No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

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

BRIEF FOR ROBERT P. ROESSER
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

BRUCE N. CAMERON
Counsel of Record
BLAINE L. HUTCHISON
RAYMOND J. LAJEUNESSE, JR.
JAMES C. DEVEREAUX
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road, Ste. 600
Springfield, VA 22160
(703) 321-8510
bnc@nrtw.org
Counsel for Amicus

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. There is no contractual bargaining exception or coworker defense for discrimination 4

A. Standards that exclude religious employees violate Title VII even if they are otherwise neutral 4

1. Congress rejected uniform standards that discriminate against religion 5

2. Congress amended Title VII to require religious accommodation and reject pre-amendment neutrality 9

3. *Hardison* defied Congress by rejecting accommodation and reinforcing pre-amendment neutrality 10

i. The majority wrongly claimed that neutral rules excuse the duty to accommodate 10

ii. The majority wrongly claimed that a collective bargaining agreement excuses the duty to accommodate...... 12

TABLE OF CONTENTS—Continued

Page

iii. The majority wrongly claimed that accommodation is discrimination .. 19

B. Title VII has one exception for undue hardship on the employer's business 20

1. Title VII requires accommodations that impose significant expense 21

i. *Hardison*'s *de minimis* standard contradicts Title VII 21

ii. *Hardison*'s *de minimis* standard eliminates the duty to accommodate.. 25

2. Title VII does not include a coworker or union discrimination defense 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Adeyeye v. Heartland Sweeteners, LLC,
721 F.3d 444 (7th Cir. 2013)....................11, 24

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974)....................3, 14

Am. Tobacco Co. v. Patterson,
456 U.S. 63 (1982)....................16

Anderson v. Gen. Dynamics Convair Aerospace Div.,
589 F.2d 397 (9th Cir. 1978)....................14, 15, 24

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946)....................25

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020)....................15, 23

Burns v. S. Pac. Transp. Co.,
589 F.2d 403 (9th Cir. 1978)....................14, 15

Cooper v. Gen. Dynamics,
533 F.2d 163 (5th Cir. 1976)....................14, 15

Dewey v. Reynolds Metals Co.,
429 F.2d 324 (6th Cir. 1970)....................7, 8, 17

Draper v. U.S. Pipe & Foundry Co.,
527 F.2d 515 (6th Cir. 1975)....................24

EEOC v. Abercrombie & Fitch Stores,
575 U.S. 768 (2015)....................6, 11–13, 16, 22, 28

TABLE OF AUTHORITIES —Continued

Page(s)

EEOC. v. Univ. of Detroit,
904 F.2d 331 (6th Cir. 1990) 1

Franks v. Bowman Transp. Co.,
424 U.S. 747 (1976) 16

IAM, Lodge 751 v. Boeing Co.,
833 F.2d 165 (9th Cir. 1987) 14

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 16

Marbury v. Madison,
5 U.S. 137 (1803) 23

McDaniel v. Essex Int'l,
571 F.2d 338 (6th Cir. 1978) 14, 15

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) 14

Nottelson v. Smith Steel Workers DALU 19806,
643 F.2d 445 (7th Cir. 1981) 14, 15

Patterson v. Walgreen Co.,
140 S. Ct. 685 (2020) 20, 21

Riley v. Bendix Corp.,
330 F. Supp. 583 (M.D. Fla. 1971) 6–8

Sandifer v. U.S. Steel Corp.,
571 U.S. 220 (2014) 23, 25

Page(s)

Sherbert v. Verner,
374 U.S. 398 (1963) ... 6

Small v. Memphis Light, Gas & Water,
952 F.3d 821 (6th Cir. 2020) ... 19, 21, 22, 25

Tooley v. Martin-Marietta Corp.,
648 F.2d 1239 (9th Cir. 1981) ... 14, 15

Trans World Airlines, Inc. v. Hardison,
432 U.S. 63 (1977) ... 2, 3, 10, 12–23, 25–27, 30

Wis. Dep't of Revenue v. William Wrigley, Jr., Co.,
505 U.S. 214 (1992) ... 24

Wondzell v. Alaska Wood Prods., Inc.,
601 P.2d 584 (Alaska 1979) ... 14, 15

Wooden v. United States,
142 S. Ct. 1063 (2022) ... 23

Yott v. N. Am. Rockwell Corp.,
501 F.2d 398 (9th Cir. 1974) ... 14

STATUTES AND RULES

29 U.S.C. §§ 158(a), 159(a) ... 18

42 U.S.C. § 2000e(j) ... 2, 5, 23, 27–28

42 U.S.C. § 2000e-2(c) ... 13

Supreme Court Rule 37.6 ... 1

TABLE OF AUTHORITIES —Continued

Page(s)

REGULATIONS AND GUIDELINES

29 C.F.R. pt. 1630, App. § 1630.15(d) (2016)...........28

EEOC Religious Discrimination Guidelines (1966) ..6

EEOC Religious Discrimination Guidelines (1967) ..6

LEGISLATIVE MATERIALS

118 Cong. Rec. 705 (1972)....................................9, 17

BOOKS AND ARTICLES

Black's Law Dictionary(4th ed. 1968)................24, 25

Black's Law Dictionary (5th ed. 1979).....................24

Blaine L. Hutchison & Bruce N. Cameron, Janus*'s Solution for Title VII Religious Objectors* (forthcoming 2023))...14, 15

Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471 (2019)............................6, 11

Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. Cin. L. Rev. 396, 414–15, 418–19 (2022)..5

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 (2015)..........................5

Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2006) 17

Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 55 (2007) 4

Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317 (1997) ... 5

Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992) 22

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 (1989) 26

Random House Dictionary (1973) 24

Webster's New American Dictionary (1965) 24

BRIEFS

Br. in Opp'n, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227 (2021) (No. 19-1388) 22

Pet. Br., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126) 22

Page(s)

Resp't Br., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126)......................... 22

U.S. Amicus Br., *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349)................... 5, 21

U.S. Amicus Br., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126) 22

OTHER MATERIALS

USPS, *515 Absence for Family Care or Illness of Employee*, https://about.usps.com/manuals/elm/html/elmc5_005.htm 29

INTEREST OF AMICUS CURIAE[1]

The University of Detroit fired **Amicus Dr. Robert P. Roesser** for his religious convictions. Dr. Roesser refused to fund a union that promoted views contrary to his religious beliefs. As a result, his employer terminated his engineering professorship.

The Equal Employment Opportunity Commission sued Dr. Roesser's employer and union after it found that they violated Title VII. Dr. Roesser intervened. The district court ruled against the EEOC and Dr. Roesser, but the Sixth Circuit reversed. *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990). It remanded the case to determine whether accommodation was possible without undue hardship.

On remand, Dr. Roesser faced at least two problems: First, a collective bargaining agreement prompted his discharge. Second, the defendants argued that a court must consider coworkers who might be inspired to claim protection for their faith because Dr. Roesser taught at a Jesuit school. These questions were never resolved because the case settled.

Dr. Roesser files this brief to highlight the inherent conflict between minority rights and the collective and underscore this case's importance for all employees who depend on Title VII to practice their faith.

---

[1] Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity aside from the National Right to Work Legal Defense Foundation, which provided Dr. Roesser's counsel, made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed Title VII, in part, to protect employees from religious discrimination. Yet shortly after its enactment, courts interpreted Title VII to allow employers to fire employees for following their faith.

Congress responded by adding Section 701(j) to Title VII to further protect religious employees. The amendment clarifies that religious-practice discrimination—even through otherwise neutral rules—is unlawful. Employers and unions must reasonably accommodate employees' religious beliefs and practices. Congress made one exception: accommodation is not required if it would impose an "undue hardship on . . . the employer's 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. It rejected religious accommodation to avoid supposedly unequal treatment. And so it let the defendants fire the plaintiff for his faith. Because the majority embraced formal neutrality, it denied what it saw as special religious privileges. It thus subjected employees' individual religious needs to uniform employment rules and collective bargaining agreements. The majority encapsulated its holding by stating that an accommodation imposes an undue hardship if it entails "more than a *de minimis* cost." *Id.* at 84.

This holding 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 (Marshall, J., dissenting). As a result, employers may fire religious employees for simply practicing their faith. In effect, *Hardison* "nullif[ied]" critical protections that Congress granted religious employees. *Id.* at 89.

Despite Congress's efforts to protect religion, *Hardison* requires many employees to make a cruel choice: surrender your faith or your job. This ultimatum harms religious minorities in particular. Individuals in the majority do not need accommodation because rules reflect their cultural and religious beliefs. Congress passed Title VII and required religious accommodation to protect minorities from the majority. As this Court recognized, Title VII protects "an individual's right to equal employment opportunities" from "majoritarian processes." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Thus, this Court held that a contractual bargaining agreement cannot waive an employee's Title VII rights. *Id.* Yet *Hardison* says that collective bargaining agreements and other majoritarian rules supplant Title VII rights.

This case illustrates *Hardison*'s harsh results. The United States Postal Service discriminated against Groff when it could have easily accommodated him. USPS could have scheduled another employee for the few weeks needed during peak season so Groff could observe his Sabbath. Pet. App. 31a. Indeed, USPS admitted that this would not have harmed USPS. *Id.* But it refused, undoubtedly based on *Hardison*. So Groff could not work for USPS and keep his faith.

This is the ignoble path that *Hardison* demands others follow. The courts below obeyed. They sanctioned religious discrimination to avoid marginally

impacting Groff's coworkers and slightly adjusting a collective bargaining agreement.

* * *

Simply put, *Hardison* contradicts Title VII and harms religious employees. This Court should overrule *Hardison* and affirm that religious employees' civil rights do not depend on the majority.

ARGUMENT

I. There is no contractual bargaining exception or coworker defense for discrimination.

Congress found that accommodation is necessary to protect religious employees, and so it amended Title VII to require it. Without accommodation, religious employees are subject to punishment for practicing their faith. *Hardison*, however, rejected religious accommodation.

A. Standards that exclude religious employees violate Title VII even if they are otherwise neutral.

The *Hardison* majority denied religious accommodation because it embraced a competing framework—formal (category) neutrality. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 55 (2007) (defining formal neutrality). The majority believed that Title VII requires religion blindness and thus prohibits decisions based on protected class. So the Court rewrote the statute to avoid different treatment based on religion. This is the animating idea behind *Hardison*. It sacrifices accommodation (and religious minorities) on the collective altar and reverses Congress's Title VII amendment.

1. ***Congress rejected uniform standards that discriminate against religion.***

Congress amended Title VII because courts applied formal neutrality and refused to protect religion. Congress clarified that failure to provide religious accommodation is also discrimination. 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, 116–17 (2015). In its amendment, Congress added that religion includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). And so it collapsed the distinction between belief and conduct.

