No. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF,

PETITIONER,

V.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

RESPONDENTS.

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

BRIEF FOR AMERICANS FOR FAIR TREATMENT AS *AMICUS CURIAE* SUPPORTING PETITIONER

David Osborne
Counsel of Record
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
(610) 949-0444
dosborne@goldsteinlp.com

Counsel for Amicus Curiae Americans for Fair Treatment

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

Americans for Fair Treatment ("AFFT") is a national, nonprofit organization that educates public employees about their rights in a unionized workplace and connects these employees with all available resources to defend those rights. AFFT offers a free membership program, networking opportunities, and professional development scholarships to support qualifying public employees.

This Court recently recognized that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018). This case is one example of how exclusive representation can restrict employees' statutory rights against discrimination in the workplace. Too often, as many AFFT members can attest, exclusive representation produces overly simplistic, one-size-fits-all solutions for workplaces, not only disregarding minority interests but threatening individual employees' rights.

This reality dovetails with the Title VII issues presented in this case. The union's failure to secure a workable solution for Gerald Groff—and his employer's inability to provide one to him—result naturally from a system of exclusive representation more sensitive to majoritarian impulse than to an individual employee's religious convictions. AFFT seeks a different approach consistent with Title VII itself: one that lessens workers' reliance on collective bargaining,

---

[1] No counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

preserves employees' individual protections, and strengthens workers' rights—even in unionized workplaces.

SUMMARY OF ARGUMENT

Gerald Groff was behind from the start. By the time Sunday delivery came to his station in Holtwood, Pennsylvania, the terms of his employment had already been negotiated for him by the National Rural Letter Carriers' Association ("Union"). *See* Pet'r's Br. 6–7.

The Union's agreement ("MOU") with the United States Postal Service ("USPS") had been in place for nearly a year by that time, and the MOU had predetermined that Groff, like every other individual with his job title, would have to work on Sundays. *See* J.A. 176–77. There were no exceptions for anyone, including those who had religious objections to the arrangement. J.A. 176–77. Groff refused to comply with the terms of the MOU, citing sincere religious beliefs that prevented him from working on Sunday.

When Groff refused to come to work on Sunday, USPS had to cover for his absence. But USPS found it difficult with the MOU in place. The local postmaster, initially sympathetic to Groff's situation, sometimes delivered packages for Groff, but this arrangement "violat[ed] a collectively bargained agreement." Mem. of Law in Supp. of Defs.' Mot. for Summ. J. 10, ECF No. 36. As his absences mounted, his co-workers, who were also bound by collectively bargained agreements, became upset and even discussed a collective "boycott" in protest against Groff. *Id.* at 12. USPS was unable or

unwilling[2] to find a long-term solution for Groff with the MOU in place.

Meanwhile, the Union was aligning itself *against* Groff. Instead of helping Groff negotiate an alternative schedule that did not violate his religious beliefs, the Union filed a grievance against USPS, arguing that allowing Groff to stay home on Sundays violated the MOU and that carriers should not receive an exemption. Mem. 10, ECF No. 36. Eventually, Groff and at least one other carrier were forced to resign. *Id.*

Needless to say, this is not an environment in which reasonable accommodation was likely to happen.

One cannot fully understand the situation without grappling with the consequences of exclusive representation: it bound USPS to a rigid MOU that made it reticent to shift work from Groff to other employees; it primed co-workers to resist any imposition beyond what the MOU promised them; and it put the Union in the impossible position of having to represent Groff and other carriers equally. The natural solution for USPS, Groff's co-workers, *and* the Union—all stuck with an MOU negotiated without apparent regard for Sabbatarians—was to squeeze Groff until he either complied or quit.

In doing so, the Union seemed to abandon its stereotypical role as the only force *preventing* employees from getting fired. For better or worse, unions are well known for defending workers threatened by management, whatever the reason.

---

[2] Groff himself suggests USPS was unwilling. See Pet'r's Br. 8.

The truth is, exclusive representation is all about picking winners and losers, from the bargaining table to disciplinary proceedings. Sometimes it is based on seniority; sometimes it is based on politics or socioeconomics; and sometimes it is based on how mainstream (and malleable) one's religious convictions are.[3]

In this instance, the Union may have simply followed the will of the majority, unaware of how the majority's will could threaten the religious liberties of the minority. Whatever the reason, the Union's insistence on the MOU hurt Groff's ability to secure some other arrangement.

