No. 19-1461

In the Supreme Court of the United States

MITCHE A. DALBERISTE,

Petitioner,

v.

GLE ASSOCIATES, INC.

Respondent.

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

BRIEF FOR ROBERT P. ROESSER & THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

In 1984, the University of Detroit fired ***Amicus* Dr. Robert P. Roesser** from his job as a professor of electrical engineering because of his faithfulness to Catholic social teaching. Dr. Roesser refused to fund a union that would use his money to campaign for abortion rights. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 332–33 (6th Cir. 1990). As a Catholic who believes promoting abortion is a mortal sin, Dr. Roesser was forced to sacrifice his career to obey his conscience.

The Equal Employment Opportunity Commission ("EEOC") found that firing Dr. Roesser was illegal religious discrimination and sued his employer and union. Dr. Roesser intervened. The district court ruled against the EEOC and Dr. Roesser, but the Sixth Circuit reversed. It remanded the case for the trial court to determine whether accommodation was possible without undue hardship. *Id.* But the question was never resolved because the EEOC and Dr. Roesser settled. Dr. Roesser has an interest in what constitutes undue hardship because his academic career depended on it.

Dr. Roesser thus joins this brief as *amicus* to highlight the national importance of this case for all employees of faith who believe that they must obey God's will but are stymied by the current flawed undue hardship standard.

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[1] Under Supreme Court Rule 37.3(a), the parties consented to the filing of this brief. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission.

Amicus **National Right to Work Legal Defense Foundation, Inc.** has been the nation's leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys pioneered litigation protecting employees, including *amicus* Dr. Roesser, from having to choose between their faith and their job when forced to pay compulsory union fees. More broadly, Foundation litigators defended the political and religious autonomy of employees in many cases before this Court, including most recently *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted Title VII, in part, to protect minority employees from discrimination based on their religious beliefs. Yet shortly afterwards, this Court and other courts interpreted Title VII in a way that allowed employers and unions to discriminate against religious employees by enforcing rules that discriminate against religious practices.

Congress responded by adding Section 701(j) to Title VII. The amendment clarified that discriminating against religious practice—even through otherwise neutral policies—is equivalent to discriminating against religious belief or status. Both are unlawful discrimination "because of" religion. To protect religious employees from discrimination, Congress requires employers and unions to provide a reasonable accommodation unless they can "demonstrate" the employer cannot adjust its actions "without undue hardship on . . . [its] business." 42 U.S.C. § 2000e(j).

But *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), gutted these vital protections for religious employees in the workplace. It did so by deviating from Title VII's text and plain meaning. The Court held that little or no duty to accommodate exists, because the majority thought accommodation requires unequal treatment. Thus, in the guise of equality, *Hardison* allows employers and unions to systematically discriminate against and exclude religious minorities from the workplace using general rules, like union seniority agreements. *Id.* at 84. The Court encapsulated its holding by stating, without explanation, that an accommodation imposes an undue hardship—and is not required—if it entails "more than a *de minimis* cost." *Id.*

Hardison's consequences cannot be overstated. Its interpretation "nullif[ies]" Congress's legal protections for religious employees. *Id.* at 89 (Marshall, J., dissenting). And it means that an employer need not "grant even the most minor special privilege to religious observers to enable them to follow their faith." *Id.* at 87. Thus, in practice employers can deprive religious employees of their livelihood for simply following their faith. Congress required accommodation to eliminate the cruel choice *Hardison* requires countless religious employees to make—they must either surrender their faith or their job.

This Court, however, recently reversed course and rejected *Hardison*'s conceptual framework. In *EEOC. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), this Court held that "Title VII does not demand mere neutrality with regard to religious practices . . . . Rather, it gives them favored treatment." *Id.* at 2034. *Abercrombie* affirmed that discrimination "due to an otherwise-neutral policy" is no excuse. *Id.*

"Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.* Despite this Court's course correction, however, lower courts continue to rigidly apply *Hardison*—denying crucial protection for religious employees. The Court should take this case to make clear to the lower courts what this Court held in *Abercrombie*: Title VII protects religious practice—even if an employer adopts a seemingly neutral policy towards religion.

* * *

At bottom, *Hardison* conflicts with Title VII's plain meaning, Congress's intent, and this Court's recent Title VII precedent in *Abercrombie*. This Court should therefore take this case to correct *Hardison*'s mistakes and restore the protections for religious employees that Congress enacted.

