>floundering ^[1] 113:4</p> <p>focused ^[3] 55:14 60:13 86:5</p> <p>follow ^[3] 19:11 82:25 88:19</p> <p>follow-up ^[2] 84:8 114:4</p> <p>foot ^[1] 42:15</p> <p>Footnote ^[14] 16:8 23:23 24:4 27:23 28:8 56:10 85:21,22 86:6 88:11 106:11 116:5,6,6</p> <p>footnotes ^[2] 86:8 88:1</p> <p>force ^[4] 4:1 11:23 12:1 114:22</p> <p>forced ^[1] 3:16</p> <p>forget ^[1] 86:16</p> <p>form ^[1] 90:22</p> <p>formulation ^[5] 24:16 63:12 64:20 71:15 80:1</p> <p>formulations ^[3] 6:9 64:16 86:2</p> <p>forth ^[1] 28:9</p> <p>fortifying ^[1] 117:12</p> <p>Fortunately ^[1] 3:20</p> <p>fortune ^[1] 22:23</p> <p>forward ^[6] 35:23 36:1 39:11 42:15 71:25 77:18</p> <p>found ^[1] 52:5</p> <p>four ^[3] 23:22 71:20 85:21</p> <p>four-plus ^[1] 55:24</p> <p>frame ^[2] 38:21 121:6</p> <p>framework ^[1] 122:16</p> <p>frequently ^[3] 51:25 80:5,6</p> <p>Friday ^[1] 44:19</p> <p>friend ^[8] 62:4 80:11 83:22 101:5 110:4 120:13 121:3, 10</p> <p>friend's ^[1] 63:3</p> <p>front ^[1] 111:4</p> <p>full ^[4] 17:24 27:25 75:3,17</p> <p>function ^[1] 75:11</p> <p>further ^[2] 17:13 21:4</p> <p>future ^[1] 87:9</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>games ^[2] 33:7 105:16</p>	<p>gap ^[1] 7:12</p> <p>GEN ^[3] 1:20 2:6 50:14</p> <p>GENERAL ^[122] 1:6,20 3:5 24:2 25:15 36:17 50:13,16 52:23 53:2,7 54:21 55:13 56:16 57:7 58:5,21 59:12, 18,22 60:4,6,8,12,25 61:21 62:2,8,22 63:7 64:10,12,18, 24 65:11,17,21,24 66:2,6,9 67:2,7,11,19 68:7,22 69:21 71:18 72:3 73:13 74:6,10, 21 76:12 77:10,20 79:23 80:3,14 81:2,9,18 82:2,9, 16 83:11,16,20 84:13,23 85:9,14,25 86:13,23 87:16, 20,24 88:4 89:10 90:2,16 91:10 92:8,21,23 94:3,21 95:17 96:23 97:22,25 98:25 99:3,11,14 100:3,18 101:24 102:10 103:25 105:20,25 106:17 107:3 108:19 109:16 110:19,22,25 111:3, 8 112:6 113:14 115:1,7,11, 24 116:23 118:7,20</p> <p>General's ^[1] 69:17</p> <p>generally ^[1] 88:24</p> <p>GERALD ^[1] 1:3</p> <p>get-out-of-work-free ^[1] 46:7</p> <p>gets ^[5] 38:17 89:5 96:16 113:4 118:21</p> <p>getting ^[3] 8:7 102:16 112:22</p> <p>give ^[18] 11:23 19:14 27:24 28:11 32:21 43:10,15 47:16 49:13 58:14 82:10 85:16 86:21 87:14 94:15 98:24 102:2 103:2</p> <p>given ^[5] 15:2 75:14 101:8 117:14 122:11</p> <p>gives ^[3] 38:18 51:2 101:25</p> <p>giving ^[3] 39:3 90:4 94:12</p> <p>glad ^[1] 84:23</p> <p>global ^[1] 87:11</p> <p>goodness ^[1] 95:6</p> <p>Gorsuch ^[38] 37:5 61:21 62:3,9,25 64:3,7,11,14,23 65:1,15,19,22 66:1,5,12 67:5,9,12 70:22 74:17 77:12 79:23 80:10,22 81:6,10,23 82:20,24 83:14,18 84:7 104:23,24 105:24 106:5</p> <p>Gorsuch's ^[3] 68:5 69:4 107:18</p> <p>got ^[1] 111:7</p> <p>government ^[15] 4:9 6:2,7, 11,18 18:13 47:11,14 48:3, 8 53:14 83:7 119:17 121:22 122:11</p> <p>government's ^[14] 4:5,13 6:4,20 17:14 25:15 27:6 46:18,24 48:1 50:6 119:22 120:4,24</p> <p>grabs ^[1] 72:5</p>	<p>grant ^[1] 92:18</p> <p>granted ^[1] 80:5</p> <p>granting ^[3] 79:5,18 93:5</p> <p>great ^[3] 33:14 71:21 95:7</p> <p>greater ^[3] 11:24 59:5 107:13</p> <p>grievance ^[3] 26:19 52:19 70:9</p> <p>grievances ^[1] 104:20</p> <p>groceries ^[1] 42:5</p> <p>grocery ^[6] 32:25 33:1,25 35:5 45:14 113:2</p> <p>GROFF ^[9] 1:3 3:5 12:15 26:20 27:3,5 29:24 34:24 46:8</p> <p>Groff's ^[1] 13:3</p> <p>grooming ^[3] 79:4 88:22 110:13</p> <p>ground ^[14] 61:22 62:10,11, 20,23 63:21 64:9 66:16 80:13,18,24 81:11,12,22</p> <p>grounds ^[1] 90:20</p> <p>group ^[1] 37:12</p> <p>groups ^[2] 58:7,7</p> <p>grumbling ^[4] 42:13 44:9 89:13 102:15</p> <p>guess ^[19] 21:10 23:3,10 26:17 27:15 41:21 46:21 48:8 49:4,9 66:14 70:20 97:6 106:21 112:24 114:3, 15,21 116:20</p> <p>guessing ^[1] 22:11</p> <p>guidance ^[12] 28:11 53:21 81:19 89:11 90:5 101:25 102:1,2,25 117:3 118:9,12</p> <p>guide ^[2] 50:21 72:7</p> <p>guideline ^[3] 5:14,16,25</p> <p>guidelines ^[7] 28:17 40:17, 23 51:18 56:4 69:6 90:21</p> <p>gut ^[1] 120:7</p> <p>guy ^[1] 38:16</p> <p>gymnastics ^[1] 