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 OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

HAROLD C. BECKER
Counsel of Record
MATTHEW GINSBURG
ANDREW LYUBARSKY
815 Black Lives Matter Plaza, N.W.
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org

Counsel for American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

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Mosaic - (301) 927-3800 - Cheverly, MD

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STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 60 national and international labor organizations with a total membership of over 12.5 million working men and women.[1] Virtually every collective bargaining agreement entered into by unions affiliated with the AFL-CIO and their locals bars discrimination in employment, including on the basis of religion, and provides for an economical and expeditious means of rooting out such invidious discrimination. At the same time, the AFL-CIO's affiliated unions also often bargain for contractual provisions fairly allocating desirable and undesirable work shifts and other employment benefits and duties.

In addition to negotiating facially neutral rules for the allocation of work, unions affiliated with the AFL-CIO routinely bargain for specific accommodations of employees' religious practices. When such provisions are present in collective bargaining agreements, the AFL-CIO's affiliates regularly enforce them through grievance/arbitration systems to ensure that their members' religious rights are respected at work.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Goodyear Tire & Rubber Co.*, 107 BNA LA 193 (Sergent, Arb. 1996) (union brought grievance to enforce company practice of exempting employees from Sunday work based on religious belief); *Ball-Foster Glass Container, Co.*, 1996 WL 34673262 (Stephens, Arb. 1996) (enforcing CBA provision stating that "[a]ny employee who is opposed to working on Sunday or Saturday because of his religious beliefs shall not be compelled to work"); *Dep't of Corr. Servs.*, 92 BNA LA 1059 (N.Y. PERB 1989) (arbitral award directing employer to allow Sabbath observer to take unpaid leave under CBA).

For these reasons, the AFL-CIO has a strong interest in the proper resolution of this case.

SUMMARY OF THE ARGUMENT

Petitioner, a Rural Carrier Associate ("RCA") formerly employed by the United States Postal Service ("USPS"), challenges the Third Circuit's ruling that USPS could not accommodate his religious beliefs prohibiting work on Sundays without suffering undue hardship to the conduct of its business. His petition raises two questions: (1) whether this Court properly interpreted Title VII's "undue hardship" standard in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977); and (2) whether an employer may meet Title VII's "undue hardship" standard "merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself."

Because the parties and other amici have fully briefed the first question presented—whether this Court properly interpreted Title VII's "undue hardship" standard in *Hardison*— we address only the second question concerning the proper treatment of burdens on co-workers in the accommodation analysis.

Petitioner argues that demonstrating undue hardship under Title VII "requires a showing of undue hardship to the business, not merely a showing of burden to co-workers," and that considerations of other employees' rights and interests are relevant only insofar as they "rise to the level of harming the enterprise as a whole." Pet. Br. 39, 42. This position is inconsistent with the text and purpose of Title VII. The fact that a proposed accommodation would interfere with an agreed-upon method of ensuring seven-day-per week coverage and fairly allocating undesirable shifts among employees is relevant to whether the accommodation would burden the "conduct"

of the employer's business, regardless of whether an employer can prove it would cause any determinate level of economic harm. That is particularly true when the arrangement is embodied in a collective bargaining agreement ("CBA"), as it is here, because Title VII must be read to accommodate the strong federal labor policy in favor of enforcement of CBAs. That is precisely why this Court, in an unchallenged portion of its decision in *Hardison*, held that the duty to accommodate religious practice does not require an employer to violate a CBA. 432 U.S. at 79. Finally, accepting Petitioner's arguments would create a tension with this Court's holding in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), that interference with "employee expectations of fair, uniform treatment" is relevant to whether a proposed accommodation is reasonable under an analogous provision in the Americans with Disabilities Act ("ADA"). *Id.* at 404. For these reasons, the proposed accommodation here would impose an undue hardship on the conduct of the employer's business under any proposed reformulation of the undue hardship standard. We demonstrate why this is so in three steps below.

First, the statutory language of Title VII's Section 701(j) does not require an employer to demonstrate that an accommodation would have an undue impact on the *employer* or on the *employer's business*. Rather, it requires a demonstration of "an undue hardship on *the conduct of the employer's business*." 42 U.S.C. § 2000e(j) (emphasis added). The word "conduct" means "the process or way of managing or directing." *Webster's New World Dictionary* (1972). USPS's "way of managing" its employees in light of the need for Sunday coverage was by rotating all non-volunteer RCAs into the Sunday shift. Removing Petitioner from that rotation would, without question, have placed a burden on that "way of managing" employees

and thus on "the conduct of the employer's business." Petitioner's argument to the contrary would render the words "conduct of" mere surplusage.