ARGUMENT

I. Whether to Overrule *Hardison* Is an Important, Recurring Question of Federal Law that Affects Thousands of Employees' Ability to Practice Their Religion and Keep Their Job.

Accommodation is necessary to adequately protect religious employees. Without such protections, religious employees are subject to punishment for practicing their faith. Workplace rules that discriminate against religious conduct discriminate against religious employees because religious conduct and status are intimately connected. Congress therefore amended Title VII to protect employees' religious belief and practice by requiring accommodation. *Hardison* undermines these critical protections.

A. *Hardison* Conflicts with Title VII's Text.

Granting review in this case would present the first meaningful opportunity for the Court to interpret undue hardship with the benefit of briefing. The Court in *Hardison* gave no justification for its unusual *de minimis* standard, and no party endorsed it. Pet. Br. at 41, 47, *Hardison*, *supra*, (No. 75-1126); Resp't Br. at 8, 21, *Hardison*, *supra*, (No. 75-1126); U.S. *Amicus* Br. at 20, *Hardison*, *supra*, (No. 75-1126). To the contrary, although the briefs in *Hardison* did not focus on the term undue hardship, the parties—and the United States as *amicus*—all acknowledged that the standard for it was far higher than the Court's eventual interpretation. *Id.*

When interpreting a statute, as this Court recently explained, a court must construe a statute "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). This is because "only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* Judges therefore usurp the legislative process and destroy the ability to rely on the law when they deviate from a statutory term's original public meaning. *Id.* Because Congress here did not define the term undue hardship, it must be interpreted according to its ordinary meaning in 1972—when Congress amended Title VII.

Hardison's interpretation of undue hardship, as Justice Alito has noted, "does not represent the most likely interpretation of the statutory term." *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the denial of certiorari). Indeed, it defies plain English. No pre-*Hardison* dictionary defines undue hardship as

simply "more than *de minimis*." And for good reason. A *de minimis* burden—one that is "very small or trifling," comparable to "a fractional part of a penny"—is no hardship at all. *Black's Law Dictionary* 482 (4th ed. 1968).

Dictionaries when the amendment was enacted defined hardship as "a condition that is difficult to endure; suffering; deprivation; oppression." *Random House Dictionary* 646 (1973). *Webster's* and *Black's* law dictionaries agree.[2] Undue primarily meant "unwarranted" or "excessive." *Random House Dictionary*, *supra*, at 1433.[3] Thus, the ordinary meaning of the term undue hardship entails "a condition that is difficult to endure" and that is serious enough to be considered undue—"excessive" or "inappropriate."

It is impossible to reconcile *Hardison*'s interpretation of undue hardship—as "[anything] more than a *de minimis* cost"—with the term's original public meaning. Many costs are neither hardships—difficult to endure—nor undue—"excessive" or "inappropriate." But they satisfy *Hardison*'s *de minimis* standard. Based on these concerns, Justices Alito, Thomas, and Gorsuch and the United States recently confirmed that the Court should reconsider *Hardison*.

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[2] *Webster's New American Dictionary* 379 (1965) (defining hardship as "something that causes or entails suffering or privation"); *Black's Law Dictionary* 646 (5th ed. 1979) (defining hardship as "privation, suffering, adversity").

[3] *See Webster's New American Dictionary*, *supra*, at 968 (defining undue as "not due," as "inappropriate" or "unsuitable," and as "exceeding or violating propriety or fitness."); *Black's Law Dictionary*, *supra*, at 1370 (defining undue as "[m]ore than necessary; not proper; illegal"); *Black's Law Dictionary* 1697 (4th ed. 1968) (same).

Patterson, 140 S. Ct. at 686; U.S. *Amicus* Br. at 19–22, *Patterson*, *supra*, (No. 18-349).

B. *Hardison*'s Deviation from Title VII's Text Undermines Congress's Intent to Protect Religious Practice by Replacing Accommodation with Formal Neutrality.

Not only does *Hardison* conflict with Title VII's text, but it also denies religious accommodation by "adopt[ing] the very position that Congress expressly rejected in 1972" when it amended Title VII. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Even though Congress amended Title VII to protect religious employees by requiring accommodation, the *Hardison* majority replaced accommodation with formal neutrality.

