No. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF

Petitioner,

V.

LOUIS DEJOY, POSTMASTER GENERAL

Respondent.

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

BRIEF OF COUNCIL ON AMERICAN-ISLAMIC RELATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

I. The Council on American-Islamic Relations

Founded in 1994, the Council on American-Islamic Relations has a mission to enhance understanding of Islam, protect civil rights, promote justice, and advocate for religious freedom. As part of that mission, CAIR tirelessly advocates for religious accommodations in the workplace.

There is no shortage of this work. Muslim-Americans represent only 1.1% of the population, but a comparatively staggering 26% of religious accommodation lawsuits filed by the EEOC between 2009 and 2015. Muslim-Americans still struggle to be truly accepted in our society. As of April 2017, research revealed that 50% of Americans view Islam as outside of "mainstream society."[2]

Given this, it is hardly surprising that Muslim-Americans have to request a seemingly inordinate

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and their counsel funded its preparation or submission.

[2] Michael Lipka, *Muslims and Islam: Key findings in the U.S. and around the world*, Pew Research Center (August 9, 2017), https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

amount of religious accommodations. Our businesses look like our population, mostly composed of, owned by, and run by white American Christians. Most Christian practices are already accommodated without any need for specific requests. The ability to attend at least one church service on Sundays, for example. Most American owned businesses have limited Sunday hours or are closed entirely. In fact, until 2019, it was illegal for businesses to be open between midnight and noon on Sunday in at least one state.[3]

Muslims have no such presence. Because of this, CAIR is often forced to fight to secure even the most basic, inoffensive religious accommodations for Muslims. And, without exception, *TWA v. Hardison* has proved the most stubborn obstacle each time.

SUMMARY OF ARGUMENT

The Court's ruling in Hardison was incorrect the moment it was made. Its doctrinal mistakes are apparent. But it is worth examining how it has failed on its own terms.

One of Hardison's underlying justifications is that "unequal treatment of employees on the basis of their

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[3]James MacPherson, *North Dakota ends ban on Sunday morning shopping*, (August 3, 2019), https://apnews.com/article/ade09bb0818b4391a81dad4af16be686

religion" was a social ill needing prevention.[4] That was what Congress sought to avoid in passing Title VII. But in the name of preventing unequal treatment, the Court created an overly deferential test that has *ensured* unequal treatment for minority religions.

Muslim women have borne an outsized brunt of its impact. 60% of Muslim women wear a headscarf, often called hijab, all, most, or some of the time in public.[5] 36% wear it in public all the time. American employers have not historically accounted for this when constructing such things as employee uniforms, appearance policies, and safety procedures.

Because of *Hardison*'s overly deferential de minimis standard, Muslim women have lost employment opportunities purely because the hijab is not contemplated by the employer's "look" policies. They have also been kept out of critical public institutions like public schools, law enforcement agencies, and youth rehabilitation centers.

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[4] *TWA v. Hardison*, 432 U.S. 63, 84 (1977).

[5] Report, *Muslim Americans: No signs of growth in alienation or support for extremism*, (August 30,2011), https://www.pewresearch.org/politics/2011/08/30/section-2-religious-beliefs-and-practices/

ARGUMENT

I. Muslim women and Hijab

America, like most of the west, has a poor understanding of women in Islam. Muslim women are regularly mispresented as being "weak, oppressed, passive, voiceless, uneducated, faceless, and subjected to the will of men..." [6]

In reality, Islam prescribes gender equality. Islam views women as individuals with rights on par with men, including the right to education, earn income, own property, choose a spouse, and inherit.[7] Essentially, the right to equal treatment.[8]

Despite this, misperceptions dominate. One reason is certainly well-publicized examples of "Islamic" states disregarding many of these teachings. But the disconnection between Quranic teachings and the policies of foreign governments are far beyond the scope of this brief.[9] The other cause of misperception is a

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[6] Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 Hastings Race & Poverty L.J. 441, 448 (2008).