Second, a proper accommodation of the commands of Title VII and the strong national labor policy in favor of enforcement of CBAs embodied in the National Labor Relations Act ("NLRA") and Labor Management Relations Act ("LMRA")[3] requires that courts give considerable weight to the fact that a proposed accommodation would violate a CBA, as the District Court found would be the case here. Indeed, in a portion of its holding that is not challenged here, this Court held in *Hardison*, "we do not believe that the duty to accommodate requires [an employer] to take steps inconsistent with [an] otherwise valid [collective bargaining agreement]." 432 U.S. at 79.

Third, Petitioner's argument on the second question is in tension with this Court's jurisprudence under the ADA. In *Barnett*, this Court held that an accommodation's interference with "employee expectations of fair, uniform treatment" and with the application of "objective standards" in allocating job benefits is relevant to the largely parallel accommodation analysis under the ADA. 535 U.S. at 404. This Court expressly held that "a demand for an effective accommodation could prove unreasonable," and therefore not required by the ADA, "because of its impact, not on business operations, but *on fellow employees*—say, because it will lead to dismissals, relocations, or modifications of employee benefits to which an employer, looking at the

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[3] Employer-employee relations at USPS are governed by the NLRA under the Postal Reorganization Act of 1970, 39 U.S.C. § 1209. *See U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 9 F.3d 138, 139 n.1 (D.C. Cir. 1993); *U.S. Postal Serv.*, 208 NLRB 948, 948 (1974).

matter from the perspective of the business itself, may be relatively indifferent." *Id.* at 400-01 (emphasis added). While *Barnett* held that such considerations are relevant to whether an accommodation is "reasonable," it would be anomalous if this Court were to square the construction of the term "undue hardship" as used in the two statutes, as Petitioner requests, while barring the same consideration of employee expectations and rights under Title VII that this Court has already permitted under the ADA.

For these reasons, the Court should affirm the decision below.

In the alternative, the Court should not address the second question presented because these three central points were not addressed by either the majority or the dissent in the Court of Appeals and should remand the case for further proceedings. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (declining to consider claims that were litigated before district court but went unaddressed by the Court of Appeals because "we are a court of review, not of first view").

ARGUMENT

I. Mandating Violation of a Collective Bargaining Agreement Ensuring Coverage of All Shifts and Fairly Allocating Undesirable Shifts Would Impose an Undue Hardship on the Conduct of the Employer's Business

A. The Plain Text of Title VII Makes Clear That Interference With Arrangements for Managing Employees Burdens the "Conduct" of an Employer's Business and is Relevant to the Undue Hardship Analysis

Contrary to Petitioner's arguments, the statutory phrase "undue hardship on the conduct of the employ-

er's business" allows for—indeed, mandates—consideration of the effects of a proposed religious accommodation on arrangements for managing employees.

We begin with the plain text of the statute. Section 701(j) provides the employer a defense to a charge of religious discrimination if an employer "demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on *the conduct of* the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). The word "conduct" means "the process or way of managing or directing." *Webster's New World Dictionary* (1972).

By definition, employers, particularly those in labor-intensive industries like mail delivery, conduct their businesses primarily through "managing or directing" employees. Neutral work rules, such as a rotation of employees into an undesirable shift, are one means of "managing and directing" an employer's employees, and, therefore, its business. While the statutory text by no means precludes consideration of economic harms to the employer—an employer who suffers financial hardship as a result of a proposed accommodation would surely be impeded in the management and direction of its business activities—it does not principally focus on such harms.

USPS conducts its business through its employees. It does so by scheduling its employees so that it can timely deliver the mail seven days per week. Specifically, in this case, USPS conducted its business by rotating non-volunteer RCAs into Sunday shifts that appear to have been especially undesirable for its employees, presumably because many employees would

have preferred to engage in religious observance[4] or otherwise spend time with their families on Sunday mornings rather than work. Pet. App. 5a-6a. USPS's "process or way of managing or directing" its employees in light of the need for Sunday coverage was by rotating all non-volunteer RCAs into the Sunday shift. According to the plain text of the statute, removing Petitioner from that rotation without question would place a burden on that "way of managing" employees and thus on "the conduct of the employer's business."[5]

Petitioner's argument that imposing a burden on coworkers cannot alone constitute an undue hardship focuses solely on the word "business," affording no independent meaning to the words "conduct of the." In essence, Petitioner asks this Court to read key words out of the text. While Petitioner posits that the decision (and the decision of every other court of appeals to consider the question)[6] "strays far from the text" and is "atextual," Pet. Br. 38-39, in fact, it is Petitioner's position that does violence to the plain language of the statute. Quoting Judge Hardiman's dissenting opinion, Petitioner argues that "a burden on coworkers isn't the same thing as a burden on the employer's business." *Id.* at 39 (quoting Pet. App. 28a). But Title VII does not require a showing that the accommodation would cause an undue hardship "on the employ-

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[4] The record specifically reflects the fact that several individuals who initially agreed to substitute for the Petitioner also wished to attend church on Sunday. J.A. 13, 59.