1. Pre-Amendment Interpretations of Title VII Rejected Accommodation.

The EEOC first interpreted Title VII's religious protection through the lens of formal neutrality, but it changed course a year later. The EEOC adopted an accommodation approach in its 1967 Guidelines. Those Guidelines stated that the duty not to discriminate under Title VII includes an obligation to accommodate religious needs, absent "undue hardship on the conduct of the employer's business." *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971) (providing the 1966 and 1967 EEOC Guidelines in Appendix A and B), *rev'd,* 464 F.2d 1113 (5th Cir. 1972). The 1967 Guidelines removed earlier language that subordinated religious practice to formally neutral employment rules.

Many courts ignored the 1967 EEOC Guidelines and continued to apply formal neutrality instead of accommodation. Two cases in particular motivated Congress to amend Title VII: *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971).

In *Dewey* and *Riley,* the plaintiffs were fired for religious practices that conflicted with neutral employment requirements. Both courts presupposed formal neutrality—they defined discrimination as a departure from category neutrality. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 364 (1997). They accordingly held that the plaintiffs were not discriminated against because the policies applied equally to all employees. Even though the policies only harmed religious employees, the disparate outcome was irrelevant because the rules were category neutral.

By adopting formal neutrality, the courts presumed that Title VII only protects status—work rules only need to be category neutral. *Riley* emphasized that employees of faith with conflicting religious practices must either conform to the workplace or "seek other employment." 330 F. Supp. at 590. Neutral rules therefore trump religious practices. *Dewey* explained that Title VII protected religious belief (status), but not religious practice. 429 F.2d at 331.

Dewey denied accommodation because the court thought it would be discriminatory. Because the court assumed that Title VII required formal neutrality, it objected that accommodation was not category neutral. *Dewey* reasoned that accommodating the plaintiff would "discriminate against . . . other employees" and

"constitute unequal administration of the collective bargaining agreement." *Id.* at 330.

2. Congress Amended Title VII to Require Religious Accommodation and Reject Pre-Amendment Formal Neutrality.

Congress rejected *Dewey* and *Riley*. In response to refusals by employers to accommodate religious employees and repeated failures by courts—particularly in *Dewey* and *Riley*—to require accommodation under Title VII, Senator Jennings Randolph encouraged Congress to amend Title VII. 118 Cong. Rec. 705 (1972). Senator Randolph argued that *Dewey* and *Riley* had "clouded" the meaning of religious discrimination. *Id.* at 706. He therefore proposed an amendment to clarify "that Title VII requires religious accommodation, *even though unequal treatment would result*." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (emphasis added). The Senate unanimously passed his proposed amendment and the House similarly approved.

Senator Randolph explained that the amendment "assure[s] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972). His amendment requires accommodation in most cases, according to Senator Randolph, and only permits non-accommodation in "a very, very, small percentage of cases." *Id.* at 706.

Section 701(j)—Congress's 1972 religious amendment proposed by Senator Randolph—reads:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

> is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

As a guidepost to interpret the duty to accommodate, Congress included in the record copies of the *Dewey* and *Riley* opinions that motivated amendment. Those decisions thus represent interpretations that Congress foreclosed by its amendment.

3. *Hardison* Defies Congress by Rejecting Accommodation and Adopting Pre-Amendment Formal Neutrality.

Despite the Congressional amendment rejecting *Dewey* and *Riley*, *Hardison* embraced the logic and analysis of those decisions. While the Court acknowledged that a duty to accommodate exists, it instead applied formal neutrality. *Hardison*, 432 U.S. at 85. The Court ignored whether the employer accommodated the individual employee. It instead held that no discrimination occurred because the employer treated all protected groups equally. The Court even described the policy that caused the plaintiff to lose his job as a "a significant accommodation," because it equally applied to protected groups. *Id.* at 78.

Formal neutrality dictated the result. Using "language striking[ly] similar" to *Dewey*, the Court reasoned that accommodation conflicts with Title VII because it requires unequal treatment. *Id.* at 89 (Marshall, J., dissenting). The Court therefore refused to construe the statute to require accommodation because it would produce what the Court thought were unequal results.