Groff's experience highlights the necessity of Title VII, rightly understood, as a counterbalance to the majoritarian impulse animating exclusive representation. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("The consequences of the law's focus on individuals rather than groups are anything but academic."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII, on the other hand, . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities."); *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 454 (7th Cir. 1981) ("Section 701(j) . . . is plainly intended to protect the employment opportunities not only of the victims of overt discrimination but

---

[3] The general public seems to understand how union decision-making might help some at the expense of others. Gallop polling consistently shows that most Americans believe labor unions "mostly help" union members but "mostly hurt" nonmembers. Gallop, Labor Unions, https://news.gallup.com/poll/12751/labor-unions.aspx.

also of individuals who are unintentionally discriminated against because their religious convictions are not reflected in facially neutral majoritarian rules."). Allowing exclusive representatives to force an "undue hardship" on employers otherwise willing to provide reasonable accommodations would allow these majoritarian impulses to overtake Title VII as well.

This Court should hold that Groff—and those who have been similarly discarded by their union and employer for their religious convictions—are entitled to greater protection under Title VII and abandon *Hardison*. This Court should also acknowledge that regimes of exclusive representation are not only inadequate to protect individuals' religious liberties, but threaten those liberties.

ARGUMENT

I. EXCLUSIVE REPRESENTATION HURT GROFF'S ABILITY TO SECURE A REASONABLE ACCOMMODATION CONSISTENT WITH TITLE VII

Exclusive union representation offers limited value to today's employee. For Groff, it was a liability; when he needed protection most, his leverage had already been bargained away. Worse, like many other public employees, Groff had become the target of the Union charged with representing him.

A. Exclusive Representation Threatens Individual Liberties

Decades ago, this Court extolled the virtues of exclusive representation for the "fearful," "inarticulate," or "ignorant" employee in a disciplinary setting. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262–63 (1975). This Court suggested that a "knowledgeable union

representative" could help such an employee and could even "assist the employer . . . and save the employer production time by getting to the bottom of the incident." *Id.* at 262.

While some unionized employees may have had a satisfactory experience with their union—and have the right to join and support it—others have experienced incompetence or even hostility.[4] Over the years, various minority groups have suffered at the hands of a hostile union majority armed with exclusive representation. *See, e.g.*, Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 93 – 93 (2002) ("The history of discrimination in the labor movement, and the parallel history of subordination against minorities, women, and immigrants in the United States, is well-documented."); *see, e.g.*, Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. IN AMER. HISTORY 189 (1996).

Tragically, many unionized employees still find themselves in the midst of such darkness today. *See, e.g.*, MEMBER SPOTLIGHT: MOELEEK THOMAS, https://americansforfairtreatment.org/2021/05/07/member-spotlight-moeleek-thomas/. One recent challenge to exclusive representation now pending before New York's Southern District, for example, involves claims of both incompetence *and* hostility due to the

---

[4] Gallup polling shows that just 24% of Americans rank the honesty and ethical standards of "Labor union leaders" as "high" or "very high"—slightly higher than lawyers and journalists. Gallup, Honesty/Ethics in Professions (Nov. 9–Dec. 2), https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx.

union's public embrace of anti-Semitic positions at the expense of Jewish bargaining unit employees. *Goldstein v. Prof'l Staff Cong./CUNY*, No. 22 CIV. 321 (PAE), 2022 WL 17342676 (S.D.N.Y. Nov. 30, 2022).

In reality, exclusive representation has always been of limited value to individual employees—and for reasons that do not necessarily suggest bad faith on unions' part. In an early case addressing the nature of collective bargaining under the National Labor Relations Act, this Court described exclusive bargaining as a "collectivist" enterprise necessarily skeptical of "individual advantage":

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; *but*

> *the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.*

J.I. Case Co. v. NLRB, 321 U.S. 332, 338–39 (1944) (emphasis added). Perhaps James Madison could have predicted this persistent problem with exclusive representation:

> Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third. Will the latter be secure? The prudence of every man would shun the danger. The rules and forms of justice suppose and guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand?

James Madison, Notes on the Confederacy, *in* LETTERS AND OTHER WRITINGS OF JAMES MADISON, VOL. I 327 (R. Worthington, 1884).

B. Exclusive Representation Lives in Tension with Title VII

No surprise, then, that when Title VII's protections for individual employees were enacted, they upset many of the collectively bargained agreements in place at the time. *See lnt'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 378–79 (1977) (Marshall, J., dissenting) (noting that, in over 30 cases across six Court of Appeals, courts held that seniority systems perpetuating pre-Title VII discrimination were unlawful). Internally, unions were also perceiving Title VII as a threat. As Professor Theodore J. St. Antoine, one of

three attorneys at the firm serving as General Counsel to the AFL-CIO at the time, explained:

> [L]abor leaders wishing to support Title VII also faced some harsh realities. The rank-and-file were up in arms over what they perceived (correctly, as it first developed) to be a serious threat to their valuable seniority. Union officials must face elections, and the 1960s were a time of flux, when numerous incumbents were voted out of office. The Kennedy administration was initially opposed to an FEP or EEO title, with the Justice Department calling labor-liberal efforts to add one "a disaster." Under all those circumstances, it seems entirely sensible for Title VII supporters among the labor leadership to feel they had to mollify their memberships by preserving seniority rights as they did.