[5] Such a burden may or may not rise to the level of "undue hardship," depending on the facts of each case. But the text allows for no doubt that interference with an arrangement for the distribution of work is a hardship that must be considered in this analysis.

[6] *See* Pet. App. 22a-23a (collecting cases from across the courts of appeals).

er's business." It requires a showing that the accommodation would cause an undue hardship "on *the conduct* of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). Petitioner is thus wrong in arguing that further proof "that the business as a whole suffers" is necessary. Pet. Br. 39.[7]

Petitioner's argument would render the words "the conduct of" mere surplusage contrary to this Court's repeated command. Courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). A statute should be construed so that effect is given to all its provisions, "so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). "If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174

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[7] Such a burden of proof on employers would be nearly impossible to carry without affording the accommodation, suffering the injury to the business, and then revoking the accommodation. It would also be inconsistent with the deference this Court accords employers' judgment about the impact of personnel decisions in other contexts, including those involving the assertion of constitutional rights. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 673 (1994) ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern"); *Connick v. Myers*, 461 U.S 138, 152 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

(2012). "[C]ourts avoid a reading that renders some words altogether redundant," and read statutes to give "some independent operation" to all their words. *Id*. at 176. Petitioner would have this Court disregard this canon of construction.

In addition to misreading Title VII, Petitioner also mischaracterizes the Court of Appeals' decision by claiming that it held that it was sufficient to show "only that an accommodation burdens or inconveniences the plaintiff's co-workers." Pet. Br. 38. The lower court held no such thing. The burden here is not simply on co-workers, but on the manner in which their employer has agreed with their union representative to manage their work schedules. In *Hardison*, this Court clearly explained why such agreements about work schedules are central to the conduct of many employers' businesses. "Any employer who, like TWA [and USPS], conducts an around-the-clock operation is presented with the choice of allocating work schedules." 432 U.S. at 80. Of course, "[w]henever there are not enough employees who choose to work a particular shift, . . . some employees must be assigned to that shift even though it is not their first choice." *Id*. "It was essential to TWA's [and USPS's] business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off." *Id*. "In considering criteria to govern this allocation," *i.e.*, in considering how to conduct its business on those days, TWA and USPS had various alternatives, including "adopt[ing] a neutral system, such as seniority, a lottery, or rotating shifts." *Id.* USPS agreed to and implemented the rotation system as "a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off"—in other words, as a fair means

of conducting its business on Sundays. *Id*. at 78. The burden of disrupting that system is a burden on the conduct of the employer's business, not "merely" a burden on coworkers.[8]

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[8] Similarly misguided is the notion that considering co-workers' interests is tantamount to "subjecting Title VII religious accommodation to a heckler's veto by disgruntled employees." Pet. App. 28a (Hardiman, *J.*, dissenting); *see also* Pet. Br. 14, 43. The "heckler's veto" is a form of "odious viewpoint discrimination" barred under the First Amendment, that would seek to allow[] "the state to punish speech based on crowd hostility." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248-49 (6th Cir. 2015); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) ((condemning, under the Establishment Clause, the notion of a "modified heckler's veto, in which . . . religious activity can be proscribed based on perceptions or discomfort") (internal quotation marks and citation omitted)); Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 Comm. L. & Pol'y 175, 188 n.68 (2016) (describing origins of the term to describe reactions of racist groups that threatened to suppress the speech of civil rights activists in the South).

Here, coworkers did not object to Petitioner's proposed accommodation because they felt any "hostility" or "discomfort" toward him or his religious practices—they did so because it would deprive them of contractual rights under the CBA and compel them to work more undesirable Sunday shifts. The suggestion that Petitioner's coworkers are somehow exercising a "heckler's veto" is not only counterfactual, it is insulting. The collective bargaining agreement at issue was negotiated without regard to Petitioner or Petitioner's desire to observe the Sabbath. It was intended to fairly honor all workers', including Petitioner's, desire not to work on weekends, doubtless so that all employees who preferred to engage in religious observance on Sunday mornings rather than at work would have a fair opportunity to do so.

