APPEAL NO. 21-2475

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M. KLUGE,

Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Honorable Jane Magnus-Stinson
Case No. 1:19-cv-02462-JMS-DLP

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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INTRODUCTION

After the Supreme Court's decision in *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), the Court directed the parties to file supplemental briefs addressing three issues: (1) *Groff*'s impact on this appeal, (2) whether this Court or the district court should apply *Groff*'s legal standard to this case, and (3) if the case is remanded, whether the district court should reopen discovery. Order at 1 (July 6, 2023). Mr. Kluge answers those questions as follows:[1]

First, *Groff* confirms Mr. Kluge's arguments for a Title VII accommodation and undermines the panel majority's reasons for stripping it away. The panel majority focused on minutia at school and used the now discredited more-than-*de-minimis*-cost or slight-burden test. *Groff* requires an accommodation unless the employer shows it would impose an undue hardship or substantial burden on the employer's *overall* business. Whereas the majority held that ideological complaints justified canceling Mr. Kluge's accommodation, *Groff* said that bias or hostility to a religious practice or accommodation does not count. And, unlike the panel majority, *Groff* instructs courts to disregard heckler's vetoes and impacts that stem from bias toward a particular religion or hostility towards accommodating faith at work. Summed up, *Groff* abrogates the majority's discrimination ruling and allows for only one conclusion: Brownsburg failed to prove undue hardship as a matter of law.

Second, this Court, not the district court, should apply *Groff*'s standard to this case. Appellate courts apply the law as it stands, and *Groff*'s application to the facts of this case is straightforward.

Finally, and relatedly, a remand would profit nothing because this Court's review is *de novo*, and no basis for reopening discovery exists.

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[1] *Groff* does not speak to Mr. Kluge's retaliation claim, which should—at the least—be remanded for trial, as Mr. Kluge's rehearing petition and panel briefing explain.

For the reasons explained below, in the rehearing petition, and Mr. Kluge's panel briefs, this Court should reverse and remand with instructions to enter summary judgment in Mr. Kluge's favor on his discrimination claim.

ARGUMENT

I. Six principles from *Groff* clarify Title VII's religious-accommodation requirement.

Groff set out to "clarify" Title VII's religious-accommodation requirement for the first time "in nearly 50 years." 143 S. Ct. at 2287–88. And it established six principles that govern Mr. Kluge's discrimination claim on appeal. *United States v. Fitzgerald*, 545 F.2d 578, 581 (7th Cir. 1976). Each of them informs the answer to one central question: whether Brownsburg proved that allowing Mr. Kluge to continue using *all* students' last names in *all* his classes caused "undue hardship on the conduct of [the school district's] business." *Groff*, 143 S. Ct. at 2288 (quoting 42 U.S.C. § 2000e(j)).

First, the Supreme Court's prior decision in *Trans World Airlines, Inc v. Hardison*, 432 U.S. 63 (1977), remains good law. *Groff*, 143 S. Ct. at 2292–94. But its holding directly applies only where a religious accommodation conflicts with seniority rights. *Hardison* made "very clear that those rights were off-limits." *Groff*, 143 S. Ct. at 2292. It did not parse Title VII's text, *id*. at 2294–95, or give much "guidance on 'undue hardship' in situations not involving seniority rights," *id.* at 2292.

Second, when *Hardison* and Title VII's language are read together, "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." *Id.* at 2294. *Hardison* spoke predominantly in terms of "substantial costs or expenditures." *Id.* at 2292 (cleaned up). Its guidance on undue hardship cannot be "reduced" to one line referencing "more than a *de minimis* cost,"

which should never have been taken "literally or . . . [to] undermine[ ] *Hardison*'s [repeated] references to 'substantial' cost." *Id.* at 2294 (cleaned up).

Title VII requires not "a mere burden" but something "more severe." *Id.* Not every "additional cost[ ]" is a hardship. Employers must show "something hard to bear." *Id.* And that hardship must also be "undue," which means the employer's hardship "[a]rise[s] to an excessive or unjustifiable level." *Id.* (cleaned up).

So demonstrating a more-than-*de-minimis* burden on the employer's business, "*i.e.*, something that is very small or trifling," falls well short of Title VII's requirement. *Id.* at 2295 (cleaned up). Employers must instead "show that the burden of granting an accommodation would result in *substantial increased costs* in relation to the conduct of its particular business." *Id.* (emphasis added). But *Groff*'s framing is key. To count as undue hardship, the "burden [must be] substantial in the *overall context* of an employer's business," not divided in parts, considered in vignettes, or viewed in isolation. *Id.* at 2294 (emphasis added).