[7] *Id.* at 447

[8] *Id.*

[9] Although state regulation over women's bodies is hardly restricted to Islamic states. *See e.g.,* Maleiha Malik, *Complex*

lack of education and understanding about things like hijab.

Hijab is an Arabic word that stems from the word hajaba – "to prevent from seeing."[10] It is not actually the headscarf itself. Rather, it is a reference point to broader notions. Devout Muslims, men and women, are expected to be modest.

In the Quran, the practice of hijab is described thus:

> And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw veils over their bosoms and not display their beauty
>
> ….
>
> O Prophet, tell your wives and your daughters and the women of the believers to draw their cloaks close round them. That will be better, so that they

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Equality: Muslim Women and the Headscarf, 68 Droit et Societe 127,131 (2008).

[10] Kristina Benson, *The Freedom to Believe and the Freedom to Practice: Title VII, Muslim Women, and Hijab*, 13 UCLA J. Islamic & Near E. L. 1, 2 n.3 (2014).

> may be recognized and not annoyed. Allah is ever Forgiving, Merciful.[11]

The generally understood physical requirements of hijab are not found in the Quran. Rather, they appear in the Hadith, the sayings of the prophet. The Hadith explains that women should wear clothing that covers their entire body, except for hands, face, and feet.[12] We use the phrase "generally understood" here only to indicate that there is no globally prescribed or agreed upon physical expression of hijab. There are a range of interpretations and healthy debate within the billion plus community of Muslims. For example, in Indonesia — the largest Muslim country in the world — only 11% of Muslim women always wear hijab in public, as compared to 71% who wear it most or some of the time. Only 18% never wear hijab. Those numbers in the United States are 36%, 24%, and 40%, respectively. [13]

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[11] Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance,* 80 UMKC L. Rev. 221, 223-224 (2011)(quoting Al-Qur'an 24:31 and Al-Qur'an 33:59).

[12] Sahih Bukhari, Vol. 6, Book 60, Hadith 282, Hadithhttps://quranx.com/Hadith/Bukhari/USC-MSA/Volume-6/Book-60/Hadith-282/

[13] *See* August 30, 2011, Pew Research Report.

Contrary to popular belief, many Muslim women describe hijab as *liberating*. Part of the message it is supposed to send is that a woman is Muslim, has self-respect, and expects to be treated accordingly.[14] One described it as a fundamental form of female empowerment, freeing one from "the bondage of the swinging pendulum of the fashion industry and other institutions that exploit women."[15] A young Scottish woman who converted to Islam noted that it made her "feel very private, very safe," and that her "self-confidence [was] boosted." She amusingly observed, "[y]ou can be doing whatever you like under there."[16]

What is globally agreed upon, however, is that hijab is not just a way to dress. Hijab is about heart, soul, and intention. A choice — something that cannot be forced or compelled[17] — to be modest in thoughts, speech, actions, and other aspects of life. At its core,

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[14] Abdo at 450.

[15] Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights – Toward a Communitarian Revision,* 25 Cumb. L. Rev. 651, 677 (1994)

[16] *Id.*

[17] "Forced veiling is not advocated by the Islamic tradition, but by the patriarchal societies that create law." Shazia N. *Nagamia, Islamic Feminism: Unveiling the Western Stigma*, 11 Buff. Women's L.J. 37 (2002-2003).

hijab is designed to remove focus from the physical appearance and instead place it on the person's character.

Whatever individual variances there may be, there is at least one unifying factor for women wearing hijab: it is a religious obligation. Because of that, any employer, anywhere, who refuses to allow hijab is functionally ending the possibility of employment for millions of Muslim women.

This has broader consequences. By perpetuating the notion that hijab is outside of mainstream American culture, many employers are unwittingly contributing to the notion that Islam is un-American.

Compounding that exponentially is another problem. While many Americans see Muslim women as victims, many others see all Muslims as villains. And Women who wear hijab are the most visible members of the Muslim community. Because of that, they are the ones who often finding themselves bearing bigotry's burden.