55:1</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half ^[2] 12:12 60:15</p> <p>hammer ^[1] 17:13</p> <p>hamstrung ^[1] 21:11</p> <p>hand ^[1] 93:4</p> <p>handle ^[1] 57:14</p> <p>happened ^[1] 15:8</p> <p>happening ^[2] 58:2 79:7</p> <p>happens ^[1] 36:17</p> <p>Happy ^[8] 18:10 29:17 68:1 81:19 82:13 96:15,18 99:7</p> <p>harassment ^[1] 79:20</p> <p>hard ^[11] 11:11 20:5 23:13 27:16,23 75:25 87:8 92:1, 4 105:13 119:3</p> <p>hard-line ^[1] 35:15</p> <p>Hardiman ^[2] 29:4 71:1</p> <p>Hardison ^[130] 3:15,24 5:13,19,23 7:14 8:11 9:19 10:4,5,12,14,15 11:6,12 13:19 14:3,21 17:11,16 18:25</p>	<p>19:1,6,7,10 20:4,6,10 21:6 22:12,13,19 23:14,16,21, 21 24:4,12 25:16 26:14 29:2 30:12 47:12,24 48:24 49:7 50:19,25 51:3 52:2,25 53:8,13 54:1,11,18 55:16, 23 56:3,7,18 57:2,8,12,15 58:8,22 60:14 61:2,20 63:14,17,23 65:5,7 66:4,7,18 67:25 68:1,9 69:17 71:1,8, 23 72:15,20 73:3,15 74:2, 16 76:3 77:25 80:17 84:15 85:24 86:1,14,24 87:14,21 88:6 91:11,22 92:13,25 93:9 97:14 100:5,16 106:12, 16 107:7,17,24 108:8 111:22 112:3,9 114:2 115:25 117:4,6 118:3,10 119:15, 19,23 120:19 121:25</p> <p>Hardison's ^[15] 3:17,20 4:6 6:21 11:1 17:22,23,25 51:13,15 57:24 94:4 98:3 120:11,12</p> <p>hardship ^[84] 3:13,22 4:8,9 5:7 6:8,13,18 7:4,5,7,8,20 8:3,21,23 9:25 10:7 11:15 12:5 14:1,8 21:14 28:4 29:25 30:3 32:15 36:22,25 37:2 39:12 47:22,25 48:4 49:21 50:19 51:22,25 52:6,20 53:19,25 54:6 58:20 59:17 68:9 69:20,20,23 74:4,12 76:25 79:6,21 80:6 84:12 87:6 89:16 90:3,22 91:2, 20 99:9 101:21 102:18 103:5 104:13 106:4 107:8 108:11,18 109:9 114:10,13, 18 115:4 116:3 120:5,18, 21,23 121:4,21 122:16</p> <p>hat ^[1] 94:25</p> <p>hate ^[1] 40:2</p> <p>hats ^[1] 90:11</p> <p>head ^[1] 89:2</p> <p>heads ^[1] 88:25</p> <p>hear ^[3] 3:3 45:1 46:16</p> <p>heard ^[6] 16:15 46:19 121:20,21,23,23</p> <p>hearings ^[2] 21:15 30:24</p> <p>hearts ^[1] 95:7</p> <p>heavily ^[1] 118:8</p> <p>heightened ^[1] 21:13</p> <p>held ^[4] 91:11,14 105:9 109:18</p> <p>help ^[1] 47:1</p> <p>helpful ^[5] 28:18 78:7 86:20 88:17 110:11</p> <p>helping ^[1] 72:7</p> <p>higher ^[1] 54:5</p> <p>himself ^[1] 101:1</p> <p>Hindus ^[1] 56:24</p> <p>hire ^[1] 75:10</p> <p>hired ^[5] 12:12,16 97:9 98:9,14</p> <p>hiring ^[2] 25:6 89:25</p>	<p>history ^[1] 49:5</p> <p>holding ^[13] 10:14 17:23 18:1 25:16 31:15 47:24 54:14 86:14 91:11 94:5 98:3, 4 120:19</p> <p>holdings ^[10] 10:3,5 13:18, 23 51:2 100:17 120:13,14, 14 121:24</p> <p>holds ^[1] 104:3</p> <p>holiday ^[1] 12:2</p> <p>holidays ^[10] 11:18,20 12:11,22 13:1,3,6 46:10 100:11,24</p> <p>Holtwood ^[1] 30:1</p> <p>honesty ^[1] 82:4</p> <p>Honor ^[28] 5:22 7:11 8:14 9:14 10:13,24 12:8 14:9 16:7 18:11 19:9,18 21:2 25:4,24 26:9 27:8 28:2,19 29:16 31:11 32:10 36:14 43:25 44:24 45:20 47:2,19</p> <p>Honors ^[1] 23:2</p> <p>hope ^[1] 104:24</p> <p>Hosanna-Tabor ^[1] 72:21</p> <p>hostility ^[2] 89:13 90:4</p> <p>hour ^[3] 59:10 112:2 113:9</p> <p>hours ^[2] 100:13 103:21</p> <p>house ^[1] 23:14</p> <p>Houston ^[1] 1:18</p> <p>however ^[1] 114:10</p> <p>HR ^[1] 19:22</p> <p>hub ^[1] 101:5</p> <p>huge ^[2] 7:12 95:12</p> <p>hundred ^[2] 32:13 47:20</p> <p>hypo ^[1] 32:21</p> <p>hypothetical ^[8] 34:19 35:10 37:21 58:14 93:10 94:10 98:2 115:2</p> <p>hypotheticals ^[1] 118:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea ^[7] 21:8 33:5 58:23 70:3 72:4 86:20 95:11</p> <p>identified ^[1] 104:16</p> <p>ignoring ^[1] 10:25</p> <p>illegitimate ^[1] 30:13</p> <p>imagine ^[2] 69:3 112:12</p> <p>immemorial ^[1] 62:18</p> <p>immunize ^[1] 92:11</p> <p>immunizing ^[1] 67:22</p> <p>impact ^[1] 101:20</p> <p>impacts ^[6] 68:16 70:6 102:12,23 103:4 104:8</p> <p>impediment ^[2] 48:15 49:24</p> <p>implemented ^[1] 5:16</p> <p>implementing ^[1] 118:10</p> <p>implicit ^[1] 114:16</p> <p>implied ^[1] 55:23</p> <p>import ^[3] 13:25 14:7,10 33:1 41:22 45:20 108:13 109:6</p> <p>impose ^[1] 97:11</p>
---	---	---	--	--