Congress intended to prevent employers from firing religious employees just as the statute protects other employees from discrimination. Religious employees simply have different needs. Religion at its core involves belief *and* conduct in a way that other protected classes do not. Kaminer, *supra*, at 116–17; Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 357–59 (1997); *see also* Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. Cin. L. Rev. 396, 414–15, 418–19 (2022) (showing how uniform rules harm religion).

In effect, no accommodation means that religious employees, like Groff and Hardison, must choose between their job and their God. Accommodation simply allows these employees the same opportunity to earn a living as other employees who do not share the same religious beliefs. For this reason, the Court elsewhere called accommodation "nothing more than . . . neutral-

ity in the face of religious differences." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). *See also* U.S. Amicus Br. at 21, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349) (Section 701(j) "removes 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.").

Thus, when an employer and union refuse to accommodate, they discriminate because of religion. Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471, 482 (2019). As this Court recently explained, refusal to accommodate is disparate treatment because religion under Title VII includes both belief and behavior. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771–72 (2015). Employers may not fire employees for following their faith when they could accommodate them.

The EEOC first realized that Title VII must protect religious practice and require accommodation. It first interpreted Title VII through formal neutrality. EEOC Religious Discrimination Guidelines (1966), *quoted in Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971), *rev'd,* 464 F.2d 1113 (5th Cir. 1972). Although it suggested that employers should accommodate employees' religious needs, it stated that employers may institute a uniform schedule—even if that unevenly affects employees' religion.

But the EEOC fully adopted a contrary, accommodation approach one year later. EEOC Religious Discrimination Guidelines (1967), *quoted in Riley*, 330 F. Supp. at 592. Those Guidelines state that the duty not

to discriminate includes an obligation to accommodate religious needs, absent "undue hardship on the conduct of the employer's business." *Id.*

Yet many courts ignored the EEOC Guidelines and applied formal neutrality. These courts ignored employees' religious needs and treated religious practice like a personal choice—rather than a protected trait. Two cases in particular made this error and motivated Congress to amend Title VII: *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court,* 402 U.S. 689 (1971), and *Riley*, 330 F. Supp. 583.

In *Dewey* and *Riley,* the plaintiffs were fired for following their religion. Yet both courts held that their employers did not discriminate because they merely enforced policies that applied to all employees. *Dewey*, 429 F.2d at 328; *Riley*, 330 F. Supp. at 589. Even though the policies discriminated against religious beliefs that require Sabbath observance, the courts ignored this religious disparity.

The Sixth Circuit reinforced its neutrality holding by relying on a collective bargaining agreement. The plaintiff in *Dewey* (like *Riley*) believed that he must refrain from work on the Sabbath. *Dewey*, 429 F.2d at 331. But the employer refused to accommodate because a collective bargaining agreement required Sabbath work and allocated labor, in part, according to seniority. *Id.* at 327–28. Because Dewey could not work on the Sabbath, the employer fired him based on that agreement. *Id.* at 328.

The court reasoned that an employee is not entitled to religious accommodation that alters a collective bargaining agreement. *Id.* at 330–31. Absent intent to discriminate, the court held, a union and employer

may enforce a bargaining agreement that prohibits an employee's religious exercise. *Id.* at 329. The court held: "The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement." *Id.* at 330.

Although the collective bargaining agreement prohibited Dewey's religious practice, the court found "nothing discriminatory in [it]." *Id.* at 329. Based on formal neutrality, the court praised the agreement. It wrote that the collective bargaining agreement "provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them." *Id.* According to the court, an employer may fire all Sabbatarians if a collective bargaining agreement requires Sabbath work.

In essence, *Dewey* and *Riley* held that Title VII does not protect religious practice—it only protects religious status or belief. *Id.* at 330. Employees may believe their religion, but they cannot practice it. *Riley* emphasized that employees with conflicting religious practices must either conform to the workplace or "seek other employment." 330 F. Supp. at 590. Thus, employers and unions need not alter formally neutral rules to allow religious practice.

In fact, the Sixth Circuit in *Dewey* went further. It called accommodation discrimination and therefore rejected it. The court reasoned that accommodating the plaintiff would "discriminate against . . . other employees" and "constitute unequal administration of the collective bargaining agreement." 429 F.2d at 330. The court cited possible personnel problems and grievances if it unequally allocated work based on religion.

Id. The Supreme Court equally divided and thus affirmed the Sixth Circuit decision. 402 U.S. at 689.

2. *Congress amended Title VII to require religious accommodation and reject pre-amendment neutrality.*

These decisions motivated Congress to amend Title VII. Senator Jennings Randolph proposed an amendment to clarify that Title VII requires religious accommodation. 118 Cong. Rec. 705 (1972). Senator Randolph appreciated the problem for religious employees because he was a Sabbatarian. *Id.* On the Senate floor, he explained his religious beliefs and articulated the acute problem that many Sabbatarians face.

Senator Randolph stated that *Dewey* and *Riley* clouded religious discrimination's meaning and did not protect religion as Congress intended. *Id.* at 706. And he cited the Supreme Court's even split in *Dewey*. He urged Congress to amend Title VII and require religious accommodation.

The Senate unanimously passed Senator Randolph's amendment—now Section 701(j)—and the House similarly approved it. Senator Randolph explained that this amendment "assure[s] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." *Id.* at 705. It requires accommodation in most cases and only permits refusal in "a very, very small percentage of cases." *Id.* at 706. The purpose, as Senator Randolph put it, is to protect employees' religious freedom "insofar as possible" and their "opportunity to earn a livelihood" regardless of religious belief. *Id.*

As a guidepost, Congress included copies of *Dewey* and *Riley* in the record. Those decisions thus represent interpretations that Congress specifically rejected by amending Title VII.