Examples are, sadly, legion. An 11-year-old girl from Muskogee, Oklahoma, was suspended — twice — for wearing hijab.[18] In order to just wear her hijab it took an intervention by CAIR and the United States Justice Department.

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[18] Abdo at 466.

In Harvey, Louisiana, a history teacher ripped off a 17-year-old's hijab and said, "I hope Allah punishes you. I didn't know you had hair under there." A Lancaster, California, professor ordered a 19-year-old to remove her hijab or get out of his classroom.[19]

In Mountain View, California, a 43-year-old woman attacked a Muslim woman calling her a "terrorist" and tried to pull off her hijab.[20] In Portland, Oregon, an assailant attacked a 24-year-old by pulling off her hijab and attempting to choke her with it.[21] In New York City, a man tried to set a hijab wearing 35-year-old Muslim woman on fire.[22]

The above is but a tiny sample of a larger, pervasive problem. A 2017 study showed that 25% of Americans believe that "[h]alf or more U.S. Muslims are

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[19] *Id*. at 467.

[20] Bay City News, *Woman Charged for Hate Crime Against Teenager Wearing Hijab,* (Aug. 30, 2022) https://www.nbcbayarea.com/news/local/south-bay/hate-crime-hijab-mountain-view/2990143/.

[21] Dennis Romero, *Woman who allegedly ripped hijab off student's head charged with hate crimes,* (Jan. 4, 2020), https://www.nbcnews.com/news/us-news/woman-who-allegedly-ripped-hijab-student-s-head-charged-hate-n1110491.

[22] Derek Hawkins, *Muslim woman set on fire on New York's Fifth Avenue in possible hate crime, police say*, (Sep. 13, 2016) https://www.washingtonpost.com/news/morning-mix/wp/2016/09/13/muslim-woman-set-on-fire-on-new-yorks-fifth-avenue-in-possible-hate-crime-police-say/

anti-American."[23] 83 million people in the United States see a Muslim woman wearing hijab and believe there's at least a fifty-percent chance she is actively anti-American.

Unsurprisingly, Muslim women wearing hijab experience discrimination at an alarming (and despicable) rate. At least one study has shown that 69% of Muslim women who wear hijab have experienced discrimination.[24] 62% of Muslim women believe that discrimination against Muslims is a major problem in the United States, compared to only 38% of Muslim men.[25]

The only possible cure for these things is more public understanding about hijab and its role in Islam. A place where that discussion can occur — and should, per Congress — is in the workplace. But *Hardison* often prevents that.

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[23] *See* Lipka, *supra*

[24] American Civil Liberties Union, *Discrimination Against Muslim Women – Fact Sheet*, https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet (last visited Feb. 22, 2023).

[25] Nura Sediqe, *Muslim women in hijab get the brunt of discrimination. I asked them what that's like*, (March 28, 2022), https://www.washingtonpost.com/politics/2022/03/28/hijab-muslim-discrimination-intersectionality/

II. *Hardison* shuts down discussion: a typical case.

When a request for religious accommodation is made, a defendant is supposed to open a dialogue with the plaintiff to see if a reasonable accommodation is possible. The plaintiff need not engage in guesswork. The process is supposed to be collaborative, taking the religious practice and the employer's needs into account.

But, because of *Hardison*, this requirement can often verge on the theoretical. The de minimis standard is so deferential to certain employers that they can often invoke a buzzword, stand firm, and simply refuse to engage. An example: "safety." CAIR is dealing with such a situation now.

CAIR represents four Muslim women, Madinah Brown, Shakeya Thomas, Amida Abdallah, and Tia Mays in a lawsuit in the Federal District Court for the District of Delaware. All four women worked as Youth Rehabilitation Counselors at for the Department.[26]

The Counselors play a critical role for the Department. They establish relationships with the youths, oversee activities, and are otherwise sort of the "front

[26] Motion for Partial Summary Judgment, *Brown v. Delaware Dep't of Services for Child.*, 1:20-cv-01048 (D. Del. Jan. 9. 2023), ECF No. 57 at 5.

line" of rehabilitation.[27] They are also trained to de-escalate confrontations, and in restraint methods to deploy when appropriate.