Official

<p>imprecise ^[1] 55:17 inaction ^[4] 16:10 23:6 30:16,23 inadequate ^[1] 120:5 inapplicable ^[1] 76:16 inappropriate ^[2] 109:12 112:10 incentives ^[1] 100:1 incentivize ^[1] 95:21 inclined ^[1] 89:7 include ^[2] 78:12 79:13 including ^[6] 5:1 18:16 29:21 85:1 91:17 122:9 incommensurable ^[1] 109:2 inconsistent ^[5] 11:14 18:25 19:5 91:6 107:22 inconvenience ^[1] 68:14 incorrect ^[2] 20:21 57:25 increase ^[1] 104:16 incur ^[1] 58:23 indicate ^[1] 70:2 indication ^[1] 86:25 indicia ^[2] 14:16 16:13 individual ^[1] 119:2 individuals ^[6] 9:7 13:12 28:21 45:2 46:11 122:14 induce ^[2] 95:14 97:1 inequitable ^[1] 33:17 inextricably ^[1] 120:11 inferences ^[1] 15:12 informal ^[1] 69:7 information ^[1] 57:14 infrequent ^[1] 51:20 inherently ^[1] 107:9 initial ^[1] 59:25 inquire ^[1] 90:8 inquiry ^[5] 55:20 61:25 89:16 111:20 113:1 insight ^[1] 98:8 insisted ^[1] 18:23 instead ^[10] 58:16 59:7 70:4 73:21 75:19 89:17 90:22 93:11 108:5 112:16 insufficiently ^[1] 51:4 intact ^[1] 14:21 intended ^[1] 74:2 interchangeably ^[1] 106:18 interests ^[6] 19:19 37:10 38:9 108:21,23 109:2 interfere ^[1] 79:10 interpret ^[4] 50:8 56:4 62:23 117:4 interpretation ^[7] 8:12 16:12 20:4,21 54:19 55:25 107:8 interpreted ^[8] 5:19 20:13 23:22 53:6,20 56:14,19 76:22 interpreter ^[1] 75:12 interpreting ^[3] 40:24 60:12 88:7 interprets ^[1] 9:17</p>	<p>interrupt ^[3] 24:14 65:20 80:23 interrupted ^[1] 22:7 introduced ^[1] 77:6 involve ^[1] 32:12 involved ^[1] 15:22 involves ^[2] 79:12 105:1 irrelevant ^[3] 38:12 72:7 95:16 isn't ^[12] 36:7 43:14 49:2,3,16 54:13 55:25 87:16 96:21 100:2,17 113:12 isolation ^[3] 55:15 62:12 71:21 issue ^[15] 8:13 9:10 10:18 29:6 53:14,18 54:7 61:19 68:10 71:24 88:10 89:3 96:21 97:5 116:2 issues ^[3] 35:24 44:8 122:10 itself ^[11] 8:22 14:7 23:21 40:25 43:7 54:1,16 62:19 65:6 75:5 89:15</p> <hr/> <p style="text-align: center;">J</p> <p>JA ^[2] 12:19 27:7 Jackson ^[17] 46:14,15 47:13 48:5,10,25 49:23 50:10 74:6,8,10 76:7 117:18,19 118:14,25 119:6 Janice ^[1] 19:20 Jehovah's ^[1] 58:18 Jew ^[1] 58:19 Jewish ^[1] 38:5 Jews ^[1] 56:25 job ^[12] 3:17 11:17 12:2 13:6 39:3 41:4 44:12 52:6 78:25 98:10,14 112:20 joined ^[1] 120:1 Joint ^[1] 29:23 Judge ^[1] 29:4 judgment ^[1] 5:7 judicial ^[1] 17:3 jurisprudence ^[2] 21:12 73:11 jury ^[2] 28:25 29:4 Justice ^[279] 1:21 3:3,10 5:10,18,21 6:1 7:1,18 8:6 9:3 10:1,17,25 11:8,16 12:9,25 13:15,17,21,24 14:22 15:4,13,15,17,18 16:14 17:19 18:22 19:24 21:17,18,19,21,22,23,25 22:1,2,2,4,5,6,10 23:17,20 24:13 25:10,12,19,25 26:7,16 27:15,19 28:7 37:6,7,24 39:15 40:2,7,9,12,18 41:10,22 46:17 52:3 56:8 82:19,22 84:8,16 85:4,13,19 86:7,10 106:7,8,19 108:1,10 109:13 110:10,20,24 111:2,7,15 116:5 keep ^[2] 33:15 118:13 key ^[1] 18:15 kicks ^[1] 34:7 kids ^[1] 33:7 kids' ^[1] 105:16 Kimble ^[1] 18:16 kind ^[14] 11:3 30:19 39:2,18 41:23 42:14 55:18 61:4 63:6 73:25 85:14 91:21 94:13 117:21 kinds ^[6] 18:23 41:19 61:15 73:17 80:25 110:18 knowing ^[2] 30:4 110:8 known ^[1] 12:24 knows ^[4] 24:18 26:10 40:19 48:18 kumbaya-ing ^[1] 82:14</p>	<p style="text-align: center;">L</p> <p>labor ^[1] 93:14 lacks ^[1] 3:25 Lancaster ^[1] 101:5 language ^[21] 3:19 11:1,6 13:25 14:5,10 51:15 56:15 62:23 65:3,14 66:21 67:20 69:22 71:13 75:12 84:5 107:10 108:3 118:22 120:12 large ^[1] 116:10 largely ^[1] 119:4 larger ^[2] 36:20 47:23 last ^[2] 56:18 110:10 later ^[5] 18:17 20:20 78:14 88:3 101:17 lateral ^[1] 78:25 latter ^[1] 93:10 Laughter ^[7] 21:24 22:9 40:14 64:6 66:8 82:15,18 law ^[45] 5:12,18 28:15 49:15 50:20,22 57:15 62:17,18 64:1,25 65:10 67:24 71:11,22 72:7,12,13,19 73:2,20 74:13,19,23 75:2,17 77:23 78:2,9 79:25 80:9,20,25 81:20 83:5,9 103:17 106:21 107:4,22 114:6 118:12,15 121:11,11 laws ^[4] 62:15 83:17,19,21 lay ^[1] 34:3 leading ^[1] 71:14 League ^[1] 33:6 leap ^[1] 36:24 least ^[13] 7:6 13:18 14:2,23 23:11 62:13 63:23 64:8 101:10 102:3 118:16 120:15 121:12 leave ^[2] 4:18 77:18 leaves ^[1] 39:18 leaving ^[1] 14:21 led ^[5] 65:13 69:15 71:16 101:2,14 Ledbetter ^[1] 14:25 left ^[1] 121:16 legal ^[1] 76:18 legally ^[1] 74:25 legislation ^[2] 30:19 62:14 legitimate ^[3] 30:11 31:4 79:8 legitimately ^[1] 93:16 Lemon ^[1] 20:13 length ^[1] 97:12 less ^[1] 122:13 lesser ^[1] 4:22 level ^[9] 6:8 17:17 32:7 36:19,20 39:12 64:9,13 104:2 levels ^[1] 60:1 liability ^[1] 67:23 liberty ^[5] 57:3 108:14 109:7 120:6 121:14 light ^[12] 23:22 51:15 53:21 55:24 56:5,15 57:12,12 62:</p>	<p>24 66:4 68:19 107:17 likelihood ^[1] 116:10 likewise ^[1] 117:15 limited ^[1] 10:15 limits ^[3] 108:3 113:24 118:22 line ^[21] 41:24 44:25 58:21 60:17 63:19 68:4,5 73:23 77:14 80:5,7 84:10 85:7 99:24 102:11 109:9 111:21 112:8 115:21 116:21 120:20 lines ^[5] 57:22 64:2 78:3 85:10 103:3 links ^[2] 48:9 89:3 lip ^[1] 33:15 list ^[1] 26:3 literally ^[2] 67:21 107:20 little ^[20] 4:6 7:2 8:7 12:17 27:5 32:23 33:6 34:10,12,13 37:8 38:18,18 43:4 49:4 61:14 80:13 95:9 104:17 110:23 lived ^[1] 118:9 local ^[2] 35:7,8 long ^[2] 49:8 114:17 longer ^[4] 52:14 72:19 101:17 113:11 look ^[14] 24:12 34:16 36:13 47:11 53:3 54:24 55:2 69:25 71:10 72:12 73:1 86:23 100:9 109:10 looked ^[3] 14:17 18:15 83:24 looking ^[5] 44:2 57:13 73:21 81:11 107:13 looks ^[2] 16:12 17:7 lose ^[3] 26:8 29:1 41:25 losing ^[1] 42:6 loss ^[1] 6:12 lost ^[2] 4:10,17 lot ^[9] 84:18 85:21 95:23 98:16 103:17 114:22 119:24 121:23,23 lots ^[1] 69:5 lottery ^[1] 91:19 LOUIS ^[2] 1:6 3:5 low ^[1] 44:20 lower ^[18] 8:25 51:13,24 52:5 54:25 56:13,19 57:5,9,11 63:13 73:8,14,20 96:6 103:14 107:15 119:23 lump ^[1] 31:4</p> <hr/> <p style="text-align: center;">M</p> <p>machinery ^[1] 79:11 made ^[3] 67:20 74:2 88:6 mail ^[5] 34:15 52:14,16 68:17 100:24 main ^[2] 110:23 111:2 maintain ^[1] 17:4 maintaining ^[1] 93:14 make-or-break ^[1] 54:10 man ^[1] 11:17</p>
---	---	---	--