Third, more important than any "favored synonym for 'undue hardship'" is Title VII's language. *Id.* at 2295. Courts must apply that balancing test by "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in the light of the nature, size[,] and operating cost of an employer." *Id.* (cleaned up). "What is *most important* is that 'undue hardship' in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in [a] common-sense," *id.* at 2296 (emphasis added), and "fact-specific" manner that "comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech," *id.* at 2294.

Fourth, an accommodation's impact is relevant only if it "go[es] on to affect the conduct of the [employer's] business." *Id.* at 2296 (cleaned up). *Groff* gave the example of an accommodation's "effect on co-workers," *id.*, because—in that case—

"[o]ther employees complained about the consequences of Groff's" Sundays off, *id.* at 2286 n.1. But the principle extends beyond co-workers: Title VII requires courts to "assess[ ] . . . a possible accommodation's effect on 'the conduct of the employer's business'"—full stop. *Id.* at 2296 (quoting 42 U.S.C. § 2000e(j)).

To illustrate, *Groff* relied on two pages of Judge Hardiman's Third Circuit dissent in that case, *id.* (citing *Groff v. DeJoy*, 35 F.4th 162, 177–78 (3d Cir. 2022) (Hardiman, J., dissenting)), which emphasize that "a burden on coworkers isn't the same thing as a burden on the employer's business," *Groff*, 35 F.4th at 177 (Hardiman, J., dissenting). Courts cannot "equate[ ] undue hardship on business with an impact—no matter how small—on coworkers." *Id.* For that would "render[ ] *any* burden on employees sufficient to establish undue hardship, effectively subjecting Title VII religious accommodation to a heckler's veto by disgruntled employees." *Id.*

Groff rejects that heckler's veto outright. Employers cannot use a snapshot of their entire operations, such as "the limited experience of the Holtwood [postal] station at Christmastime," to show a religious accommodation would cause their businesses to "suffer undue hardship." *Id.* at 178. "Title VII concerns undue hardship on the employer's *business*" writ large, *id.* at 177 (citing 42 U.S.C. § 2000e(j)), not the impact on a few co-workers, such as the "[p]ostmaster in Holtwood or certain Lancaster Annex" delivery personnel, *id.* at 178.

Fifth, some real-world impacts on the employer's business are "'off the table.'" *Groff*, 143 S. Ct. at 2296. Title VII doesn't factor in "religious hostility" or bias. *Id.* (cleaned up). Critically, hardships "attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice" are not "'undue.'" *Id.* The same is true of hardships based on "adverse customer reaction from a simple aversion to, or discomfort in dealing with," certain religious people, such as those who faith prescribes shaving and teaches men to wear "beard[s]." *Id.* (cleaned up). Regardless of who complains, *Groff*

applied the same rule: "bias or hostility to a religious practice or a religious accommodation" is no "defense to a reasonable accommodation claim." *Id.* For that would put Title VII "at war with itself." *Id.*

Last, the Supreme Court took a clear position on Seventh Circuit precedent. *Groff* approved the reasoning in *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013), twice. *Groff*, 143 S. Ct. at 2294–96 (citing *Adeyeye*, 721 F.3d at 455–56). But *Groff* took a dim view of *EEOC v. Walmart Stores East, L.P.*, 992 F.3d 656 (7th Cir. 2021), abrogating this Court's reliance on *Hardison*'s more-than-a-*de-minimis*-cost language and a "slight burden" variant. 143 S. Ct. at 2292–95. *Groff* specifically disapproved *Walmart Stores*' holding that requiring "the Nation's largest private employer" to "facilitate voluntary shift-trading to accommodate" a Sabbatarian assistant manager caused undue hardship. *Id.* at 2293 & n.12.

In sum, *Walmart Stores* has been abrogated because it misperceived *Hardison*, applied the wrong test, and reached the wrong conclusion. But much of *Adeyeye* remains good law because it largely got *Hardison* and Title VII right.