All four of these counselors wore hijab, and sought an accommodation to wear them at work. The Department refused, citing them as a safety risk that posed more than a de minimis burden. The Department alleged the hijabs could be used as a weapon.[28]

But not all hijabs are the same. Some hijabs consist of long and wide pieces of fabric measuring 70 by 35 inches.[29] Such hijabs typically cover the hair, neck, and—depending on length and style—chest. Others, such as a turban-style hijab consist of fabric approximately 4-5 inches across. In appearance, it sits on a Muslim woman's head much like a winter cap.[30] This kind of hijab cannot even be unwrapped. It would be impossible to use to choke or attack someone.

There are also a wide variety of specialty hijabs that allow Muslim women to adapt the garment to particular situations. Examples include a form fitting hijab made of polyester that athletes wear, a break-

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[27] *Id.* at 5-6.

[28] *Id.* at 7.

[29] *Id.* at 6.

[30] *Id.*

away version with buttons on the seams, a hijab specially designed for police officers, among any number of others.[31] The Muslim world has police officers, detention centers, and every other conceivable form of government employment. Muslim women work in those places, and hijabs have been designed to minimize or eliminate certain risks. The plaintiffs proposed several alternatives that could allow them to both wear hijab and work safely.

But — *for over two years* — the Department would not even entertain a discussion. Just invoking the word "safety," according to the Department, ends the inquiry under *Hardison*.

And like many other cases, there is strong evidence accommodation was possible. Visitors, contractors, and other employees in the facility are allowed to wear hijab in the presence of residents.[32] The Department has a security procedure for searching hijabs to ensure contraband is not smuggled in. No one has ever seen a hijab used as a weapon nor has any evidence been produced that they were ever used to smuggle contraband.[33]

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[31] *Id.*

[32] *Id.* at 7.

[33] *Id.*

Plaintiffs themselves were allowed to sporadically wear hijab while working without incident. Multiple Department witnesses testified to being aware of a breakaway hijab, and one even testified that it would be acceptably safe.[34] The Department never proposed this as an option.

The plaintiffs also went above what was required, proposing specific accommodations based on their own research. Mays and Thomas both proposed the turban style hijab that cannot be unwrapped. Both were denied. Thomas suggested the Nike sports hijab, that is a tight fitting covering that is extremely difficult to remove.[35] That was denied.

Ultimately, the Department gave a simple mandate: "give up your hijab or give up your job." All four plaintiffs were forced to "make the cruel choice of surrendering their religion or their job."[36] They chose their religion, to the extent one can call it a choice.

The outcome of the *Brown* litigation is not yet known. It may be that the plaintiffs win even under *Hardison*'s hostile standard. But the fact is that, but for *Hardison*, these all or nothing stands would not happen. And they exact a heavy toll. Even if a plaintiff

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[34] *Id.* at 13.

[35] *Id.* at 11-12.

[36] *Hardison*, 432 U.S. 63, 87 (1977)(J. Marshall, dissenting).

ends up prevailing, the plaintiff has lost her job, lost income, and was forced to sue a former employer – something prospective employers will discover. This toll has been exacted on scores of Muslim women.

III. *Hardison* has disproportionately harmed Muslim women who wear hijab.

The all-or-nothing approach to hijab is not just common now. It has been occurring in various forms since *Hardison* was decided.

Alima Delores Reardon's case is a good example. A devout Muslim, Reardon wore a headscarf and dress that covered everything but her hands. She did this for from 1982 to 1984 without issue.[37]

In 1984, she was told she could not wear these while teaching anymore. An 1895 Pennsylvania law forbade the wearing of "any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."[38] Three times she showed up to school to teach. Each time, she was told to go home and change

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[37] *United States v. Bd. of Educ. for Sch. Dist.*, 911 F.2d 882, 884 (3d Cir. 1990).