Theodore J. St. Antoine, *Labor Unions and Title VII: A Bit Player at the Creation Looks Back* in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY, 255 (S. R. Bagenstos, et al. eds. 2015). As this Court observed in *Gardner-Denver*, 415 U.S. at 58 n.19, "it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers."

Tensions remain between our exclusive representation and Title VII regimes.[5] S*ee* Ryan H. Vann &

---

[5] *See, e.g.*, *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 21 (D.C. Cir. 2016) (Millett, J., concurring) ("While the law properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting

Melissa A. Logan, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective*, 33 ABA J. OF LABOR & EMP'T L. 291 (2018). ("As with Title VII and other similar federal legislation, an employer's duty to provide a workplace free of harassment or discrimination under state and local laws also can cause tension with its responsibilities under the NLRA."). Some union representatives may even find it difficult to see how their efforts to secure better terms and conditions for some employees may, in fact, be harmful to other employees.

C. The Union Favored Majoritarian Interests at Groff's Expense

Here, the tension is obvious: on one hand, exclusive representation required the Union and USPS to negotiate for generalized terms and conditions of employment—ones that would be accepted by a majority of union members. On the other hand, Title VII requires USPS to remain flexible and able to intervene when faced with an individual request for reasonable accommodation. Whereas exclusive representation imposes collectivism at the expense of individual interests, Title VII requires individual accommodations, sometimes at the expense of the collective.

---

others for sexual or racial degradation is categorically different. Conduct that is designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop.").

Unfortunately for Groff, this tension broke in favor of exclusive representation.[6] The Union and USPS negotiated an MOU that had a discriminatory effect on Groff by requiring all carriers to work Sundays, and when the discrimination became apparent, neither the Union nor USPS wanted to upset employees who had relied on the MOU by effectively returning to the bargaining table. In fact, the Union ended up working *against* Groff to prevent any alteration to the MOU by filing a grievance on behalf of other employees.

In other words, exclusive representation produced discriminatory terms *ex ante*, and it was not up to the task of correcting discriminatory terms *ex post*. Title VII is necessary—perhaps especially necessary—for unionized employees.

---

[6] In at least this sense, Groff's experience bears a strong resemblance to Larry Hardison's. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), as here, union-negotiated seniority provisions stood in the way of an accommodation for the employee. Unfortunately, this Court concluded:

> *Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy*, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.

Id. at 79 (emphasis added).

II. THIS COURT SHOULD EMPOWER INDIVIDUALS AND EMPLOYERS TO PURSUE REASONABLE ACCOMODATIONS IN A UNIONIZED WORKPLACE BY ABANDONING *HARDISON*

This Court's ruling in *Hardison* suggests that unions can impose an "undue hardship" on an employer by refusing to deviate from a collectively bargained agreement. This Court should abandon *Hardison* and instead clarify that Title VII allows employees and employers to arrive at reasonable accommodations even when they may require changes to collectively bargained terms.

This Court recognized in *Janus* that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees." 138 S. Ct. at 2460. Under exclusive representation, "individual employees may not be represented by any agent other than the designated union," which alone is tasked with "[p]rotection of the employees' interests." *Id.* Individualized treatment—or "direct dealing"—is prohibited. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944) ("Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained.").

However, "Congress gave private individuals a significant role in the enforcement process of Title VII." *Gardner-Denver*, 415 U.S. at 45. Under Title VII, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.*

The role of the individual in litigating Title VII disputes is so strong that "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51; *see A.W. ex rel. N.W. v. Princeton Pub. Sch. Bd. of Educ.*, No. 20-2433, 2022 WL 989348, at *3 (3d Cir. Mar. 15, 2022), *cert. denied sub nom. A. W. v. Princeton Pub. Sch. Bd. of Educ.*, 143 S. Ct. 625 (2023) ("[P]rospective waivers of rights under federal non-discrimination statutes are unenforceable."); *Williams v. Dearborn Motors 1, LLC*, No. 20-1351, 2021 WL 3854805, at *7 (6th Cir. Aug. 30, 2021) ("Such a scheme would clearly be unlawful."); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 (2009) ("Indeed, . . . even a waiver signed by an individual employee would be invalid as the statute also prevents individuals from 'waiv[ing] rights or claims that may arise after the date the waiver is executed.'" (quoting 29 U.S.C. § 626(f)(1))).[7] An employee may have his substantive Title VII rights waived only in the context of a private settlement, and then only when the waiver is knowing and voluntary. *Gardner-Denver*, 415 U.S. at 52 n.15 ("In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.").