3. ***Hardison* defied Congress by rejecting accommodation and reinforcing pre-amendment neutrality.**

Even though Congress repudiated *Dewey* and *Riley*, *Hardison* still applied those decisions' logic. As Justice Marshall charged, the majority defied Congress by "follow[ing] the *Dewey* decision." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Based on pre-amendment formal neutrality, the majority rejected accommodation for three reasons.

i. <u>*The majority wrongly claimed that neutral rules excuse the duty to accommodate.*</u>

The *Hardison* majority held that the defendant employer and union did not discriminate when they fired the plaintiff for his religious beliefs. The majority reasoned that no (unlawful) discrimination occurred because the employer and union treated all protected groups equally. *Id.* at 78 (majority opinion). In an amazing statement, the majority described the seniority policy that caused the plaintiff to lose his job as "a significant accommodation," because it equally applied to protected groups. *Id.* In other words, the policy was an accommodation because it was formally neutral. It did not (on its face) allocate work based on religion and the majority thought that it treated all protected classes equally.

The majority derided any uniquely religious accommodation. It argued that the union and employer

could "adopt a *neutral* system, such as seniority, a lottery, or rotating shifts; *or* allocate days off in accordance with the religious needs of its employees." *Id.* at 80–81 (emphasis added). The majority thus commended the seniority policy as a fair, neutral choice. The Court claimed that a religious accommodation policy is unfair because it discriminates based on religion. *Id.* at 81. But despite the majority's recommendation, it called these choices "a matter for collective bargaining." *Id.* at 80. Unions and employers, not Congress, determine whether accommodation is necessary. In short, they may hire or fire Sabbatarians.

This holding contradicts Title VII and undermines essential protections for religious employees. Congress required unions and employers to allocate work based on religion. It did not praise otherwise neutral rules. Nor did it endorse systems that prefer time—or other features—over conscience. Congress amended Title VII because otherwise neutral rules often discriminate against religious minorities. As the Seventh Circuit put it, Congress *required* accommodation from otherwise neutral rules "to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013).

Neutrality is not a defense. A neutral rule that prevents religious practice is a *trigger* that requires accommodation. As Justice Alito observed: "If neutral work rules . . . precluded liability, there would be no need to provide [a] defense, which allows an employer to escape liability for refusing to make an exception to a neutral work rule." *Abercrombie*, 575 U.S. at 779 (Alito, J., concurring). Accommodation is relevant only

when an otherwise neutral rule conflicts with a person's religious practice. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

In fact, Congress determined that otherwise neutral rules that prohibit religious exercise are discriminatory. Thus, they violate Title VII. Congress collapsed the distinction cases made between belief and conduct. Cameron & Hutchison, Abercrombie & Fitch, *supra*, at 482. Thus, work rules that prohibit religious conduct (*e.g.*, no headwear) are the same as work rules that prohibit religious belief (*e.g.*, no Muslims). *Abercrombie*, 575 U.S. at 775. Both are unlawful because they discriminate against religion. In short, Congress prohibited *Hardison*'s construction.

ii. *The majority wrongly claimed that a collective bargaining agreement excuses the duty to accommodate.*

The *Hardison* majority argued that the neutral (seniority) rules were special because they came from a collective bargaining agreement. *Hardison*, 432 U.S. at 81. As a practical matter, *Hardison* made a super exception for formally neutral rules in a collective bargaining agreement. It suggested it is *always* an undue hardship for a union or employer to deviate from such rules. *Id.* at 83. But Title VII does not say that a union and employer must accommodate religious employees unless the collective decides otherwise.

Indeed, the majority conceded "that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute." *Id.* at 79. Yet it did not find a statutory violation because it rejected Title VII's duty to accommodate. Rules that prohibit

religious practice discriminate against religion. *Abercrombie*, 575 U.S. at 775. And an employer that enforces such rules and refuses to accommodate violates Title VII.

A rule that discriminates against religion is *not* a defense regardless of its source. Title VII trumps collective agreements and other rules that discriminate against religion and prohibit religious practice. It is logically irrelevant whether the offending policy comes from a bargaining agreement, negotiated by a union and employer, or an employer unilaterally. Rules in a collective bargaining agreement that prohibit religious exercise are just as discriminatory as employer mandates that prohibit religious exercise.[2] Both prevent employees from practicing their religion.

(a) The majority wrongly claimed that labor law trumps Title VII.

The majority suggested that labor law insulates collective bargaining agreements from Title VII. The majority argued that collective bargaining "lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Hardison*, 432 U.S. at 79. It refused to require any accommodation that conflicts with a collective bargaining agreement until Congress approves such accommodations. Yet Congress not only approved religious accommodation but also required it—no less through congressional amendment.[3] And Congress stated that

---

[2] Title VII also prohibits unions from discriminating against employees' religious beliefs and practices. 42 U.S.C. § 2000e-2(c).