[38] *Id.* at 885.

or she would not be allowed in the building. Eventually, the EEOC brought a case on her behalf. Reardon won her bench trial.

On appeal, the Board argued it was impossible to accommodate Reardon because the only possible accommodation was to allow her to teach in religious garb. That, standing alone, was an undue burden under *Hardison*.[39] The Third Circuit agreed, and reversed.

But the result is only part of the story. How the result was reached is the other. Fear of prosecution under the hundred year old "Religious Garb" was enough to satisfy *Hardison*'s de minimis requirement, even in the absence of any evidence that the law had been enforced in decades.[40]

At the same time, the court went to pains to point out that "the offending dress is dress that communicates to the teacher's students adherence to a religion…." Such "common decorations like a cross or a Star of David," by contrast, would not trigger the law. *Id.* The concurrence specifically noted that "religious symbols like mezuzahs [and] crucifixes" on necklaces would present a different situation.[41]

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[39] *Id.* at 887.

[40] *Id.* at 890.

[41] *Id.* at 900 n.4 (J. Ackerman, concurring).

Put simply, the court's ruling revolved around the fact that hijab was overtly religious and not "common." That was undeniably the case. Hijab is both overtly religious and is not commonly worn by Americans. But crucifixes and Stars of David are overtly religious too. The second factor was the true problem.

The concurrence reveals this. The concurrence saw children being exposed to hijab as problematic, because it "creates curiosity in the child."[42] Consider what would have happened had Reardon been able to explain her hijab to the children. As members of a plural, free society, they would have had access to a real flesh and blood Muslim woman who could explain why she was wearing what she wore. Those children would then know — from the source — what that symbol meant. The government prevented that from happening in the name preventing religious favoritism.

But that *perpetuates* religious favoritism. Embedded in the concurrence's reasoning is the fact that those children probably knew what a crucifix or Star of David represented. I.e., they would not need to ask, and thereby those symbols did not present the same problem. Those children did not know what a hijab was. Instead of learning what it was from a Muslim teacher, the children only learned that their Muslim teacher was fired.

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[42] *Id.* at 899.

Kimberlie Webb's case was similar. Webb worked as a Philadelphia police officer for eight years. In her eighth year, she asked to be allowed to wear hijab while on duty.[43] The city denied the request on one ground only: Philadelphia Police Department Directive 78. Directive 78 created the uniform requirements and an allowance for hijab was not in it.

Philadelphia claimed that any accommodation at all would be more than a de minimis burden.[44] The court agreed, reasoning "that uniform requirements are crucial to the safety of officers (so that the public will be able to identify officers as genuine, based on their uniform appearance), morale and esprit de corps, and public confidence in the police."[45] The uniform requirement "encourage[d] the subordination of personal preferences in favor of the overall policing mission and convey[ed] a sense of authority and competence to other officers inside the Department, as well as to the general public."[46]

Consider the clear implications for Muslim women. According to the court, allowing an officer to wear hijab could damage morale, espirit de corps, and public

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[43] *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009).

[44] *Id.* at 260.

[45] *Id.* at 262.

[46] *Id.* at 261 (quotations omitted).

confidence. The mere visible presence of a Muslim, the court reasoned, could harm the institution.

The *Webb* court was also concerned with ensuring the police department was allowed to maintain a "neutral" appearance. "The importance of public confidence in the neutrality"[47] as well as the state's interest in "preserving [a] nonpartisan police force and appearance thereof"[48] were considered crucial.

Viewed contextually, this is a contradiction in terms. The "neutral" appearance of the police department already conformed to any mainline Christian requirements. There was nothing that needed to be added to, or deleted from, the uniform for a practicing Catholic or Methodist to join the force. The average American could look at Philadelphia's police department and be sure that mainline Christians were within that department.

Muslims, on the other hand, could look at the force and likely guess that it probably did not contain any Muslim women. That means a segment of the population could think that the police force actively excluded them.

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[47] *Id.* (citing *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998).

[48] *Id.* (citing *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir. 1974).