II. *Groff*'s principles support only one conclusion: Brownsburg failed to show undue hardship as a matter of law.

A. *Groff* and *Adeyeye*, not *Walmart Stores*, provide the Title VII accommodation standard.

One question lies at the heart of this appeal: what does Title VII mean by "undue hardship?" 42 U.S.C. § 2000e(j). Mr. Kluge's position has always been that Title VII's language and this Court's decision in *Adeyeye* provide the answer. *E.g.*, OpeningBr.26–27 & n.4, 40; ReplyBr.1–4, 7–8, 12. Mr. Kluge cautioned against over-reading *Hardison*'s scope and treating its brief reference to "more than a *de minimis* cost" as the benchmark for religious accommodations. EnBanc.Pet.7. And he distinguished *Walmart Stores*, which—like *Hardison*—dealt with Saturdays off and was being misused to erase Title VII's "undue hardship" language, ReplyBr.3,

EnBanc.Pet.7, effectively allowing "*any* employer to deny *any* religious accommodation that imposes a 'slight burden' on *anyone*," ReplyBr.3.

Judge Brennan's dissent largely agreed.[2] He relied on *Adeyeye* for the proposition that "*Hardison* is most instructive when there is . . . a seniority system or collective bargaining agreement." *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 906 (7th Cir. 2023) (Brennan, J., dissenting) (citing *Adeyeye*, 721 F.3d at 456). Judge Brennan's only citation of *Walmart Stores* was to identify "*Hardison*'s core" and narrow its reach. *Id.* (citing *Walmart Stores*, 992 F.3d at 659).

Brownsburg took a different tack. It construed *Adeyeye* out of existence and stretched *Hardison* to the max. AppelleeBr.28–30. In the district's view, *Hardison*'s "anything more than de minimis" language replaced "the term 'undue hardship' in 42 U.S.C. § 2000e(j)." AppelleeBr.28 (cleaned up). Placing *Hardison* and *Adeyeye* in needless collision, Brownsburg invited this Court to use *Walmart Stores* to "dispel[ ]" the resulting mess. AppelleeBr.30.

The panel majority accepted Brownsburg's invitation, citing *Adeyeye* in passing and never addressing its description of Title VII's text and *Hardison*'s scope. *Kluge*, 64 F.4th at 883–84 (citing *Adeyeye*, 721 F.3d at 449, 455). Only two things mattered, said the majority: (1) *Hardison*'s reference to employers "not 'bear[ing] more than a *de minimis* cost' in making an accommodation," and (2) *Walmart Stores*' description of "*de minimis* cost as a 'slight burden.'" *Id.* at 883. And the majority's reasoning hinged entirely on these substitutes for undue hardship. *E.g.*, *id.* at 886–91.

Groff proved Mr. Kluge right and Brownsburg wrong. *Walmart Stores* and *Hardison*'s more-than-a-*de-minimis*-cost line never provided the relevant test.

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[2] For brevity and ease of reference, this brief refers to Judge Brennan's partial concurrence and dissent at the panel stage as a "dissent."

Demonstrating that accommodations result in more than a very small or trifling burden on employers doesn't show undue hardship—not even close. *Supra* pp.2–3. Because Brownsburg caused the panel majority to apply the wrong legal test, *Groff* abrogates its accommodation holding *in toto*.

B. Brownsburg must show undue hardship in the overall context of its business, not merely in its relationship with a few disaffected teachers or students.

Brownsburg also caused the panel majority to use the wrong data and lens. As a result, the majority focused on ideological complaints by several co-workers and alleged "emotional harm" to a few students. *Kluge*, 64 F.4th at 885–87. Yet not every "additional cost[ ]" or "mere burden" is a hardship, let alone one that is undue. *Groff*, 143 S. Ct. at 2294. Brownsburg never showed—and the majority never considered whether—those costs were "hard to bear" or rose "to an excessive or unjustifiable level." *Id.* (cleaned up).

Mr. Kluge argued that his accommodation caused no meaningful disruption at school. OpeningBr.11, 34–35; ReplyBr.6–7; EnBanc.Pet.5. In other words, there were no "substantial increased costs" to the school district's business. *Groff*, 143 S. Ct. at 2295. The district's answer was that "the last-name-only accommodation is an undue hardship under any reasonable definition of that term," AppelleeBr.31 n.3, because some teachers complained and a few students were offended, *e.g.*, *id.* at 34. Yet Brownsburg never proved those costs were substantial. Nor could it.

Undue hardship depends on "the *overall context* of an employer's business," including its "nature, size[,] and operating cost." *Groff*, 143 S. Ct. at 2294–95 (cleaned up) (emphasis added). Brownsburg High School has more than 2,800 students and over 150 teachers. A few people complained because *one teacher* refused to affirm their beliefs about gender identity. That is a storm in a teacup.