[3] Congress also did so after it passed and amended the National Labor Relations Act and the Railway Labor Act.

the policy behind Title VII to protect minorities from discrimination is "of the 'highest priority.'" *Alexander*, 415 U.S. at 47 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

What's more, every circuit court that considered the relationship between Title VII and labor law in the union dues context rejected *Hardison*'s position. *IAM, Lodge 751 v. Boeing Co.*, 833 F.2d 165, 169–70 (9th Cir. 1987); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1242–44 (9th Cir. 1981); *Nottelson v. Smith Steel Workers DALU 19806*, 643 F.2d 445, 450–53 (7th Cir. 1981); *Anderson v. Gen. Dynamics*, 589 F.2d 397, 402 (9th Cir. 1978); *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978); *McDaniel v. Essex Int'l*, 571 F.2d 338, 344 (6th Cir. 1978); *Cooper v. Gen. Dynamics*, 533 F.2d 163, 166–70 (5th Cir. 1976); *Yott v. N. Am. Rockwell Corp.*, 501 F.2d 398, 403 (9th Cir. 1974); *see also Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 586 (Alaska 1979). These courts all held that a contractual bargaining agreement does not excuse Title VII's duty to accommodate.

Thus, Title VII forbids unions and employers from enforcing collective bargaining agreements that require individuals to fund a union that conflicts with their religion. *E.g.*, *Tooley*, 648 F.2d at 1244; *see also* Blaine L. Hutchison & Bruce N. Cameron, Janus*'s Solution for Title VII Religious Objectors* (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4371781 (surveying the conflict between religion and labor law and analyzing Title VII's protections for religious objectors). Like union seniority, union fees are a mandatory bargaining subject, and

many collective bargaining agreements require employees to fund the union to keep their job. Yet appeals courts all agree that Title VII protects employees with religious objections from this common collective bargaining requirement. *E.g.*, *Boeing*, 833 F.2d at 70; *Tooley*, 648 F.2d at 1244; *Nottelson*, 643 F.2d at 451; *Anderson*, 589 F.2d at 402; *Burns*, 589 F.2d at 407; *McDaniel*, 571 F.2d at 344; *Cooper*, 533 F.2d at 171; *Yott*, 501 F.2d at 403; *Wondzell*, 601 P.2d at 586.

These courts reasoned that Title VII, not labor law, addresses employees' religious needs and *requires* religious accommodation. *E.g.*, *McDaniel*, 571 F.2d at 341–43; *see also* Hutchison & Cameron, Janus*'s Solution*, *supra*, at 12 (analyzing the union dues cases under Title VII). Accommodation does not undermine labor law. As the Fifth Circuit explained, when the law permits forced union fees, unions and employers may still enforce so-called union security clauses "in all except the unusual [case] where compliance would run counter to a particular employee's religious conviction." *Cooper*, 533 F.2d at 170. But given a direct conflict, Title VII controls. No labor policy is more important than eliminating employment discrimination. *Nottelson*, 643 F.2d at 451; *McDaniel*, 571 F.2d at 343. *See also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964."). For these reasons, appeals courts all held that "Title VII creates an exception to . . . union security clauses." *Nottelson*, 643 F.2d at 450.

(b) The majority wrongly claimed that Section 703(h) immunizes collective bargaining agreements and seniority rules.

Section 703(h) does not support *Hardison*'s conclusion. That section provides that employers may establish seniority and merit systems that do not discriminate based on protected class. It does not create a discrimination safe harbor. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976).[4] The majority in *Hardison* agreed. *Hardison*, 432 U.S. at 79. At most, Section 703(h) immunizes seniority agreements from disparate-impact challenges. But it does not prevent disparate treatment challenges. *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) ("703(h) exempts from Title VII the disparate impact of a bona fide seniority system"); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, 348 n.30 (1977) (same but distinguishing disparate treatment). Because refusal to accommodate is disparate treatment, Section 703(h) is not an obstacle. *See Abercrombie*, 575 U.S. at 771. When a union and employer create a system that discriminates against religion, and they refuse to accommodate, they act with "an intention to discriminate" under Section 703(h).

At any rate, seniority is a poor discrimination defense. As the majority itself recognized in *Hardison*:

---

[4] Section 703(h)'s legislative history suggests that Congress intended that section to only prevent challenges to pre-act seniority and merit systems. *Franks*, 424 U.S. at 761–62. *See also Am. Tobacco*, 456 U.S. at 77–78 (Brennan, J., dissenting) (Section 703(h) "reflects Congress' desire to protect vested seniority rights; Congress did not seek to ensure the vesting of new rights that are the byproduct of discrimination."). *But see Am. Tobacco Co.*, 456 U.S. at 77-78 (majority opinion).

"This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Hardison*, 432 U.S. at 79 n.12 (quoting *Franks*, 424 U.S. at 778). Our society recognizes many reasons to deviate from a seniority system.

A seniority agreement in a CBA is essentially a queue. It creates a preference based on time. But preferences for time generally give way to the disabled, the elderly, those in the military, and those with small children, to name a few. Favoring time over conscience contradicts the theory behind the Free Exercise Clause and Title VII's application of that theory.[5]

Moreover, Congress rejected *Hardison*'s collective bargaining agreement and seniority arguments. In *Dewey* the Sixth Circuit refused to accommodate based on a collective agreement that assigned work. 429 F.2d at 329. The court found no discriminatory intent and held that the agreement did not discriminate on its face or in its application against religion. *Id.* So it sanctioned the employer's decision to fire the plaintiff under the collective bargaining agreement.

Congress renounced the decision in *Dewey*. It amended Title VII because *Dewey* misapplied the statute and failed to protect religion. Congress added Section 701(j) to require the opposite result. 118 Cong. Rec. 706 (1972). Thus, Congress repudiated these arguments and in essence legislatively overturned *Dewey*. As a result, Congress foreclosed a seniority and collective bargaining agreement defense.