That does not convey a "neutral" image. It conveys bias.

Webb shows how *Hardison*'s logic is self-defeating. When one religion has required visible marks and those marks are not present in a government institution, what are that religion's believers to conclude? The only logical conclusion is that they are not represented. That harms public faith in our institutions.

There are even cases in which *Hardison* and our current accommodation jurisprudence has functioned to *explicitly accommodate bigotry*. *Camara v. Epps Air Serv.,* provides a striking example.[49]

Aissatou Camara worked the front desk at an aviation company. That position made her the company's frontline, "usually the first person that the customer" encounters.[50] Everyone agreed that Camara was well-liked, and her supervisor stated that Camara was "one of his best employees."[51]

After roughly ten years of service, Camara sought permission to wear hijab at work. The owner personally denied the request. He reasoned that wearing hijab was "not consistent with the image" he wanted at

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[49] 292 F. Supp. 3d 1314 (N.D. Ga. 2017)

[50] *Id.* at 1320.

[51] *Id.*

his business.[52] He also believed that customers would be disturbed by seeing a woman in hijab working in an airport terminal. Ultimately, he feared his company would lose business.[53]

The reason for this fear was "negative stereotypes and perceptions about Muslims..."[54] The company's offered accommodation? A move to accounting, where she would work out of public view.

Camara wanted to keep working in the role she excelled at, and not be shoved behind closed doors. The court decided, however, that Camara's failure to accept the move ended her case. The court took a hostile tone towards that decision, stating that "accommodation was impossible where [Camara] unreasonably refused to accept the alternative remedy provided." It also characterized the proposed accommodation as the owner providing his "best efforts," and that Camara's real issue was that she had an "apparent preference for a job that was more in line with what she perceived her status to be…"[55]

The court also added that, even if the owner had offered nothing, Camara would lose anyway. Under *Hardison*'s de minimis standard, any "exemption from

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[52] *Id.* at 1322.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1330.

[an] appearance policy" is an automatic undue hardship.[56] Having a woman wearing hijab at the front desk would "adversely affect the image" the company sought to present and could "potentially cost it business if some customers [went] elsewhere."

Only under *Hardison* could such a result be possible. If the accommodation had to be assessed under a true undue hardship analysis, the business would have to argue that hypothetical losses from bigotry was an undue hardship. Pure speculation about would not suffice.

Also, Muslim women suffer losses from bigotry simply by wearing hijab. All Camara was doing was asking her employer to *maybe* share *a sliver* of that fact. Even if we accept that as a kind of hardship, it is not "undue." Asking an employer to maybe bear the loss of the occasional bigoted customer is an acceptable societal request when the alternative is a Muslim woman losing her job entirely.

CONCLUSION

This Court once observed that "[t]he promotion of safety of persons and property is unquestionably at

[56] *Id.* at 1331.

the core of the State's police power…"[57] Our police departments, this Court reasoned, are vital to carrying out that purpose.

Bearing that in mind, consider the case of Amal Chammout. She is an American citizen, born in Lebanon.[58] She has the proud distinction of being the first known hijab wearing police officer in the history of the United States. She is also turning 30 this year

Consider that for a moment. Muslims have been present in America since its founding. But the first hijab wearing police officer in United States history is so young that she has probably never seen a functioning rotary phone.

That is *Hardison*'s legacy. It permitted employers, private and public, to exclude entire categories of minority religions. Muslim women in particular suffered.

This Court should correct *Hardison*'s obvious error and end this shameful legacy. Undue hardship means undue hardship. This Court should overturn *Hardison*, and restore Title VII's promise to reasonably accommodate people of all religions in the workplace.

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[57] *Kelley v. Johnson*, 425 U.S. 238, 247 (1976)

[58] Asmaa Bahadi, *Amal Chammout: First Female Police Officer to Wear Hijab in U.S.*, (Sep. 5, 2016) https://www.moroccoworldnews.com/2016/09/196097/amal-chammout-first-female-police-officer-to-wear-hijab

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