Official

<p>manage [1] 33:15 manifest [1] 104:19 manifold [1] 68:15 manual [4] 27:25 28:17 57:17,18 manuals [1] 19:22 Many [20] 15:5 16:4 41:17 42:2,4 49:6,6 56:23,24 77:7 84:1 99:18,18 103:6,15 116:11,14,25 120:1 121:13 marginal [1] 36:19 margins [1] 107:5 Marvel [1] 18:16 mass [1] 4:19 matching [1] 94:24 materially [2] 89:19 103:10 matter [10] 1:13 16:17 37:19 65:19,23 83:5 100:9 105:13 118:24 122:1 matters [1] 24:19 McLean [1] 16:8 mean [45] 3:23 8:3 15:20 16:18,23 17:5 22:1,10 24:18 29:4,5 32:18 33:6,21 34:10 36:7,9 40:4,10,13,18 41:13,16 42:8,10 45:7 47:14 48:15 49:2 60:10,21 67:17,21 69:13 70:24 71:9 73:6,10 97:17 98:13 107:20 112:25 113:22 116:16 117:24 meaning [19] 4:8 7:20 8:2 9:22 11:14 20:1 50:9 53:9,19,25 54:14 55:3 75:18,25 103:20 107:13 109:21 120:21 121:18 meaningful [1] 50:22 meanings [1] 88:8 means [13] 40:15,16 45:9 47:4,9,10 51:16 58:11 73:6 77:24 93:23 107:20 121:5 meant [1] 107:24 measure [2] 42:1 108:23 measured [1] 45:17 medicine [1] 119:13 meeting [1] 79:16 meets [1] 6:10 member [1] 30:17 members [1] 58:9 memorandum [5] 24:24 31:9 91:7 92:6,17 mention [1] 20:8 mentioned [4] 20:24 21:3 27:9 85:21 mere [4] 16:9 89:12 90:19 102:15 metric [3] 9:1,25 36:16 midday [2] 78:14,19 might [26] 4:16,19 6:20 8:7 9:4 22:13,23 23:1 33:22 41:17 42:11,15,17 63:7 64:21 78:7 83:7 88:11 93:25</p>	<p>94:1 98:23 111:9 113:1 114:9 115:20 116:19 mile [1] 42:14 mill [1] 79:9 mind [1] 75:6 minds [1] 23:1 mine [2] 32:11 86:17 minimal [2] 69:8,14 minimis [43] 3:18,25 6:3 10:3 19:12 20:12 23:23 24:3 35:2 51:14 55:8,11,15 56:5 62:12,14,17 65:3,14 66:21 67:20 69:13 71:7,13,21 73:5,6 81:15,16 85:22,23 86:3 92:19 93:22,23,23 101:6 106:15 107:6,12,20 120:12 121:14 minor [1] 68:13 minority [2] 56:21,24 minuscule [1] 36:19 minute [2] 14:22 25:20 miss [1] 57:5 misunderstand [2] 57:5 58:7 misunderstanding [2] 66:19 115:23 misunderstood [1] 73:15 mix [1] 27:9 Mm-hmm [1] 7:18 mockery [1] 3:18 modify [2] 75:8 79:9 Monday [1] 44:21 money [9] 95:9 96:18 100:2,15 108:16 111:23 115:18 116:7,8 months [3] 113:18 114:8,13 months' [1] 114:19 moon [1] 104:12 morale [20] 33:13 35:24 39:16,24 40:19,24 41:6,22 42:9 43:7,14,21,21,22 44:1,8,17,20 100:9 122:10 morale's [1] 41:1 morning [1] 3:4 most [4] 31:12 96:10 100:12 121:2 mostly [1] 96:22 motivate [1] 21:5 motivated [3] 22:16 92:11 102:20 MOU [9] 25:22 26:2,8 29:6 52:10 109:14,14,21,23 much [8] 59:5 66:16 67:3 70:4 76:4 95:11 98:22 102:2 Muslim [2] 89:1,8 Muslims [3] 56:24 89:24 90:14 must [1] 36:2</p>	<p>61:16 62:6 90:18 98:10 101:8 112:18 necessarily [3] 28:4 55:20 114:23 necessary [2] 70:13 94:5 necessity [1] 67:17 need [12] 9:10 15:18 16:20,21 44:13 64:15 66:13 67:16 106:22 108:6 116:25 117:15 needed [1] 12:21 needing [1] 79:15 needs [7] 28:10 39:25 42:21 45:11 66:15 100:1 105:2 negotiate [1] 31:18 negotiated [1] 109:25 neither [2] 90:16 91:23 neutral [3] 17:17 91:18 102:17 neutrality [8] 18:21 19:13 20:16 72:18 73:16 74:1 93:21 119:19 neutrality-based [1] 4:3 never [8] 22:12,14 35:20 49:8 92:18 107:20 111:13 115:16 new [19] 4:5 5:1 24:22 25:6 28:13 44:2 47:6 55:25 63:11 72:6 75:3 77:22 83:13,21 87:23 113:17 116:19 119:21 121:16 next [3] 38:16 63:8 64:4 2,15 108:16 111:23 115:18 116:7,8 nobody [1] 95:8 non-career [1] 12:20 non-Sunday [1] 46:9 none [6] 14:16 33:24 34:1 98:24 110:2 111:13 nor [1] 91:24 normally [1] 11:25 notable [1] 119:25 noted [1] 56:8 nothing [5] 18:24 19:4 31:7 70:1 96:24 nowhere [1] 73:18 nub [1] 63:6 number [5] 35:1 83:1,21 101:9 111:19</p>	<p>odd [1] 7:2 offense [1] 110:15 offer [3] 58:15 113:11 114:17 offered [2] 85:18 98:12 Office [17] 25:21 27:4 34:10,11,12,13,14 35:7 41:7 52:10 95:24 99:17 104:18 105:1 113:4 116:17,18 office's [1] 105:3 offices [3] 34:20 35:9 96:3 often [2] 19:4 101:11 Ofentimes [1] 28:24 Okay [23] 24:13 32:16 37:25 40:7 60:3 62:10,25 64:11 66:14 67:12 81:10 84:7,16 88:2,4,13 89:21 90:11 95:5,7 97:16 106:19 117:16 old [1] 59:15 on-the-ground [1] 83:7 once [1] 101:13 one [48] 5:21 6:15 7:1 10:6 15:6 26:18,18 27:2 28:5 32:1 33:2 37:7,21,24 44:21 48:11 52:17 61:8 65:4,24 70:9,19,20 71:24 80:1 82:25 87:25 88:23 91:16 92:10 93:2,4 94:1 95:13,13 97:2 98:13 99:21 100:22 102:4 104:12 108:13 110:10 111:21 112:13 115:4 116:13,24 one's [2] 70:23 71:3 ones [1] 23:3 ongoing [5] 58:24 61:12 87:4 112:21,25 only [15] 15:10 16:18,23 30:4 34:7,25 47:10 55:14 78:4 79:18 89:18 90:23 107:12 109:10 114:8 onwards [1] 107:16 open [4] 33:2 53:10 69:24 104:3 opening [1] 10:11 opens [1] 43:8 operate [1] 51:18 operated [1] 77:2 operates [1] 61:4 operating [8] 76:9 79:11 84:14,17,19,20,21 106:23 operation [3] 36:3 40:21 43:15 operations [5] 27:12 39:14 40:1 42:23 43:12 opinion [7] 9:15 20:8 53:4,5 56:10 86:4 87:25 opinions [1] 54:25 opportunities [2] 25:5 26:3 opportunity [2] 16:1 49:17 oppose [1] 11:2 opposed [1] 114:23 opposite [1] 102:2</p>	<p>options [1] 62:6 or-expense [1] 31:1 oral [6] 1:14 2:2,5 3:8 20:9 50:14 order [3] 32:5 98:6,16 ordinarily [1] 61:3 ordinary [2] 60:22,24 original [1] 108:12 Orthodox [2] 56:25 58:19 other [53] 4:23 5:4 6:1 7:22 9:17,21 11:1,23 13:9,25 14:18 15:5 16:13 27:3 28:14 33:4,21 35:8 38:16 41:19 45:15 47:5 51:20 52:13 55:4 56:9 62:4 70:19 72:14,18 73:4 74:11,12 80:11 84:14,19 85:11 93:4 96:3,17 98:11 100:23 101:3,10 103:9 104:8 108:14 117:9,11,14 120:1 122:13,14 others [6] 8:9 37:23 85:7 97:1 99:7 105:15 otherwise [9] 92:5 103:22 112:2,5 115:20 ourselves [2] 8:8 71:11 out [46] 7:16 24:20 25:1 26:3,10 27:21 28:1,15 31:13 32:1,13 34:3,19,24 35:6 36:5 38:11 42:23 44:12 47:1,17 49:16 57:9,15 64:19 66:23 71:25 73:3,4,9 85:7,18 93:14 95:6 97:3 100:23 101:11,17 102:22 103:17 104:7 107:19 109:9,11 110:2 111:22 out-of-pocket [2] 59:3 60:19 outlined [1] 81:1 over [12] 15:21,21 51:9,9 56:13 70:3 72:6 75:20 76:6,17 77:4 100:24 overburdened [3] 35:25 44:11 45:3 overcome [1] 51:1 overhaul [2] 14:20 15:9 overhauled [1] 14:23 overloaded [2] 28:22 41:3 override [9] 10:2,12 11:12 13:18 18:8 22:22 50:25 67:4 77:24 overruled [2] 14:24 16:4 overruling [4] 17:10 63:23 66:7 67:25 overt [1] 89:13 overtime [1] 6:14 13:10 51:17 58:24 59:24 60:17 61:10 95:21 114:1 117:8 120:16 overtly [1] 92:10 overview [1] 57:20</p>
N				
<p>narrow [1] 79:6 nature [9] 13:14 36:1 59:8</p>				
O				
<p>objection [1] 37:22 objectively [1] 41:3 obligations [1] 72:8 observance [4] 6:23 33:20 78:13,24 observances [1] 116:11 observants [1] 50:23 observation [1] 63:18 observer [3] 33:3,9 120:18 observers [1] 121:8 obvious [1] 43:19 obviously [5] 9:8 34:10 69:23 78:13 81:4 occasions [1] 101:2</p>				
P				
<p>packages [2] 42:3 101:19 PAGE [2] 2:2 47:10</p>				