But the Court never defined neutrality or considered the appropriate benchmark for comparison. Unequal could have meant either that accommodation treats religion better than non-protected characteristics (like contract rights) or better than other protected characteristics (like race). The first meaning, however, would nullify protecting religion or any other characteristic—all protected characteristics are treated better than non-protected characteristics. The second conflicts with Congress's 1972 amendment. Congress amended Title VII by requiring accommodation to prohibit religious discrimination—as the statute equally prohibits discrimination based on other protected characteristics.

Non-accommodation has failed to protect employees of faith from religious discrimination. Refusing accommodation results in inequality: employees are protected from discrimination based on other characteristics but are not protected from religious discrimination. *Hardison* thus allows employers to exclude individuals from the workforce based on only one protected characteristic—religion.

The Court simply glossed over Congress's amendment rejecting formal neutrality. Religious accommodation is substantively, but not formally, neutral—it requires accommodation based on protected categories. The amendment also collapses the distinction between status and conduct. Religious status and conduct are indivisible under Section 701(j). Thus, by discriminating against religious practices, *Hardison*'s policy discriminates against religion.

The Court buttressed its decision by arguing that accommodation conflicts with other non-protected characteristics, including contract rights under a collective bargaining agreement. *Id.* at 81. The majority

argued that deviation from a majoritarian collective bargaining agreement is always an undue hardship. *Id.* at 83. But resorting to group rights that dispense with individual employee rights exacerbates the problem. Congress required accommodation to protect individuals from groups. Accommodation is only needed for minorities who are unable to enact policies to protect their beliefs. Adding another collective—a union that has eliminated a plaintiff's right to negotiate his own working conditions with his employer and that by law represents majority interests at the expense of minority interests—increases, not decreases, the need for accommodation.[4]

The practical result is not neutrality. Religious employees—often religious minorities—are inherently singled out for discrimination and exclusion by majoritarian systems. The collective requires it.

C. *Hardison* Undermines Important Protections for Religious Employees.

By defining undue hardship as *anything* "more than *de minimis*," *Hardison* effectively eliminates the duty to accommodate. Almost any cost, by definition, is more than *de minimis* and defeats the duty to accommodate. This Court defined *de minimis* costs as "trifles," mere "[s]plit second absurdities" or inconveniences—for example, requiring "a few seconds or minutes of work beyond the scheduled working hours." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220,

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[4] Section 703(h) does not support the *Hardison* majority's conclusion: it does not create a safe harbor for duties required elsewhere in Title VII. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761–62 (1976) (Section 703(h) does not "modify or restrict relief otherwise appropriate").

233–34 (2014) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). Such costs, according to the Court, are so trivial, the law does not recognize them. *Id. Hardison* thus allows any cost greater than a "trifle" or "[s]plit second" inconvenience to excuse religious-practice discrimination.

1. *Hardison* Undermines Title VII's Religious Practice Protections by Inverting the Burden of Accommodation from Employers to Employees.

In practice, courts "almost unanimously" consider "any economic costs"—regardless of the type or amount—an undue hardship because of *Hardison*. Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 139–40 (2015) (listing cases); *see also* Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. Pitt. L. Rev. 513, 544 (1989) (applying *Hardison*, most courts hold that an undue hardship exists if accommodation "requires an employer to bear any additional cost whatsoever.").

Hardison supplies the rule: it held that for a major airline $150 was an undue hardship. 432 U.S. at 92 n.6 (Marshall, J., dissenting). Even though the employee offered to reimburse the airline by working overtime at regular pay—eliminating any cost—the Court claimed accommodation was impossible without undue hardship. Justice Marshall noted in his dissent that for a major airline $150 was a *de minimis* cost—a mere trifle. *Id.* But the precise amount was irrelevant to the majority. Because *potential* economic

costs were involved, the majority concluded—with little to no cost-benefit analysis—that accommodation imposed an undue hardship. *Id.* at 84. The religious employee lost his job as a result.

Lower courts have applied *Hardison* as a per se rule: "virtually all cost alternatives" are "unduly harsh," regardless of the type or amount. Zablotsky, *supra*, at 547. It is irrelevant whether the cost is direct—such as costs incurred securing a temporary replacement or paying additional wages—or indirect, including costs resulting from lost efficiency or increased administrative workload. *Id.* at 544–45.

Because of *Hardison*, courts have also held that accommodations that require no economic costs impose an undue hardship. Kaminer, *supra*, at 141; Engle, *supra*, at 392; Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 Fordham L. Rev. 839, 850 (1985).