Mr. Kluge's accommodation had no effect on Brownsburg's business writ large, and the district did not argue otherwise. ReplyBr.5 & n.1.

Courts cannot "equate[ ] undue hardship on business with an impact—no matter how small—on coworkers" or clients. *Groff*, 35 F.4th at 177 (Hardiman, J., dissenting), *approved by Groff*, 143 S. Ct. at 2296. Yet that is the hardship Brownsburg raised and on which the panel majority relied. *Groff* eliminates any such heckler's veto. *Id.* A disaffected few among thousands of students and scores of teachers, *cf. id.* at 177–78, cannot show undue hardship on Brownsburg's business "overall," *Groff*, 143 S. Ct. at 2294.

C. Brownsburg's only proof of undue hardship is non-cognizable bias or hostility towards Mr. Kluge's accommodation or beliefs.

The school district's undue-hardship claim never varied. It rescinded Mr. Kluge's accommodation because a few stakeholders complained that he wasn't affirming transgender beliefs. Doc.121 at 35–36; AppelleeBr.33–34. And the panel majority ruled for Brownsburg on that basis. *Kluge*, 64 F.4th at 885–87. Yet *Groff* unequivocally takes that evidence of undue hardship "off the table." 143 S. Ct. at 2296.

"[B]ias or hostility to a religious practice or a religious accommodation" is no "defense to a reasonable accommodation claim." *Id.* So grumblings that Mr. Kluge's last-names-only accommodation caused offense, discomfort, or alleged emotional harm are irrelevant. Costs resulting from clients' "discomfort in dealing with" certain religious people or "employee animosity to a particular" religious practice don't count. *Id.* (cleaned up). Employers cannot "giv[e] effect to religious hostility" or bias—even if they have a general policy of making clients feel supported. *Id.* (cleaned up). Otherwise, "Title VII would be at war with itself." *Id.*

It would be no different if an Orthodox Jewish teacher requested a religious accommodation to a "no head coverings" school district policy, and a few Palestinian

teachers and students objected that seeing a yarmulke made them feel uncomfortable or caused them emotional harm. The district would still have to grant the accommodation. The same would be true if a Muslim teacher requested an accommodation to take a prayer break, and some teachers and students said this caused them discomfort. Animosity to or discomfort with someone's religious beliefs and practices are legally irrelevant to an undue-hardship analysis after *Groff*.

D. Mr. Kluge's accommodation claim prevails.

In sum, *Groff* abrogates the majority's ruling on Mr. Kluge's accommodation claim by rejecting Brownsburg's entire theory of the case and the school district's only purported evidence of undue hardship.[3] Because the school district cannot overcome Mr. Kluge's prima facie case of discrimination, his Title VII accommodation claim prevails as a matter of law. ReplyBr.2.

III. This Court should apply *Groff* to Mr. Kluge's accommodation claim and reverse for the entry of summary judgment in his favor.

This Court should follow the "well-established" rule and apply *Groff* to Mr. Kluge's accommodation claim. *Richardson v. United States*, 379 F.3d 485, 487 (7th Cir. 2004) (per curiam). "[A] court generally applies the law in effect at the time of its decision, and . . . if the law changes while the case is on appeal[,] the appellate court applies the new rule." *Id.*; *accord Ortiz-Santiago v. Barr*, 924 F.3d 956, 964 (7th Cir. 2019). That "obligation . . . extends through a party's direct appeal," *id.*, including when a rehearing petition is pending.

Remanding to the district court would be exceptional and unwarranted. There has been no sea change in the nature of this appeal. First, the accommo-

[3] Brownsburg's Title IX argument for undue hardship is improper and meritless, as explained in Mr. Kluge's panel briefing, OpeningBr.38–39; ReplyBr.11–14, and Judge Brennan's dissent, *Kluge*, 64 F.4th at 915–16 (Brennan, J., dissenting).

dation standard Mr. Kluge cited under Title VII, *Hardison*, and *Adeyeye* is remarkably similar to the one *Groff* ultimately established. Brownsburg invited the panel majority to err by sidestepping *Adeyeye* and turning to *Walmart Stores*, and *Groff* merely confirmed that Mr. Kluge was right and Brownsburg was wrong. *Supra* pp.5–7.