Official

<p>pages [4] 19:9 29:22 36:5 40:17</p> <p>painting [1] 111:12</p> <p>parallel [2] 88:8 94:23</p> <p>parsed [1] 70:4</p> <p>part [7] 10:12 22:19 42:7 46:2 87:21 112:19 117:4</p> <p>particular [9] 36:25 49:2 55:22 56:5 71:19 73:22 85:5 94:7 118:5</p> <p>particularly [3] 30:23 31:12 77:2</p> <p>parties [2] 66:17,17</p> <p>party [1] 3:19</p> <p>pass [1] 62:13</p> <p>past [2] 63:14 118:11</p> <p>patchwork [1] 4:5</p> <p>path [1] 21:9</p> <p>pattern [1] 55:22</p> <p>patterns [2] 72:10 76:1</p> <p>Patterson [2] 14:25 16:8</p> <p>pay [28] 11:10 24:21 32:4 51:17 58:11,12,12,12,13 60:22,23,24 87:4 96:13,25 97:13,19,20 98:5,16 100:11 105:5,10,11 112:2,22 114:7 115:20</p> <p>paying [14] 4:20 6:14 11:9 25:7,16 47:20 84:11 85:2 86:11 99:21 105:21 106:24 113:8 115:19</p> <p>payment [11] 4:11 6:13 51:20 60:17 61:9 95:20 98:5 105:23 114:1 116:1 117:8</p> <p>peace [1] 93:14</p> <p>peak [2] 15:23 100:21</p> <p>people [18] 12:1 33:14,18 34:14 41:17 49:5 70:7,7 72:15 89:25 95:5,14 96:13 98:23 99:5 100:10 105:14 113:17</p> <p>people's [3] 23:1 72:16,24</p> <p>per [3] 6:15 32:10 121:4</p> <p>percent [1] 8:16</p> <p>perfectly [1] 24:7</p> <p>perform [1] 98:15</p> <p>performed [2] 45:11,12</p> <p>perhaps [4] 9:12 27:6 67:13 104:1</p> <p>period [1] 65:9</p> <p>permanent [1] 61:12</p> <p>permissible [1] 90:15</p> <p>permit [1] 78:15</p> <p>permits [1] 48:14</p> <p>perpetuity [4] 97:12 113:13,25 114:23</p> <p>person [10] 6:15,15 37:17 38:21 49:10 60:7 94:24 95:2 98:13 112:3</p> <p>persuaded [1] 19:18</p> <p>Petitioner [18] 1:4,19 2:4,10 3:9 50:24 51:12 67:3 81:4,19 91:12 95:19 96:2,6 100:22 101:16 111:12</p>	<p>119:11</p> <p>Petitioner's [2] 52:6 102:9</p> <p>pick [7] 32:5 37:10 43:4 45:15 75:2 93:15 104:12</p> <p>picked [1] 49:2</p> <p>picture [1] 111:12</p> <p>piece [2] 65:25 76:18</p> <p>pieces [1] 76:16</p> <p>pitch [1] 55:19</p> <p>place [3] 33:20 48:22 61:17</p> <p>plain [11] 3:22 7:20 8:2 9:17,21 11:14 14:8 50:9 55:3 109:22 121:18</p> <p>plate [1] 9:11</p> <p>plausible [1] 23:12</p> <p>play [3] 16:19,22 27:25</p> <p>played [1] 57:9</p> <p>plays [1] 32:1</p> <p>please [5] 3:11 21:22 50:17 60:9 66:3</p> <p>plight [1] 105:3</p> <p>point [32] 12:17 16:7 22:20 23:9 32:12 36:5 38:11 39:21 42:7 45:20 66:10,13 69:21 71:15 74:11 75:1,21 77:15 87:21 89:10,12 90:5 92:14 94:21 95:18 98:1 99:23 103:4 107:18 110:5 113:19 117:11</p> <p>pointed [3] 49:16 70:5 85:7</p> <p>pointing [4] 24:20 83:16,18 118:13</p> <p>points [4] 16:6 29:15 56:10 88:18</p> <p>policies [1] 79:4</p> <p>policy [4] 49:3,19 51:6 102:17</p> <p>pool [1] 104:17</p> <p>poor [1] 17:10</p> <p>port [1] 77:4</p> <p>portion [5] 61:13 86:3 88:5 98:14 106:2</p> <p>portions [1] 102:3</p> <p>portraying [1] 57:8</p> <p>posed [1] 28:19</p> <p>posited [2] 30:20 112:13</p> <p>position [13] 12:6,18,23 13:3 23:4 25:15 34:2 35:14,20 43:24 79:1 104:7 120:24</p> <p>possibility [3] 54:3 104:3 116:13</p> <p>possible [1] 75:2</p> <p>possibly [2] 36:20,20</p> <p>Post [20] 25:21 27:4 34:10,11,12,13,14,20 35:7,8 41:7 52:10 95:24 96:3 99:17 104:17 105:1,3 113:4 116:17</p> <p>Postal [5] 12:23 68:14 95:12 96:8 110:1</p> <p>POSTMASTER [4] 1:6 3:5 96:1 101:1</p>	<p>postmaster's [1] 30:1</p> <p>potential [1] 75:6</p> <p>potentially [3] 64:22 78:1 79:14</p> <p>practical [3] 74:22 75:1 83:6</p> <p>practice [5] 26:12 38:23 89:14 108:25 109:7</p> <p>practices [1] 17:17</p> <p>prayer [3] 4:15 78:14,20</p> <p>pre-amendment [1] 5:16</p> <p>precedent [3] 18:9 22:22 52:2</p> <p>precedential [1] 4:1</p> <p>precise [1] 77:8</p> <p>predecessor [2] 53:12,20</p> <p>predictability [1] 17:2</p> <p>prefer [2] 13:13 38:2</p> <p>preference [8] 4:12,20 6:17 19:14 39:4,5 48:3 120:23</p> <p>preferences [2] 17:18 39:6</p> <p>preferred [1] 46:1</p> <p>pregnancy [2] 4:18 9:5</p> <p>Pregnant [3] 43:2,5 122:5</p> <p>PRELOGAR [108] 1:20 2:6 50:13,14,16 53:2,7 54:21 55:13 57:7 58:5,21 59:12,18,22 60:4,6,12,25 62:2,8,22 63:7 64:10,12,18,24 65:11,17,21,24 66:2,6,9 67:2,7,11,19 68:7,22 69:21 71:18 72:3 73:13 74:21 76:12 77:20 80:3,14 81:2,9,18 82:2,9,16 83:11,16,20 84:13,23 85:9,14,25 86:13,23 87:24 88:4 89:10 90:2,16 91:10 92:8,21,23 94:3,21 95:17 96:23 97:22,25 98:25 99:3,11,14 100:3,18 102:10 103:25 105:20,25 106:17 107:3 108:19 109:16 110:19,22,25 111:3,8 112:6 113:14 115:1,7,11,24 116:23 118:7,20</p> <p>premium [39] 4:11,20 6:14 11:9 25:8,17 32:4 51:20 58:11,12,12,12,13 59:24 60:3,5,9,21 84:11 85:2 86:11,18,22 87:10 98:5 99:22 100:7,7 102:1 104:25 105:5,11,12,23 106:24 112:4 115:17,18 116:2</p> <p>presented [3] 8:10,15,17</p> <p>preserve [2] 107:4 108:5</p> <p>pressed [1] 95:19</p> <p>pressure [2] 66:10,13</p> <p>presumably [1] 48:18</p> <p>pretty [6] 24:11 35:15 46:19,25 110:14 115:22</p> <p>prevailed [1] 54:11</p> <p>preventing [1] 110:16</p> <p>previously [1] 91:12</p>	<p>principle [2] 73:16 74:1</p> <p>principles [2] 34:4 51:24</p> <p>probably [2] 47:22 59:6</p> <p>problem [11] 24:11 46:20 52:24 67:14,15 72:23 76:20 83:8 113:16 116:9 122:8</p> <p>problems [4] 8:16 30:18 52:15,17</p> <p>produced [2] 52:16 107:6</p> <p>producing [1] 27:14</p> <p>productive [2] 42:12 88:18</p> <p>profit [2] 99:17,18</p> <p>profit-making [1] 95:13</p> <p>profitable [1] 95:13</p> <p>prohibit [1] 96:25</p> <p>prohibits [1] 88:24</p> <p>prominent [1] 20:9</p> <p>promise [1] 3:15</p> <p>prong [1] 45:21</p> <p>proof [1] 105:17</p> <p>proper [3] 59:23 79:25 81:13</p> <p>properly [6] 55:23 56:14,20 66:3 107:17 108:9</p> <p>proposed [1] 70:21</p> <p>propositions [1] 120:16</p> <p>prospect [1] 117:14</p> <p>protect [2] 6:25 109:6</p> <p>protected [2] 31:19 122:14</p> <p>protecting [3] 76:4 94:11 121:13</p> <p>protection [4] 4:22 50:23 57:10 120:5</p> <p>protects [1] 51:4</p> <p>prove [2] 42:11,25</p> <p>provide [7] 61:4 70:15 78:7,17 89:7 98:23 120:5</p> <p>provided [1] 90:20</p> <p>provides [2] 50:22 57:19</p> <p>provision [3] 91:6 93:21 94:10</p> <p>provisions [3] 15:11 26:11,15</p> <p>published [1] 56:3</p> <p>pulling [1] 111:22</p> <p>purposes [4] 34:21 56:1 106:15 110:8</p> <p>Put [14] 30:10 36:1 39:11 42:11,14,16 54:2 64:19 65:8 92:2 95:25 96:8 99:12 111:5</p> <p>putting [1] 18:2</p>	<p>10 31:1 32:2,17 34:5 36:15,21 48:7,11,21 49:3,19,20 50:3 53:11 58:10 59:10,25 60:9 63:1,8,12 64:4,15,22 70:20 73:20,22 78:1 83:7 91:3 92:2 97:6 102:1 104:25 114:4,4 118:24 119:20</p> <p>questions [16] 5:9,11 28:18 31:25 37:11 48:12 52:4,22 61:15 84:9 85:6 87:8 99:19 106:9 111:25 118:16</p> <p>quick [4] 27:1 78:8 82:25 104:24</p> <p>quiet [1] 45:2</p> <p>quit [8] 26:18 33:12,12 39:9,24 43:23 44:22 89:23</p> <p>quite [6] 28:18 31:16 35:4 88:17 112:8 119:25</p> <p>quits [3] 43:19,20 44:18</p> <p>quitting [12] 28:21 35:25 44:25 45:2 52:17 70:7 89:24 90:9,10,13 102:20 104:20</p>
R				
<p>radar [1] 49:7</p> <p>radically [1] 84:6</p> <p>rails [1] 121:12</p> <p>raised [1] 106:21</p> <p>rarely [1] 104:2</p> <p>rate [2] 58:16,16</p> <p>rather [3] 15:22 65:4 93:7</p> <p>rationale [7] 4:3 17:15 18:14,17,21 93:11 119:19</p> <p>rationalizing [1] 71:5</p> <p>RCA [2] 12:10,18</p> <p>RCAs [4] 34:21,22 35:8 101:9</p> <p>reach [6] 29:6 68:4,4 70:11 93:9,10</p> <p>reaction [2] 89:3,6</p> <p>read [7] 17:21 19:9 26:5 28:8,16 74:5 102:3</p> <p>reading [3] 11:7 107:19 115:25</p> <p>real [2] 76:20 109:3</p> <p>real-world [2] 101:2,20</p> <p>realize [2] 43:14 103:16</p> <p>really [21] 10:2 15:18 16:17 20:5 24:19 33:18 56:16,22 60:8 66:10,17 70:5 72:22 73:6 74:1 78:4,8 83:25 86:17 93:20 112:16</p> <p>reason [17] 4:21 21:2 28:5 30:12,16,22 36:14 49:1 75:4 88:9 94:2,18,20,23 95:8 120:10 122:12</p> <p>reasonable [14] 30:17 45:9,16,21 46:3 52:21 61:17 62:6 68:9 75:14 101:21 114:11,12 122:15</p> <p>reasonableness [2] 45:7,</p>				
Q				
<p>QP [1] 8:19</p> <p>qualify [1] 68:8</p> <p>qualitative [1] 107:9</p> <p>quality [1] 17:11</p> <p>quantifiable [1] 44:14</p> <p>quantified [1] 100:15</p> <p>quantum [1] 8:19</p> <p>question [47] 7:2 8:9,15,17 13:9 14:13 21:16 27:21 30:</p>				