In *Hardison*, the majority relied on neutral seniority rules and focused on the perceived interests of other employees—considerations unrelated and untethered to the statute—to conclude that it would unduly burden a company worth hundreds of millions of dollars to pay $150 to accommodate a religious employee. 432 U.S. at 78, 81. The majority reasoned that accommodation would impose an undue hardship because it would require the employer to deviate from the seniority agreement and treat employees differently. *Id.* at 81.

In many cases, following *Hardison*'s approach, courts have reasoned that an accommodation that deviates from neutral policies or potentially affects other

employees is an undue burden.[5] These opinions, like *Hardison*, focused on the employers' general employment practices and on the interests of employees generally.[6] This approach established by *Hardison* ignores the needs of religious minorities and employers' efforts to accommodate individual employees.

The approach directly contradicts Title VII, which requires accommodation unless it unduly burdens "*the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added). Congress did not include the preferences of coworkers or the reasonableness of an employer's general policies as an exception to the duty to accommodate. Congress made the opposite determination: em-

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[5] *See, e.g.*, *EEOC. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008) ("If an employer reasonably believes that an accommodation would . . . impose 'more than a *de minimis* impact on coworkers,' then it is not required to offer the accommodation under Title VII." Accommodation required an undue hardship because it imposed on coworkers, *even though coworkers were willing to accommodate the religious employee.*); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact on co-workers" based on *Hardison* "is sufficient to constitute an undue hardship."); *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988) (holding an employer is not required to rearrange its otherwise neutral schedule to accommodate an employee, particularly when other employees oppose changes); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145 (5th Cir. 1982) (holding that a flexible scheduling system was adequate accommodation; plaintiff was responsible for obtaining shift exchanges); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) ("an employer should [not] have to adjust its entire work schedule to accommodate individual religious preferences and practices").

[6] *See, e.g.*, *Huston v. Local No. 93, UAW*, 559 F.2d 477, 480 (8th Cir. 1977) (The plaintiff was "not discriminated against, for he was afforded the same rights as other employees").

ployer policies and general employee interests are *unreasonable* if they exclude religious individuals by refusing accommodation.

The practical result of *Hardison* is that the duty to accommodate has been reversed. Accommodation often depends on the religious employee. Zablotsky, *supra*, at 549. Employers who are in the best position to accommodate and protect religious employees have virtually no responsibility; religious employees with little ability to accommodate themselves have prime responsibility. Employees must often arrange shift swaps, use personal days off, or depend on luck. Title VII provides them little protection under *Hardison*.

2. *Hardison* Undermines Title VII's Religious Practice Protections by Failing to Protect Religious Minorities.

Hardison conditions religious protection under Title VII on the preferences of co-workers. Kaminer, *supra*, at 141. Although *Hardison* harms all religious individuals, it especially prejudices religious minorities who are most vulnerable.

Majorities rarely need accommodation. Cultural context informs policies, which reflect a culture's dominant beliefs and ideas. Accommodation mainly protects minorities—it is only needed when a conflict exists with prevailing policies and practices. Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 693 (1992).

In Pennsylvania during the 17th and 18th centuries, for example, there was no exemption from military service or oath taking while the Quakers were politically dominant. At that time, the laws reflected the Quakers' values and did not require anyone to serve

in the military or take oaths. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1802 (2006). The Quakers only needed accommodation when they lost control—"when the Crown imposed oath requirements and when a new political majority enacted conscription to raise an army for the Revolution." *Id.*

Hardison endangers minorities who most need protection from the majority by conditioning their protection on co-worker acceptance and popularity. This undermines Title VII, which Congress enacted to eradicate discrimination. Freedom from discrimination based on race, color, sex, or national origin does not depend on majority will; nor should freedom from religious discrimination.

No doubt, when Congress passed Title VII, some employees might have thought it prejudiced them by altering general workplace rules. But that is no defense. Non-acceptance of racial minorities is odious. The same is true for religious minorities. *Hardison*, however, allows religious hostility as a defense and creates a heckler's veto—the rights of religious minorities depend on others' acceptance. The Court should remedy this unequal treatment that conflicts with Title VII.

3. *Hardison* Undermines Title VII's Religious Practice Protections by Allowing Systematic Religious Discrimination.