Second, Mr. Kluge's argument has always been that (1) ideological grumblings from a few coworkers and students didn't show undue hardship, (2) heckler's vetoes are not allowed, and (3) an employer cannot give effect to clients' perceived religious bias. OpeningBr.4, 33–36; ReplyBr.4–10; EnBanc.Pet.2, 4–6. *Groff* simply makes these points more evident and categorical. It doesn't alter their substance. Brownsburg had ample notice, time, and opportunity to respond to Mr. Kluge's accommodation claim, and it did so by citing evidence that *Groff* says is legally irrelevant to the undue-hardship determination.[4]

Third, even when the Supreme Court grants, vacates, and remands a case for reconsideration in light of a recent decision, this Court often performs the reevaluation itself. *E.g.*, *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013); *Matz v. Household Int'l Tax Reduction Investment Plan*, 265 F.3d 572 (7th Cir. 2001); *Tinsley v. United Parcel Serv.*, 665 F.2d 778 (7th Cir. 1981). That course is especially fitting in a scenario like this one, when a "prior decision [of this Court] correctly anticipated the Supreme Court's holding." *Kurek v. Pleasure Driveway & Park Dist. of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam). In that respect, this Court's decision in *Adeyeye* was prescient.

[4] For example, no one suggests the undue-hardship issue "was not really developed" in the district court. *Knapp v. Whitaker,* 577 F. Supp. 1265, 1270 (C.D. Ill. 1983).

Fourth, how *Groff*'s rule applies to the facts of this case is a pure legal question. This Court reviews such questions *de novo* and gives no deference to the district court. *United States v. Sandidge*, 863 F.3d 755, 758 (7th Cir. 2017). So no occasion exists for the "type of detailed and exacting factfinding that is better performed" below. *Dederich Corp. v. Eurozyme S.N.C.,* 839 F.2d 373, 375 (7th Cir. 1988). There is "nothing to be gained from a remand." *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1138 (7th Cir. 1986).

Conversely, there is much "judicial economy"—and time and expense for the parties—to lose. *Id.* After nearly 25 months of litigation in the district court and 23 months on appeal, the parties deserve a timely resolution. Mr. Kluge agrees with Brownsburg's position a year ago: the Court should not remand and "prolong this litigation" further beyond the four years that Mr. Kluge has already waited to vindicate his Title VII rights. Appellee.Supp.Br.14; *accord* Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 219 (2020) ("[T]he courts of appeals have mandatory jurisdiction," so efficiency "weighs in favor of *deciding* rather than *remanding* for applying of the correct standard . . . far more often than it does in the Supreme Court") (emphasis in original).

Fifth, the panel already gave the school district an extra opportunity to request a remand for further factual development. Order at 1 (June 30, 2022). The school district emphatically declined, sticking to its argument that any "interfere[nce] with Brownsburg's educational mission" showed that Mr. Kluge's accommodation caused "undue hardship as a matter of law." Appellee.Supp.Br.14. The district deliberately chose its legally theory; just as a remand was inappropriate then, it is inappropriate now. Appellant.Supp.Br.16–18.

"The litigation process does not include a dress rehearsal or practice run for the parties." *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007) (cleaned up). Brownsburg had extensive notice of Kluge's accommodation claim and "ample time

to develop" evidence of undue hardship, if any existed. *Id.* That the school district failed to "unearth" proof that counts "is a problem of [the district's] own making." *Taflinger v. Hindson*, 870 F. Supp. 2d 598, 603 (S.D. Ind. 2012). During over nine months of discovery, nothing suggested that undue hardship "was an issue [Brownsburg] should not explore." *Sullivan v. Flora, Inc.*, 63 F.4th 1130, 1139–40 (7th Cir. 2023) (cleaned up). Any evidentiary gap stems from the extreme nature of the school district's legal theory and the district's "own lack of diligence." *Echemendia v. Gene B. Glick Mgmt. Corp.*, 263 F. App'x 479, 481 (7th Cir. 2008). *Groff* is no reason for "a 'do over,'" *Winters*, 498 F.3d at 743, especially when the parties agreed (twice) to summary judgment on the existing record, Docs. 113 & 120; Appellant.Supp.Br.16–19; Appellee.Supp.Br.13–17.

IV. If the case is remanded, the district court will simply apply *Groff*: no factual or legal basis for reopening discovery exists.