---

[5] Hutchison & Cameron, Janus*'s Solution*, *supra*, at 12 (arguing that Title VII enforces the Free Exercise Clause).

When Congress amended Title VII, it particularly had Sabbatarians in mind. Senator Randolph explained the problem that many Sabbatarians face, like the plaintiffs in *Dewey* and *Riley*. *Id.* at 705. Sabbatarians often have religious conflicts with collective bargaining agreements and seniority provisions because these devices often control work. Congress intended to protect these individuals. *Id.* A collective bargaining agreement exception would undermine Congress's intent. It would allow employers to continue to fire Sabbatarians despite Congress's efforts to protect them.

(c) The collective bargaining agreement exception contradicts Title VII.

Above all, a collective bargaining agreement exception undermines Title VII's effort to protect vulnerable minorities. At its core, accommodation shields individuals from uncaring and sometimes hostile groups. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1802 (2006). And it often protects minorities who cannot enact policies to protect their beliefs.

A union exclusive bargaining representative eliminates an individual's right to negotiate his own working conditions and by law represents the majority at the minority's expense. *See* National Labor Relations Act, 29 U.S.C. §§ 158(a), 159(a). That increases, not decreases, the need for accommodation. Thus, if anything, a collective bargaining agreement worsens the problem Congress tried to solve.

Simply put, unions and employers cannot discard employees' civil rights—even if they agree to do so in

a collective bargaining agreement. As Justice Marshall recognized, "an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations." *Hardison*, 432 U.S. at 96 (Marshall, J., dissenting). Work rules that prohibit religious exercise violate the statute—even when a union also agrees to the discrimination.

iii. The majority wrongly claimed that accommodation is discrimination.

The *Hardison* majority further argued—in "language strikingly similar" to *Dewey* and *Riley*—that accommodation would "discriminate against . . . other employees" and thus conflicts with Title VII. *Id.* at 89. Because Congress intended to prevent discrimination, the majority asserted that "it would be anomalous" to interpret "reasonable accommodation" to require "such unequal treatment." *Id.* at 81 (majority opinion). Thus, the majority rejected accommodation.

This reasoning presumes that Congress did not really mean what it said when it amended Title VII and required religious accommodation. And taken to its logical end, it negates *any* duty to accommodate since all accommodation (from this viewpoint) is discriminatory. As Justice Marshall wrote, "if an accommodation can be rejected simply because it involves preferential treatment, then . . . the statute, while brimming with 'sound and fury,' ultimately 'signif[ies] nothing.'" *Id.* at 87 (Marshall, J., dissenting).

Accommodation, moreover, does not discriminate against other employees. *Hardison*'s charge, according to Judge Thapar, is "unreasonable on its face." *Small v. Memphis Light, Gas and Water*, 952 F.3d

821, 828 (6th Cir. 2020) (Thapar, J., concurring). Consider the Americans with Disabilities Act, which requires accommodations for disabled employees. "No right-minded person would call such accommodations a form of impermissible discrimination against *non*-disabled employees." *Id.* The singular opposition toward religious accommodation reflects our society's increasing hostility toward religion—and the urgent need to protect it.

Refusing to accommodate causes inequality: employers may exclude religious employees from the workforce while others are protected. Hardison and Groff—and others who have similar religious beliefs—suffer employment capital punishment for their faith. Employees who have different or no beliefs do not suffer so. After *Dewey* and *Riley*, Congress determined that accommodation is necessary to protect religious employees. *Hardison* "disregard[s] [these] congressional choices" and permits religious discrimination. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Thus, under *Hardison*, USPS may fire Groff when it could just as easily accommodate him.

B. *Title VII has one exception for undue hardship on the employer's business.*

Based on formal neutrality, *Hardison* held that unions and employers need not accommodate religion. Employees may work within the system available to all employees to swap shifts and use seniority to observe their religion, if possible. But unions and employers, under *Hardison*, need not make any special exceptions for religion.

With that in mind the Court invented two rules. First, an employer need not accommodate if

accommodation requires more than a *de minimis* cost. And second, an employer need not accommodate if accommodation impacts coworkers or alters a collective bargaining agreement. Both rules conflict with Title VII.

1. *Title VII requires accommodations that impose significant expense.*

Congress required unions and employers to accommodate employees' religious beliefs and practices unless accommodation is impossible without *undue hardship*. Yet the *Hardison* majority asserted in its penultimate paragraph—"almost as an afterthought"—that any accommodation that requires "more than a *de minimis* cost" is "an undue hardship." *Small*, 952 F.3d at 828 (Thapar, J., concurring). In effect, the Court redefined undue hardship.

i. Hardison*'s de minimis standard contradicts Title VII.*

Hardison's *de minimis* standard is untenable. As three Justices recently observed, "*Hardison'*s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring in denial of certiorari). Indeed, *Hardison*'s reading is implausible. Justice Marshall rightly objected in dissent that this standard conflicts with "simple English usage" and Title VII's "plain words." *Hardison*, 432 U.S. at 88, 92 n.6 (Marshall, J., dissenting).

On that basis, circuit judges,[6] scholars,[7] and the United States Solicitor General[8] have all agreed that *Hardison*'s *de minimis* standard is wrong. In fact, it is hard to find anyone who thinks that *Hardison* is right—including respondents forced to defend it. One recently admitted before this Court that "the *Hardison* equation very likely is not the best possible gloss on the phrase 'undue hardship.'" Br. in Opp'n at 23, *Small*, *supra* (No. 19-1388).