Official

13 reasoning [7] 17:11,23,25 18:4 30:12 50:5,7 reasons [9] 7:24 17:1,3 19: 14 21:2 61:8 68:11 89:2 90:8 REBUTTAL [2] 2:8 119:10 recalling [1] 87:2 receive [4] 4:14,17,22 112: 5 receiving [1] 26:20 recognize [7] 45:8 51:19 61:18 69:24 71:18 75:22 108:20 recognized [6] 54:16 57: 11 76:15,24 92:14 109:5 record [13] 12:19 13:11,12 22:21 29:10,21 30:2 41:5 95:18,23 100:20 101:7 103:16 recurring [1] 72:10 redo [1] 108:7 reduced [1] 34:25 reduces [1] 51:8 refer [1] 53:5 refers [1] 121:10 reflect [1] 108:12 reflected [3] 80:19 117:3 118:12 reflexively [1] 58:3 refusing [1] 23:18 regardless [2] 56:17 105: 22 regional [1] 96:3 regrettably [1] 99:16 regular [13] 6:13 58:24 59: 15 60:10,16 61:9 97:12 98: 4,6 100:7,8 116:1 117:8 regularly [14] 51:17,17 78: 16 79:5,17 84:11,13,17,20, 21 85:17 86:11 106:23,24 regulation [1] 87:22 regulations [1] 53:5 reimburses [1] 60:2 reject [3] 67:8,13 120:3 rejecting [1] 79:5 related [1] 74:14 relates [1] 93:2 relatively [1] 101:25 relevance [1] 91:4 relevant [9] 20:2,25 35:22 88:5 89:17 91:2 102:13 103:6 116:24 reliability [1] 17:2 reliance [3] 17:2 19:19 71: 23 relied [1] 87:14 religion [8] 11:22 14:20 20: 1,15 37:16 38:3,18 45:10 religion's [1] 38:7 religions [2] 56:21,24 religious [6] 3:12 4:21 5:2 11:20 17:17 19:14 20:18 28:15 31:18 33:20 37:9,13,	16,17,25 38:9,16,17,23 39: 4 41:17 46:1 50:23 51:5 57:2,10 61:7 72:17,24,25 73:11 76:4 78:5 79:12,14, 16,19 89:2,14 90:4,20 92: 18 93:25 94:20,22 95:2 96: 15,16 102:21,23 105:7,9 108:13,25 109:6 110:13 116:11 120:6 121:13 122: 9,12 rely [2] 93:16 110:8 relying [1] 118:8 remains [1] 15:5 remand [7] 65:15,19,22,25 68:19 69:2,11 remands [1] 29:18 remedial [1] 30:19 remotely [1] 19:5 renovations [1] 75:9 repeat [1] 76:1 repeatedly [2] 77:5 120:13 replace [1] 14:3 replacement [2] 64:21 112:22 reply [1] 26:2 replying [1] 118:8 reported [1] 83:24 represent [1] 17:22 representative's [1] 29:22 representatives [1] 56:23 request [6] 31:4,6 62:6 94: 17 113:25 116:18 requested [3] 68:15 82:3 91:5 requests [4] 41:16 78:6 85: 11 94:19 require [11] 4:19 67:25 80: 25 81:17 82:6,8,13 105:22 116:12 119:1 120:24 required [17] 12:10 13:10 18:23 19:2,4,7,21 51:16,19 52:7 72:1 80:2 89:1 97:18, 20 115:17 117:22 requirement [3] 97:12 102: 22 112:21 requirements [1] 61:6 requires [12] 3:12 7:23 19: 13 38:23 55:21 69:18 81: 13 92:19 93:21 108:22 114:1,7 requiring [2] 78:17 114:6 resentment [2] 89:13 102: 15 resist [1] 63:20 resisting [1] 67:9 resolve [3] 53:23 54:7 88:9 resolved [2] 53:9,17 resource [1] 93:3 respect [7] 9:12 13:8 18:1 48:12 49:11 76:10 92:5 respects [2] 56:20 72:14 respond [2] 74:11,21 Respondent [4] 1:7,22 2:7 50:15	responding [1] 106:12 response [2] 74:18 114:5 responses [2] 102:14 117: 25 responsibility [1] 98:16 rest [4] 35:9 67:1 73:16 121:9 rests [1] 51:21 result [3] 26:20 70:12 99:6 results [1] 63:16 retaining [1] 71:15 retention [1] 52:17 retroactivity [3] 53:15,24 88:10 reverse [1] 5:7 reversed [1] 19:16 revised [1] 114:24 revisit [1] 49:24 revisited [1] 20:4 revisiting [1] 74:16 rightly [4] 40:23 73:24 85: 18 87:14 Rights [23] 15:5 31:6,14,18 52:10 56:21 62:14,15 91: 16,20 93:1,5,6,18 94:7,13, 16,19 100:7 108:14 110:7 117:11 120:2 rise [3] 32:6 39:12 104:2 road [4] 6:10 23:10 70:14 113:18 ROBERTS [27] 3:3 8:6 9:3 22:2 30:6 31:21 37:4 41: 11 46:13 50:11 70:18 72:2, 11 74:7,9 86:9,15 87:18 88:15 98:19 101:23 104: 22 106:6 111:16 117:17 119:7 122:17 robust [1] 71:7 role [2] 16:19,22 rosy [1] 119:22 rotation [3] 91:19 109:23 121:7 routes [2] 101:17,18 rubber [1] 6:10 rule [6] 15:25 16:15,16 32: 10 36:17 104:15 rules [2] 93:8 100:16 ruling [6] 16:4,19,20,23 18: 25 23:16 run [5] 32:11 66:21 99:17 100:1,13 running [1] 40:19 rural [6] 32:25 34:14 45:14 104:17 113:2 116:18	same [22] 7:3,16 9:24 12:1 14:11 15:14 31:10,12 38:4, 5 40:16 41:14,18 53:19,25 55:11 73:4 94:16,19 105: 21 106:14 122:15 Sandoval [1] 15:8 Saturday [7] 12:11 38:6 58: 17,18 105:6,8,12 Saturdays [2] 11:18 46:9 saw [1] 101:15 saying [27] 10:4 12:4 17:21 18:5,7 43:14 44:17 53:18 60:11 65:9 71:1,5 72:22 81:25 82:5,7 85:24 106:13 107:1 114:5,6,15 115:8,14, 16,21 118:5 says [25] 8:10 11:19 16:9 19:1,6 30:2 33:3 38:1,4,5 48:3 56:18 62:17 69:7 80: 17 84:19,20 89:1,7 92:17 94:15 110:4 114:10 116:7 121:3 scarce [1] 93:3 scarf [1] 89:2 scenario [2] 50:1 118:6 scenarios [2] 112:13 121: 24 scheduled [2] 30:4 96:2 schedules [1] 78:18 scheduling [4] 25:11 26:4 78:11 82:3 scheme [1] 110:6 scope [1] 9:9 screen [1] 49:8 scrutiny [1] 92:12 se [2] 32:10 121:4 searching [1] 64:25 season [1] 100:21 second [7] 8:13 11:9 21:7 29:20 79:3 88:21 110:12 Section [1] 26:13 secular [7] 6:17 17:18 20: 17 39:5 94:2,15,18 secure [1] 106:1 see [10] 6:10,11 10:9 61:22 92:1,4 103:12 104:18 112: 25 113:18 seeking [2] 14:10 41:18 seem [3] 21:5 46:25 112:14 seemed [1] 35:15 seems [19] 7:2,5 8:7 9:11 24:2 29:5 35:13 38:14 41: 14,21,23 45:12 64:8 81:11 111:19,20 114:15 116:22 119:24 seen [1] 100:10 select [1] 45:25 selected [1] 15:10 sell [1] 42:4 send [2] 70:13,15 seniority [14] 10:15,23 22: 3,4 26:13 31:5,7,13 91:9, 18,24 92:3 100:6 117:10 sense [4] 38:10 69:10 76:5	85:17 sensible [1] 82:10 sentence [1] 92:14 sentences [1] 19:10 separate [1] 73:21 separately [1] 92:3 Separation [1] 70:25 serious [1] 66:19 seriously [1] 65:4 serve [3] 27:13 41:2 105:1 Service [5] 12:23 68:14 78: 15 95:12 96:8 set [3] 85:5 117:22 118:19 sets [1] 110:2 setting [1] 48:16 seven [1] 8:20 Seventh [1] 56:25 several [2] 4:25 106:9 SG [2] 17:19,21 shall [1] 94:15 share [1] 122:15 she's [3] 17:20,20,21 sheet [1] 69:7 shift [15] 4:12,20 6:16 42:7 47:21 48:2 58:18 78:23 95: 6 96:13,14,17 104:12 113: 20 120:22 shifted [3] 46:10 49:15 78: 18 shifting [1] 48:13 shifts [14] 34:23 45:16 46: 11 52:11,14 60:15 91:1 93: 16 94:9 95:5,15,25 97:1 110:2 short [2] 4:7 115:22 short-handedness [2] 25: 6 100:8 short-shifted [1] 24:22 short-shiftedness [1] 25: 5 short-staffed [1] 114:20 shorthanded [10] 44:10 51:18 84:14,17,19,20,22 85:2 106:24 114:20 shot [1] 74:24 shoulders [1] 48:23 shouldn't [3] 29:3 36:24 49:14 show [6] 30:5 36:2 39:13 40:25 103:5 104:13 showed [2] 100:21 101:11 shows [4] 29:10 34:17 78: 9 103:9 shut [1] 114:2 side [3] 62:4 80:11 109:10 side's [1] 74:11 sides [3] 37:10 81:16 108: 21 sign [2] 13:5 75:11 signals [1] 75:5 significance [1] 108:24 significant [18] 3:23 7:21 8:3 14:3 24:17 29:17 32:7, 14,20 46:23 47:3 59:5 67:
---	---	--	---	--

S

Sabbatarian [1] 6:22
Sabbatarian's [1] 6:16
Sabbath [11] 33:3,8 47:21
78:12,24 79:1 82:3 116:18
120:7,18 121:8
safety [1] 79:8
salary [1] 87:10
sales [1] 42:7