Yet, in *Hardison*, 432 U.S. at 79, this Court suggested that an exclusive representative can *effectively*

---

[7] Accordingly, this Court has held that a unionized employee is not precluded from pursuing Title VII remedies notwithstanding their union's efforts to litigate similar contract-based claims through a collectively bargained grievance procedure. *Gardner-Denver*, 415 U.S. at 59–60.

waive employees' Title VII rights as long as it enters into a rigid collective bargaining agreement and declines to deviate from it.[8] In *Hardison*, the union and employer had collectively bargained and come to an agreement that included a seniority system governing the assignment of shifts.[9] *Id.* According to the majority opinion, any accommodation for Hardison's religious beliefs would have involved a change to the work schedule in violation of the seniority agreement. *Id.* at 81. The union flatly refused to any such change. *Id.* at 79.

But Justice Marshall, in dissent, recognized that there were other options for accommodating the employee—options that violated the collective bargaining agreement but did not "deprive[ ] any other employee of rights under the contract or violate[ ] the seniority system in any way." *Hardison*, 432 U.S. at 96 (Marshall, J., dissenting).[10] According to Justice Marshall, these accommodations would have somewhat disadvantaged the employee seeking the accommodation

---

[8] As the Equal Employment Opportunity Commission puts it, "Undue hardship also may be shown if the request for an accommodation violates others' job rights established through a collective bargaining agreement or seniority system." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-10, FACT SHEET: RELIGIOUS DISCRIMINATION (1997).

[9] Standing alone, seniority systems are not an unlawful employment practice under Title VII, provided they do not have a discriminatory purpose. 42 U.S.C. § 2000e-2(h).

[10] Notably, the majority in *Hardison* also recognized that, in theory, "a seniority system agreement may be modified by" Title VII. *Id.* at 79 n.12.

but would have successfully allowed him to maintain working while maintaining his convictions. *Id.* at 96 n.12.

As it was, this Court held that any deviation from the collective bargaining agreement would have imposed an undue hardship on the employer, adopting the *de minimis cost* test in the process. In effect, it allowed union in *Hardison* to stand in the way of even viable solutions, treating any change in the individual's employment as a change to the seniority agreement, where the employer could avoid Title VII liability. *See* 42 U.S.C. § 2000e-2(h).

In this sense, *Hardison*'s understanding of Title VII in a unionized workplace is terribly out of step with this Court's other decisions involving waiver of Title VII claims, as well as Title VII itself. *See Gardner-Denver*, 415 U.S. at 51 ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices."). As Justice Marshall correctly observed in dissent, "Plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations." 432 U.S. at 96 (Marshall, J., dissenting).

In this case, the Union simply followed the path carved out by the union in *Hardison* and treated the MOU as an inviolate pact that could not be revisited. USPS interpreted—understandably, given *Hardison*—the Union's refusal to deviate from the MOU in its entirety as legally sanctioned, and it failed to give Groff any workable solution that respected his convictions. Meanwhile, the courts reviewing Groff's claims were primed to conclude, under *Hardison*, that "undue hardship"—however artificially imposed by the

Union—prevented Groff from receiving any further accommodation.

This cannot be the end of the reasonable accommodation process. Without *Hardison*, Groff may have been able to negotiate an accommodation that deviated from the MOU, allowing him to continue working while respecting his religious convictions. For example, Groff was willing to work extra shifts, including Saturdays and holidays, and even accept a transfer to another position. Pet'r's Br. 9–10. One of these outcomes would have efficiently avoided litigation and allowed the Union to focus on facilitating any changes for the rest of the bargaining unit.

Allowing for flexibility in a unionized workplace would be desirable for any employee faced with a choice between his faith and his work, but it is necessary for employers who must deal with obstinate—even hostile—unions. Instead, *Hardison* encourages unions to stand in the way, prevent reasonable alternatives for employers, and stop workable solutions from helping employees.

Accordingly, this Court should abandon *Hardison* and make clear that employees and employers are permitted to pursue reasonable accommodations consistent with Title VII even when an exclusive representative refuses to budge. Such a ruling would restore individuals' "significant role in the enforcement process of Title VII" and give much needed flexibility to employers. *Gardner-Denver*, 415 U.S. at 45. After all, Title VII nowhere gives unions the power to effectively waive employees' protections or otherwise shut down the reasonable accommodation process.

CONCLUSION

This Court can restore the balance between exclusive representation and Title VII by concluding that USPS failed to provide a reasonable accommodation to Groff. In doing so, this Court should abandon *Hardison* and specifically acknowledge the threat exclusive representation poses to individual liberty.

February 28, 2023

Respectfully submitted,

David R. Osborne
Counsel of Record
GOLDSTEIN LAW PARTNERS, LLC
11 Church Road
Hatfield, PA 19440
Telephone: 610-949-0444
Facsimile: 215-257-1910
dosborne@goldsteinlp.com

Counsel to Amicus Americans for Fair Treatment