The *Hardison* majority did not claim that its *de minimis* rule came from Title VII's text.[9] *Id.* The majority gave no reason for its impromptu rule—likely because it follows the majority's neutrality logic. No party endorsed it. Pet. Br. at 40–41, 47, *Hardison*, *supra* (No. 75-1126); Resp't Br. at 8, 21, *Hardison*, *supra* (No. 75-1126); U.S. Amicus Br. at 20–22, *Hardison*, *supra* (No. 75-1126). To the contrary, the briefs in *Hardison* did not question undue hardship's meaning. The parties—including the United States as amicus—all agreed that the term means far more than *any* non-*de-minimis* cost.

Title VII provides robust protection for religion. The text is plain: it requires unions and employers to

---

[6] *E.g.*, *Small*, 952 F.3d at 828–29 (Thapar, J., concurring).

[7] *E.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 704 (1992).

[8] U.S. Amicus Br. at 19–23, *Patterson*, *supra* (No. 18-349).

[9] Although *Hardison* referenced Title VII's text, the case started before Congress amended Title VII. So it only applied the existing EEOC guidelines and does not control Title VII's meaning. *Abercrombie*, 575 U.S. at 787 n.3 (Thomas, J., concurring in part and dissenting in part).

accommodate employees' religious beliefs and practices unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Congress said nothing more and made no other exception.

Because Congress did not define the term undue hardship, the term retains its original, public meaning. *Bostock*, 140 S. Ct. at 1738 (affirming this is the normal rule); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (affirming this is a "fundamental canon of statutory construction")(citation omitted). The reason is that "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. These words have accepted meaning that Congress chose, and the President approved. Judges are, therefore, not free to deviate from words' original meaning. They usurp the legislative process and destabilize the law when they do.

Yet the *Hardison* majority did just that. It ignored and rewrote the law "effectively nullifying it." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). *Hardison* created its own law on religious accommodation—it did not "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And it imposed its own values contrary to the peoples' values expressed through their representatives. So there is little, if any, stare decisis reason to uphold it. The opinion is left over from a "bygone era" that did not focus on text and instead applied "a more freewheeling approach to statutory construction." *Wooden v. United States*, 142 S. Ct. 1063, 1085 (2022) (Gorsuch, J., concurring).

No pre-*Hardison* dictionary defined 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. *Black's Law Dictionary* 482 (4th ed. 1968). For another thing, the reading conflicts with the established legal principle that applies to "all enactments"—"*de minimis non curat lex* ('the law cares not for trifles.')" *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Dictionaries at the time 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 from the time agree. *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"). By itself, hardship requires accommodations that are "difficult to endure."

But hardship is not enough. Congress also required that the hardship be "undue." *E.g.*, *Adeyeye*, 721 F.3d at 455 ("Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that"); *Anderson*, 589 F.2d at 402 ("Undue hardship means something greater than hardship."); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (same). So the hardship must exceed conditions that are "difficult to endure."

Dictionaries largely defined undue as "unwarranted" or "excessive." *Random House Dictionary*, *supra*, at 1433. *See also 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). Thus, undue hardship requires "a condition that is difficult to endure" and serious enough to be called "excessive." That means that "the accommodation must impose significant costs on the company" to qualify. *Small*, 952 F.3d at 827 (Thapar, J., concurring).[10]

Hardison stated the opposite. Many costs are neither hardships—difficult to endure—nor undue—excessive. Yet *Hardison* allows these costs to negate critical protections for religious employees. Simply put, *Hardison* makes a "mockery of the statute"—"effectively nullifying it." *Hardison*, 432 U.S. at 88–89 (Marshall, J., dissenting).

ii. <u>Hardison*'s de minimis standard eliminates the duty to accommodate.*</u>

Almost any cost, by definition, is more than *de minimis*. As the Supreme Court wrote elsewhere: *de minimis* costs are "trifles," mere "[s]plit second absurdities" or inconveniences. *Sandifer*, 571 U.S. at 233–34 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). Such costs are so trivial, the law does not recognize them. *Id.* Yet the *Hardison* majority claimed that Title VII does.

And *Hardison* goes further still. While the majority stated that an employer need not accept *more* than a *de minimis* cost, it held, in effect, that an employer need not bear *any* cost. No cost options were available

---

[10] In *Hardison*, the cost would have had to have been considerable, indeed, to impose an undue hardship on the employer—one of the largest airlines in the United States.

in *Hardison*. 432 U.S. at 92 n.6 (Marshall, J., dissenting). Another employee could have done Hardison's work, but the Court rejected this option out of hand based on "efficiency loss"—without evidence showing that efficiency would be lost. *Id.*

Accommodation for Hardison simply required that his employer pay overtime wages for three months—$150—until he could transfer. *Id.* Justice Marshall aptly noted that $150 for a major airline *is* a *de minimis* cost. *Id.* And Hardison offered to reimburse the airline—eliminating any cost. Yet the majority held that these options imposed an undue hardship.

As a result, many courts predictably apply *Hardison* as a per se rule: "virtually all cost alternatives"—no matter how large or small—are "unduly harsh." 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, 547 (1989); *see also* Kaminer, *supra*, at 139–40 ("[C]ourts have almost unanimously held that employers" need not bear "any economic costs or [efficiency] costs . . . to accommodate a religious employee."). It is immaterial whether the costs are direct—like paying a temporary replacement or additional wage—or indirect—like lost efficiency or increased administrative work. Zablotsky, *supra*, at 544–45. Accommodation is considered an undue hardship "if it requires an employer to bear any additional cost whatsoever." *Id.* at 544.