Official

15 68:25 70:6 73:7 75:20 112:15 significant-difficulty [1] 30:25 significant-difficulty-an d [1] 74:14 significant-difficulty-an d-expense [1] 122:7 significant-difficulty-or [2] 4:24 7:25 significant-difficulty-or- expense [2] 28:12 63:4 silence [1] 23:5 silent [3] 15:1,5 67:1 similar [6] 5:4 32:22 44:6 49:25 101:4 117:20 similarity [1] 7:9 simplify [1] 32:23 simply [3] 46:10 65:2 121: 6 since [4] 55:24 62:17 71:3 74:19 sincerely [1] 105:9 single [4] 6:17 48:2 120:17 121:20 situation [4] 24:21 33:17 88:23 89:9 situations [1] 111:1 six [4] 35:3,6 114:13,19 size [2] 32:14 62:5 skirt [1] 79:10 slack [2] 32:6 43:4 slot [1] 98:7 small [4] 42:17 65:25 83:20 104:17 smile [1] 33:15 snack [1] 4:14 soccer [1] 105:16 Solicitor [3] 1:20 24:1 69: 16 solutions [1] 98:12 solve [2] 8:15 106:25 somebody [6] 25:17 30:5 39:2 47:20 98:9 120:25 someone [7] 39:17 44:18 97:9 102:16 106:1 112:19 113:8 someone's [1] 100:6 sometimes [4] 19:1,2,6 81: 14 soothsayer [1] 22:25 sorry [9] 21:20 46:15 65:20 80:23 82:24 88:12 97:25 98:3 106:8 sort [4] 9:10 22:23 33:9 71: 25 SOTOMAYOR [27] 10:1,17, 25 11:8,16 12:9,25 13:15, 17,21,24 14:22 15:4,13,17 31:22 87:16 98:20,21 99:1, 4,13,15,16 100:4 101:22 117:20 sound [3] 6:20 43:13 69:8 sounds [4] 24:11 44:16 46:	19 117:19 space [1] 108:4 specific [3] 12:21 13:6 98: 10 specifically [3] 31:13 52:7 97:10 specifics [1] 24:25 speculate [2] 30:11 100: 19 speculation [2] 51:23 117: 2 speech [3] 79:16,20 111:8 spell [1] 26:2 spoke [1] 21:16 spot [1] 112:21 spread [1] 103:8 square [3] 17:24 54:13 55: 7 squarely [3] 5:24 98:2 109: 18 stability [2] 107:4 108:6 staked [1] 104:6 standard [37] 8:8 9:13 21: 14 24:6 27:21 28:5 31:1 32:1 36:22 49:12 52:21 53: 19,25 54:1,6 55:10,12,21 63:24 71:16 72:6 75:23 76: 1,6,15 77:8,22 80:1,16 84: 6 85:20 101:21 107:10 108:8,22 118:23 122:7 standards [4] 47:16 76:9 84:2 88:22 standing [3] 17:24 18:7 118:4 stands [1] 18:13 stare [17] 14:18 15:21,23 16:9,15,18,21,22 17:7 49: 25 50:4 51:1,11 76:21 87: 1 97:15 119:14 start [3] 75:20 76:6 101:13 starting [3] 16:7 23:6 113: 17 starts [1] 39:17 State [4] 71:1 83:5,9 107: 22 stated [1] 5:24 statement [2] 56:17 67:24 STATES [11] 1:1,15 4:25 28:14 29:17 83:2,3,15,21 84:4 122:2 statute [27] 5:17,23 14:6 15:10,22 16:20 28:3 31:19 38:20 48:19,21 53:10,12, 15,18 54:4,8 55:12 72:9 87:23,23 88:7 91:25 97:11 108:12 119:16 121:19 statute's [1] 3:15 statutes [15] 4:23 5:5 7:23 8:5 9:17,21,24 13:25 14: 11 17:5 47:5 74:13 75:23 122:4,14 statutory [18] 15:20,20 16: 4,16 17:6 18:8 20:3 22:22 49:12 51:2,10 69:22 75:15	76:21 87:1 97:15 119:13 120:21 stay [3] 33:2 52:13 101:16 steel [1] 79:9 steps [1] 119:5 stiff [1] 33:15 still [4] 16:24 75:16,24 120: 11 store [6] 32:25 33:2 34:1 35:5 45:14 113:2 STREET [79] 1:18 2:3,9 3: 7,8,10 5:15,20,22 6:6 7:11, 19 8:14 9:14 10:13,24 11: 5,13 12:6,14 13:2,16,20,22 14:9 15:3,7,15 16:6 17:6 18:10 19:8,24 21:1 23:2, 18 24:9 25:3,11,14,23 26:1, 9,25 27:18 28:2,10 29:15 30:21 31:11 32:9 34:2,16 35:19 36:12 37:20 38:20 39:22 40:5,8,11,15,22 42: 20 43:18,24 44:6,24 45:19, 24 47:2,19 48:7,20 49:18 50:2 119:9,10,12 Street's [1] 103:24 strict [6] 20:16 72:18 73:16, 25 93:21 109:23 striking [1] 121:2 strip [1] 91:20 stripping [1] 117:9 strong [4] 14:16 37:22 51: 1 119:13 struck [3] 56:17,22 109:5 structure [1] 75:15 struggle [3] 97:8,18,19 subject [1] 55:18 submitted [2] 122:18,20 substantial [44] 11:4 23: 24,25 24:5,5,6,7,10,17 26: 22 27:22 28:8,9 29:11,20 45:18 46:18,24 47:8 48:6, 8 50:20 56:11,11 57:10 58: 1,24 63:3,10,19 64:8 69:19, 19,20,20 77:17 83:3,4 86:5 106:10,13 107:1,12 117:7 substantially [1] 60:23 substitute [1] 120:17 success [1] 40:20 suddenly [1] 114:19 suffice [1] 103:5 sufficient [2] 16:10 102:17 suggest [3] 71:19 113:15, 22 suggested [3] 45:8 101:5 112:9 suggesting [3] 56:1 63:23 104:11 suggestion [2] 68:6 74:18 suggests [1] 74:17 summarizes [1] 81:20 summary [2] 63:5 78:8 Sunday [31] 11:20 12:3,11, 16,25 13:2 26:4 33:2,5,22 34:23 37:15,18,22 38:2,4,	15,17 52:8,11 70:9 78:15 96:1,5 100:24 105:2,6,8,12 109:24 110:9 Sundays [9] 11:18 12:22 13:6,13 33:18 41:19 42:5 52:7 97:11 super-duper [1] 58:13 supply [1] 115:11 supported [1] 92:24 Suppose [4] 89:5,21 92:15 94:14 supposed [2] 71:9 102:4 supposedly [1] 28:21 SUPREME [2] 1:1,14 surprising [1] 104:18 surrender [1] 39:2 swaps [2] 78:23 113:20 symbol [2] 79:14 111:5 symbols [2] 110:13,17 synchronizes [1] 87:22 synonymous [1] 46:25 system [6] 10:23 17:4 91: 18,25 109:23 121:7 systems [2] 10:15 26:13	11 13:11 15:22 18:24 19:4 23:14 28:15 29:10 30:13, 16 32:24 33:19 36:24 37:1 38:9 45:1 48:17 54:12 61: 22 62:11 69:18 74:13 75: 22 76:8,20 79:1,7 80:24 82:12 84:5 95:7 99:19 102: 21 103:17 108:2 109:2 111:6,21 114:14 115:21 therefore [4] 39:20 93:5,22 120:15 they'll [2] 103:20,21 they've [2] 49:8 97:9 thing's [1] 27:23 thinking [3] 21:8,10 32:17 thinks [5] 6:7 33:16 81:4 102:7 118:17 Third [7] 10:19 63:1 69:2, 25 70:11 79:12 110:12 THOMAS [17] 5:10,18,21 6: 1 7:1,18 30:8 52:23 53:3,8 54:20,23 87:19,20 88:1,2, 13 though [9] 7:5 20:23 22:14, 17 38:15 77:5 81:5 84:4 92:9 threatened [1] 70:8 threats [1] 39:24 three [19] 10:5 13:18 17:21 19:10 32:25 56:2 78:5,8 79:24 80:24 81:8,21,23 88: 16 101:1,12 110:2,11 120: 16 three-person [1] 33:25 thrilled [1] 33:4 thrive [2] 108:15,15 throughout [2] 13:4 57:18 throw [2] 50:24 72:5 tied [1] 120:11 time-and-a [1] 60:14 time-and-a-half [5] 87:4 98:6 113:9 115:6 116:1 timely [1] 52:15 Title [29] 3:12,21,25 4:15, 16 5:14 7:9 9:8 12:2 14:21 15:9 18:23 19:12,17 26:5 31:2 34:6 50:20 53:1 75: 16 76:23 77:1 80:2,5,7 81: 13,17 84:2 92:4 today [13] 3:19 10:10 18:14 45:2,22 49:24 50:3 66:15 73:12 78:21 79:4 122:2,11 together [3] 6:19 31:4 82: 14 took [1] 69:3 top-down [1] 108:2 toss [1] 27:21 touched [1] 118:24 tracks [1] 61:14 Trans [1] 120:20 transfer [4] 26:19 76:17 78: 25 98:15 transferred [2] 27:2,4 transferring [6] 52:18 70:
--	---	--	--	---

T

table [1] 102:24
talked [2] 20:14 26:14
talks [1] 23:23
teaches [1] 103:1
teller [1] 22:23
temporarily [1] 85:2
temporary [4] 84:25 85:1
113:16 114:7
tenable [1] 74:5
tend [1] 84:1
term [8] 7:3 24:3 55:8 91:
21 92:10 93:12 94:5 108:
11
terms [13] 26:21 38:21 48:
17 55:15 89:20 91:14 92:
25 93:4,17 106:18 109:22
119:18 121:15
test [57] 3:18,20,25 4:5,13,
25 5:2,4,7 6:20 8:1,10,12
10:3 17:14 18:13 19:12 20:
12 24:17 28:12,14 29:18
42:21 44:3 45:18 46:18,22,
24 47:23 48:1,6 49:2 50:7
61:25 62:12 63:2,3,4,10
71:3,7,12 74:15,19 77:17
83:5 86:21 93:22 105:19
107:2,7 119:18,21 120:4,
10 121:15,16
testimony [1] 101:11
tests [2] 47:18 83:10
Texas [1] 1:18
text [7] 3:23 7:20 9:18 50:8
121:18,21 122:1
textual [2] 5:6 121:22
themselves [2] 73:15 94:
13
theory [1] 22:6
There's [43] 4:21 7:4,12 9:

Official

<p>8 101:6 102:20 104:20 112:20 transplant [2] 74:23 75:3 treat [3] 72:16 113:1,3 treated [3] 54:17 92:3 113:4 treating [1] 17:16 treatment [2] 7:7 26:21 trial [1] 29:19 tried [2] 68:11 76:14 trifle [3] 67:22 68:24 70:3 trifles [2] 62:19 68:21 trifling [4] 62:16 66:22 69:9,13 trivialities [1] 77:14 true [3] 33:19 57:1 102:19 truly [1] 3:19 try [9] 34:3 57:14 60:6 71:25 95:21,25 97:1 108:2 116:17 trying [19] 6:24 14:14 21:9 34:14 46:21 72:4 73:8,9 74:22 82:10 85:16 87:11 96:3,8 105:1 108:22 112:17 114:2 118:22 Tuesday [1] 1:11 TWA [4] 3:14 59:15 116:10 117:13 twice [1] 14:23 two [15] 13:18,22 16:6 21:2 24:15 29:15 33:4 45:15 47:9,15 101:11 108:13 109:13 113:18 114:8 type [4] 11:2 59:8 61:10 112:10 types [9] 9:23 57:20,21 72:1 75:7 76:10 85:11 102:12 113:23</p> <hr/> <p style="text-align: center;">U</p> <p>U.S [1] 53:13 ultimate [1] 59:2 ultimately [4] 39:11 51:7 53:17 70:11 unable [1] 27:13 unanticipated [1] 114:14 unavailable [2] 100:22,25 unclear [3] 27:6 98:1 119:14 under [42] 4:13,15,15,16 5:4 7:3,8,13,14 9:23 45:18,20 47:4,18,22,25 50:4,20 52:10,20 53:1 54:21 55:5 61:25 68:9,9 72:6 73:2 76:3,6 79:24 91:21 92:3 101:21 105:18,19 108:8 112:3 117:22 120:23 122:4,14 undergo [1] 75:8 underpinnings [1] 21:5 understand [19] 20:5,11 29:13 35:12 46:21 55:6 58:22 91:12 93:9,20 104:1 105:2 108:10,11,17,20 111:24 112:8 115:20</p>	<p>understanding [19] 19:17 20:1 24:25 31:9 37:20 68:10 69:17 71:7 72:8 79:25 81:13 84:10 91:8 92:7,17 94:9 109:20 112:4 118:2 understands [1] 17:25 understood [9] 8:2 10:5 32:3,18 38:25 66:4 72:19 108:9 115:7 undesirable [5] 52:11 91:1,17 93:16 110:1 undue [97] 3:13,22 4:8,9 5:7 6:8,13,18 7:3,5,7,7,20 8:2,12,21,22 9:12,25 10:7,22 11:11,14,22 12:4 14:1,8 21:14 28:4 29:24 30:3 32:15 36:22,25 37:1 39:12 47:22,25 48:4 49:21 50:19 51:22,25 52:5,20 53:18,25 54:5 55:3,8,12 58:20 59:17 68:8 69:22 73:24 74:4,12 76:9,25 79:6,21 80:6 83:4 84:12 86:12,19 87:5 89:16 90:3 91:2,19 99:9 101:21 102:18 103:5 104:13 105:18 106:3 107:8 108:11,17 109:9,10 114:9,12,18 115:4 116:3 117:13 120:4,18,21,23 121:4,21 122:16 unfair [2] 39:8,16 unfamiliar [1] 101:18 unhappy [2] 99:6 102:21 union [3] 52:19 70:9 121:6 unions [1] 31:17 unique [1] 52:24 unit [1] 109:25 UNITED [3] 1:1,15 122:2 universal [1] 68:20 unlawful [1] 26:12 unless [3] 44:17 69:14 86:20 unlike [1] 41:15 unnecessary [2] 54:8 74:3 unrest [1] 101:14 unsettle [3] 80:8,11 119:5 unsettling [1] 77:24 until [1] 43:22 unusual [2] 22:6,8 unwarranted [2] 109:12 112:10 up [30] 13:5 14:15 18:7,13 30:5 32:5 37:10 39:4 43:4,6,8 45:15 48:9 57:21 72:5 75:2 76:19 78:6,20 82:25 84:24 88:19 89:3 93:15 104:12 107:5 109:8 111:5 115:14 120:20 update [1] 19:21 upper [1] 33:15 uproot [1] 75:2 upset [1] 43:3 urge [3] 28:6 57:16 65:17 useful [1] 65:12 USERRA [2] 9:5 122:6</p>	<p>using [3] 22:23 71:23 106:18 USPS's [1] 68:16</p> <hr/> <p style="text-align: center;">V</p> <p>vacate [2] 69:2,11 vacating [1] 68:19 vacuum [1] 24:10 valid [1] 106:3 values [1] 108:13 variety [3] 6:9 7:24 122:4 various [2] 86:2 118:1 verbal [4] 63:12 64:16,20 80:1 version [6] 53:9,11,13,20 54:14 119:16 versions [1] 88:7 versus [6] 3:5,14 15:7 16:8 18:16 37:17 vest [1] 94:6 view [12] 20:12 22:16,17 45:17 57:7 68:7 85:23 91:4 103:23,24 119:23,24 views [1] 48:13 VII [28] 3:12,21,25 4:15,16 5:14 7:9 9:8 14:21 15:9 18:23 19:12,17 26:5 31:2 34:6 50:20 53:1 75:16 76:23 77:1 80:2,5,7 81:13,17 84:2 92:4 violate [6] 10:22 11:3 24:23 26:7 31:8 91:25 violated [3] 20:15 52:9 57:2 violates [1] 3:15 violating [1] 25:21 violation [1] 11:2 vis-à-vis [1] 91:16 voluntarily [3] 25:9 95:6 115:9 voluntary [5] 25:17 78:22 95:4,25 113:20 volunteer [2] 58:17 95:22 volunteered [2] 46:8,9 volunteers [1] 96:4 vote [1] 23:15</p> <hr/> <p style="text-align: center;">W</p> <p>wage [12] 11:9 60:11 86:22 99:22 100:8 105:5,11,12 112:4 115:18,18 116:2 wages [22] 4:11,21 6:14 25:8,17 32:4 51:17,21 59:6,24 60:17 61:10 84:11 85:3 86:11,18 97:13 98:5 102:1 104:25 105:23 114:1 Wait [4] 14:22 43:22 49:14 86:8 Walmart [1] 59:14 wanted [7] 20:17,17 38:11 70:15 82:25 88:19 111:11 wanting [1] 78:14 wants [4] 80:11 94:24 96:15 105:7</p>	<p>warning [1] 30:24 Washington [2] 1:10,21 watered-down [1] 120:4 way [31] 18:5 20:11 35:6,9 36:4,13 47:10 50:8 54:2,12 56:12,20 60:13 61:3,18 63:13 73:4 74:5,17 76:3 78:23 82:17 97:4 103:11 104:14 107:3 108:2,5 109:3,4,18 weak [1] 19:19 weaker [1] 19:20 wealth [1] 57:15 wear [3] 89:2 90:10 94:25 wearing [3] 79:10 88:25 110:17 web [2] 7:22 122:3 week [5] 6:15 13:4 32:13 47:20 115:19 weekend [4] 19:15 101:10,14 105:22 weekends [2] 93:3 101:12 weekly [3] 4:10,18 120:16 weeks [4] 34:19,25 35:3,6 weighs [1] 17:9 weight [1] 51:1 welcome [2] 5:9 52:22 well-developed [1] 64:24 whatever [4] 26:22 39:24 79:25 113:10 whenever [2] 4:10 12:21 Whereupon [1] 122:19 whether [26] 8:10 10:19 13:9 16:17 18:12,16 20:3 27:11,12,13 30:11 48:22 50:7 53:12 54:10 58:11,13 66:14 69:18 77:24 86:22 87:9 91:18 99:25 103:12 117:21 who's [1] 100:10 whole [3] 36:23 74:13 110:5 wholeheartedly [1] 49:18 wholly [2] 74:3 76:16 whom [1] 97:7 will [21] 8:15 18:3 24:18 56:4 66:22,22,23 72:1 73:10 79:10 92:18 95:6,8,9 96:14,22 114:16 120:5,7 121:7 122:8 willing [1] 42:13 winds [1] 115:14 wish [1] 119:22 within [3] 12:23 94:4 98:2 without [2] 61:6 106:20 Witness [1] 58:18 witnesses [2] 21:15 30:24 woman [2] 89:1,8 won [1] 68:24 wonder [1] 66:14 wondering [2] 9:9 116:20 word [3] 22:8 24:10 121:20 words [10] 17:21 24:16 28:3 47:9 49:21 55:2,3 71:20 72:18 73:4 Work [52] 9:5 11:18,24 12:2,10,12,13 13:10,10,13,14 25:9,18 28:22 36:1 38:2,3 45:4 46:8,9 52:7,8 61:5,13,23 65:8 75:25 76:2 78:17,18 79:8 90:25 91:17 94:8 96:5 97:1,10 100:10,10,14 101:8 103:20,21 104:14 105:6,12,14 106:2 108:7 110:9 119:3 120:25 workable [1] 28:16 worked [1] 99:18 worker [1] 112:23 workers [7] 4:21 24:22 32:12 43:2,3 103:7 122:5 workflow [2] 101:15 103:13 workforce [1] 27:14 working [9] 11:19,20 19:15 33:5 37:22 41:8 46:11 74:12 101:10 workplace [7] 41:18 76:5 79:13 89:15 103:10 109:7 120:6 works [1] 4:25 workspace [1] 103:14 World [1] 120:20 worried [1] 49:4 worry [1] 80:14 worth [1] 93:23 written [3] 47:14,15 120:15 wrongly [1] 51:8 wrote [1] 8:4</p> <hr/> <p style="text-align: center;">Y</p> <p>yardstick [2] 8:18 36:15 year [5] 34:20,25 35:4,7,10 year-round [2] 11:10 35:5 years [9] 50:18 56:3,13,18 63:15 71:10 99:18 107:16 118:11 York [7] 5:1 28:13 44:2 47:6 83:13,21 116:19</p> <hr/> <p style="text-align: center;">Z</p> <p>zone [1] 57:10</p>
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