Remanding would be futile because there is no basis to reopen discovery, and the district court will simply apply *Groff*—just like this Court can and should do. Over four years of litigation, Brownsburg stated a remarkably narrow undue-hardship defense: the district could revoke Mr. Kluge's accommodation based on a few teachers' and students' complaints of offense, discomfort, awkwardness, or alleged emotional harm. That defense never expanded or varied. Brownsburg relied on the same complaints at summary judgment that it cited on appeal. *Compare* Doc. 121 at 13–16, 35–36, 39–41; Doc. 150 at 11–14, *with* AppelleeBr.12–15, 33–37, 41; Appellee.Supp.Br.5–6, 13, 16. And, in the course of discovery, Brownsburg *disclaimed* reliance on other potential evidence of undue hardship, such as administrative costs related to Mr. Kluge's accommodation request. Doc. 114 at 31–32.

So, as the "master of [its] case," the school district "chose [its] ground." *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016). It's too late for Brownsburg to make *another* undue-hardship claim based on different facts. *Cf.*

White v. Finkbeiner, 753 F.2d 540, 543 (7th Cir. 1985) (appellees cannot "present for the first time on remand a factual issue, relevant to the merits of [appellant's] claim, which could have been raised in the district court"). Those arguments are waived because Brownsburg didn't raise them below or on appeal. *Bradley v. Vill. of Univ. Park*, 59 F.4th 887, 897–98 (7th Cir. 2023). Because the district forfeited any alternative grounds for undue hardship, there's no reason to reopen discovery to explore them.

Indeed, granting Brownsburg a second (actually third) bite at the discovery apple would constitute an abuse of discretion. *Flint v. City of Belvidere*, 791 F.3d 764, 768 (7th Cir. 2015); *Winters*, 498 F.3d at 743. "Only if a party has failed to act because of *excusable neglect* do the Federal Rules permit a post-deadline extension." *Flint*, 791 F.3d at 768 (citing Fed. R. Civ. P. 6(b)(1)(B)) (emphasis added). Such a high burden is unsurmountable here. The school district had clear "incentive" and "opportunity" to discover objections to Mr. Kluge's accommodation "during the original discovery period."[5] *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, No. 84-cv-6113, 1990 WL 92817, at *6 (N.D. Ill. June 26, 1990). Brownsburg's failure to do so, and extensive reliance on affidavits submitted by a would-be-intervenor, OpeningBr.37, reflect a mere "lack of diligence." *Flint*, 791 F.3d at 768. That is excusable neglect's polar opposite. If Brownsburg "wanted additional information to use in [its] case, [the district] needed to ask for it during discovery." *Rodriguez v. Kane Cnty. Sheriff's Merit Comm'n*, 505 F. App'x 580, 584 (7th Cir. 2013).

Summed up, "remands are not typically intended to allow a party to fill in gaps from the original record." *Webber v. Butner*, No. 1:16-cv-01169, 2019 WL 6213143, at *1 (S.D. Ind. Nov. 21, 2019). Brownsburg has no plausible grounds for reopening discovery "at this late juncture," which would cause "significant delay in

[5] *Accord Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1057 (7th Cir. 2000).

this already aged matter and, ultimately, allow [the district] a second shot at discovery [it] already had an opportunity to engage in." *Cunningham v. Jenkins*, No. 17-cv-126, 2021 WL 2554201, at *3 (S.D. Ill. June 22, 2021). That delay and additional bite at the apple would prejudice Mr. Kluge who litigated this case—vigorously and in good faith—for over four years. *Raymond v. Ameritech Corp.*, 442 F.3d 600, 606 (7th Cir. 2006) (requiring courts to consider prejudice). Brownsburg has no countervailing interest, dooming any effort to reopen discovery. *Cf. Webber*, 2019 WL 6213143, at *2 (citing prejudice to the non-movant).

Four years is enough. It's time for this litigation to end. This Court should not remand but instead apply *Groff* and direct that summary judgment be entered in Mr. Kluge's favor before "this needlessly long case [turns] into an interminable one." *Taflinger*, 870 F. Supp. 2d at 604 (cleaned up).

CONCLUSION

For the foregoing reasons, and those explained in the rehearing petition and Mr. Kluge's panel briefs, this Court should—at the least—reverse and direct the district court to enter summary judgment in Mr. Kluge's favor on his Title VII discrimination claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's July 6, 2023, supplemental-briefing order because this brief contains 4,292 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: July 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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