Hardison allows employers to systematically discriminate against religious employees. As the United States explained in its *amicus* briefs earlier this year and in *Hardison*, the accommodation protection "re-

moves an artificial barrier to equal employment opportunity * * * except to the limited extent that a person's religious practice *significantly and demonstrably affects* the employer's business." U.S. *Amicus* Br. at 21, *Patterson*, *supra*, (No. 18-349) (quoting U.S. *Amicus* Br. at 20, *Hardison*, *supra*, (No. 75-1126). In this way, *Hardison* allows ambivalent employers and those governed by collective bargaining agreements to resurrect barriers that exclude religious minorities, which Congress directly sought to prevent.

Hardison also trivializes religion by allowing religious practice discrimination. It limits Title VII's protection to mere belief. The right to believe, however, is hollow without the right to practice—it subjects believers to persecution for following their faith. Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 176 (2009). The Court said in *Hardison* that policies that discriminate against Sabbatarians and exclude them from the workforce are not discriminatory because the policies apply equally. 432 U.S. at 78. But the Court failed to appreciate that the policy adopted in *Hardison* does not preclude employees from the workplace based on race, color, sex, or national origin. It does, however, systematically exclude members of Sabbatarian religions.

General policies that ban religious practices ban believers. Douglas Laycock, *Exemption Debate*, *supra*, at 150. In amending Title VII in 1972 Congress recognized that general workplace rules often discriminate against religious conduct and exclude from the workforce religious minorities—like the plaintiffs in *Dewey* and *Riley*. Unlike other protected characteristics, conduct is inextricably associated with religion.

It did not matter in *Hardison*, *Dewey*, or *Riley* whether the employers explicitly prohibited Sabbatarians from employment or simply required all employees to work on the Sabbath. It likewise would not matter whether an employer bans Muslims and Jews or forbids head coverings and beards. Many Sabbatarians, Muslims, and Jews cannot work under such policies. Banning religious practices bans believers—even if the policies apply generally. *Id.*

Congress therefore decided that Title VII protects both belief and practice. Because courts that only protected religious beliefs failed to adequately protect religious believers, Congress explicitly amended Title VII. *Hardison*, however, undermines Congress's intent and allows employers to exclude believers through policies that discriminate against religious practices. *Hardison* thus forces thousands of religious employees to make a cruel choice: surrender their religion or their job.

II. *Hardison* conflicts with this Court's Recent Precedent Protecting Religion in the Workplace.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), this Court held in a virtually unanimous decision that Title VII requires more than formal neutrality. The Court stated that disparate-treatment claims are not limited "to only those employer policies that treat religious practices less favorably than similar secular practices" *Id.* at 2034. Although a neutral policy may not be discriminatory in other contexts where conduct and status are unrelated, the Court clarified that formal neutrality does not apply to religion. *Id.* According to this Court, "Title VII does not demand mere neutrality with regard to religious

practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.'" *Id.* (quoting 42 U.S.C. §§ 2000e-2(a), 2000e(j)).

The Court clarified that employers have a right to adopt neutral policies, like the no-headwear policy at issue in *Abercrombie*. But when an employee or prospective employee requires a religious accommodation "it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

Hardison is impossible to reconcile with *Abercrombie*. The majority in *Hardison* intentionally refused accommodation to avoid favored religious treatment. *Abercrombie*, however, holds that Title VII demands "favored" religious treatment. Formally neutral rules are not a defense.

Abercrombie mirrors Justice Marshall's understanding of accommodation in his *Hardison* dissent. He wrote that accommodation "always result[s] in a privilege being 'allocated according to religious beliefs,' unless the employer gratuitously decides to repeal the rule in toto." *Hardison*, 432 U.S. at 88 (Marshall, J., dissenting). "[S]uch allocations are required" by Title VII, Justice Marshall explained, "unless 'undue hardship' would result." *Id.*

CONCLUSION

Four Justices on this Court have suggested revisiting *Hardison*. In *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019), Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, concurring in the denial of certiorari, noted that they were open to revisiting *Hardison*. More recently, in an opinion concurring in the denial of certiorari in *Patterson v. Walgreen*, 140 S. Ct. 685, 685 (2020), Justices Alito, Thomas, and Gorsuch agreed with the United States that this Court should "reconsider" *Hardison*. This case presents an excellent vehicle to do just that. This Court should grant review.

Respectfully submitted,

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August 6, 2020