At its core, *Hardison* eviscerates religious accommodation. If taken seriously, *Hardison* means that an employer need not tolerate *any* cost or inconvenience to accommodate an employee's religion. Little if any duty to accommodate remains.

2. *Title VII does not include a coworker or union discrimination defense.*

Hardison's second rule eliminates what little is left of the duty to accommodate. To avoid special treatment, the majority also rejected accommodations that impact coworkers or affect a collective bargaining agreement. 432 U.S. at 81. *Hardison* stressed that religious accommodation discriminates against coworkers and benefits religious employees at others' expense. *Id.* On that basis, many courts have inferred an atextual rule from *Hardison*: "an accommodation that causes more than a *de minimis* impact on co-workers creates an undue hardship." Pet. App. 26a. Based on that rule, the courts below sanctioned USPS's refusal to accommodate Groff's religious beliefs. *Id.* at 24a.

The rule derived from *Hardison* contradicts Title VII's text. As Judge Hardiman ably explained, Title VII requires an undue hardship on the employer's *business*. *Id.* at 28a (citing 42 U.S.C. § 2000e(j)). And "a burden on coworkers isn't the same thing as a burden on the employer's business." *Id.* The *Hardison* rule, moreover, means that "*any* burden on employees [is] sufficient to establish undue hardship." *Id.* In essence, it subjects religious accommodation "to a heckler's veto by disgruntled employees." *Id.*

Congress provided only one exception to the otherwise absolute duty to accommodate: undue hardship *on the employer's business*. Outside that exception, unions and employers must accommodate. Congress did not include a union or coworker exception. So there is no basis to infer or create one.

As this Court recently noted, courts may not "add words to the law to produce what is thought to be a

desirable result. That is Congress's province." *Abercrombie*, 575 U.S. at 774. Thus, this Court should "construe Title VII's silence" about unions and coworkers "as exactly that: silence." *Id.* The text therefore excludes a union or coworker exception. It requires unions and employers to show that accommodation would impose an undue hardship *on the employer's business*. 42 U.S.C. § 2000e(j). Like Judge Hardiman noted, coworker and bargaining agreement impact are not the same as a burden on the employer's business.

Congress enacted Title VII to protect unpopular minorities. Yet *Hardison* counts coworkers'—and unions'—unwillingness to accept and accommodate religious employees as a defense rather than a defect. Consider any other protected class: Title VII prohibits discrimination based on race, for example, even if the collective prefers it. *Hardison*'s coworker rule simply discriminates against religion. Accommodation under Title VII is particularly needed when unions and coworkers *disfavor* it. A legal duty is unneeded when accommodation is favored.

Hardison's rule likewise conflicts with civil rights statutes generally. Take the ADA. It is immaterial under the statute whether unions and coworkers disfavor accommodating a disabled employee. In fact, employers may not claim undue hardship based on "employees' fears or prejudices toward [an] individual's disability." 29 C.F.R. pt. 1630, App. § 1630.15(d) (2016). Nor may employers base undue hardship on accommodations that might have "a negative impact on the morale of its other employees." *Id.* Employers must show that the accommodation would unduly disrupt coworkers "ability . . . to perform their jobs." *Id.*

Or take the Family Medical Leave Act ("FMLA"). The FMLA applies to the USPS, and the USPS states that employees may use "up to 12 workweeks of leave within a Postal Service leave year" under the Act. USPS, *515 Absence for Family Care or Illness of Employee*, https://about.usps.com/manuals/elm/html/elmc5_005.htm (last visited Feb. 23, 2023). This leave requires coworkers to do more work or employers to wait (at least) 12 weeks until the employee returns to work. Leave does not depend on its impact on coworkers. And employers may not refuse FMLA leave by signing a contract with a union.

Coworker preferences are just as immaterial when they are expressed by a collective representative. It is irrelevant whether a union and employer agree to comply with the ADA and FMLA. Employers may not waive these statutory rights by creating uniform rules under a collective bargaining agreement that preclude ADA accommodation or FMLA leave. A bargaining agreement is not a defense.

Groff only needed religious accommodation or leave for a few days each year—six according to Judge Hardiman. Pet. App. 31a. USPS could have simply scheduled another employee. *Id.* USPS even conceded that scheduling an extra employee to take Groff's place would not harm USPS. *Id.* Yet the courts below rejected accommodation because it supposedly impacted coworkers and *may* require USPS to alter its collective bargaining agreement. By contrast, if Groff had requested FMLA leave, no court would have allowed USPS to refuse based on coworkers' preferences or a collective bargaining agreement.

In short, religious employees' civil rights do not depend on the collective. There is no Title VII exception for unions and coworkers.

CONCLUSION

"All Americans will be a little poorer until [*Hardison*] is erased"—particularly those who must sacrifice their job to follow their faith. *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting). This Court should overturn *Hardison* in full and restore our nation's commitment to religious liberty.

Respectfully submitted,

BRUCE N. CAMERON
Counsel of Record
BLAINE L. HUTCHISON
RAYMOND J. LAJEUNESSE, JR.
JAMES C. DEVEREAUX
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510
bnc@nrtw.org
Counsel for Amicus

February 28, 2023