By bringing a grievance under the CBA, Petitioner's co-workers and his Union were not akin to "hecklers" displaying their displeasure with Petitioner's religious practice. Instead, they were vindicating national labor policy in favor of the enforcement of CBAs and engaging in protected, concerted activity under Sec-

Even if this Court were to accept Petitioner's misreading of the statutory language, it should presume that violation of a collectively bargained provision burdens the employer. Collective bargaining involves a "give and take" and embodied in any agreement are benefits for both employer and employees. *NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974). Here, employees were given a guarantee that they would have some Sundays off according to a fair and transparent formula and the employer was guaranteed coverage on Sundays. Requiring the employer to breach the agreement would not only burden employees, it would burden the employer because the employer would not be entitled to require other employees to cover for the Petitioner and the employer would thus be deprived of the benefit of its bargain.

Moreover, empirical evidence shows that differences in employee morale reliably translate to a measurable impact on the performance and the successful conduct of employers' businesses. Academic research has found positive, statistically-significant correlations between employee satisfaction with the terms and conditions of their employment and firm performance.[9] And, as relevant here, perceived disparities

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tion 7 of the NLRA. *See* 29 U.S.C. § 157. To compare the fair allocation of an undesirable shift with the racist violence that threatened to suppress the speech of civil rights activists in the South, to which the term "heckler's veto" was originally applied, is both grossly inaccurate and repugnant.

[9] *See, e.g.,* Alex Bryson et al., "Does Employees' Subjective Well-Being Affect Workplace Performance?," 70 Human Relations 1017-37 (2017), *available at* https://journals.sagepub.com/doi/abs/10.1177/0018726717693073 ("clear, positive, and statistically significant relationship" between the average level of job satisfaction at the workplace and workplace performance using nationally representative employer-employees matched dataset

in scheduling—such as those that would result from failure to follow a neutral, collectively-bargained system for shift allocation—have been identified as key factors leading to the loss of employee morale.[10]

Finally, giving effect to every word in the phrase "undue hardship on the conduct of the employer's business" is also consistent with Title VII's purpose. It is beyond peradventure that, under Title VII, "the burden of accommodation is supposed to fall on the employer, not on other workers." *EEOC v. Walmart Stores, E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021). Yet an interpretation of the phrase "the conduct of the employer's business" that would categorically deny consideration of co-workers' interests would create perverse incentives for employers to pass the costs of required

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in the United Kingdom); Petri Böckerman & Pekka Ilmakunnas, "The Job Satisfaction-Productivity Nexus: A Study Using Matched Survey and Register Data," 65 Industrial and Labor Relations Review 244–262 (2012), *available at* https://journals.sagepub.com/doi/10.1177/001979391206500203 (increase in the measure of job satisfaction within one manufacturing plant by one standard deviation increased value-added per hours worked by 6.6%); Daniel J. Koys, "The Effects of Employee Satisfaction, Organizational Citizenship Behavior, and Turnover on Organizational Effectiveness: A Unit-level, Longitudinal Study," 54 Personnel Psychology 101–114 (2001), *available at* https://onlinelibrary.wiley.com/doi/10.1111/j.1744-6570.2001.tb00087.x (positive correlation between employee satisfaction and store profit and customer satisfaction across restaurant chain in United States).

[10] *See, e.g.,* Adam Storer, "Workplace Stratification of Scheduling Practices as a Source of Social Comparison," Academy of Management Proceedings (2022), *available at* https://journals.aom.org/doi/pdf/10.5465/AMBPP.2022.54 (study of 1,049 employees across 10 firms finding "evidence of steep declines in schedule satisfaction, overall job satisfaction, and increases in turnover intentions when frontline workers feel they have worse schedules than their coworkers").

accommodations to their employees, rather than bearing them themselves as the statute intended.

Religious accommodations involving the observance of the Sabbath or other holy days, by their very definition, require employers to cover gaps in scheduling. Assuming the employer is unwilling to reduce the scope or volume of its operations and unable to accommodate the employee's religious practice by means of a voluntary shift-swapping arrangement agreeable to all parties, it can fill this gap in one of three ways: (1) it can compel other employees to work harder by failing to cover for the absent employee, and "short-staffing" its operation; (2) it can compel other employees to work longer or to more frequently work less desirable shifts; or (3) it can hire additional workers. The first solution will tend to lead to a greater intensity of work and, depending on the workplace, could subject co-workers to an elevated risk of occupational injury, but would impose limited *financial* cost on the employer. The second solution would require co-workers to routinely sacrifice their preferred leisure and family time but, again, impose limited *financial* cost on the employer. The third solution protects co-worker interests, but may impose a financial cost on the employer.

If coworker interests are wholly discounted in an analysis of undue hardship and burdens on their work lives are essentially priced as "free," employers, as rational economic actors, will be incentivized to select an accommodation that burdens only their employees. There is no indication that Title VII's drafters intended that employers be able to skirt their accommodation obligations in this manner, or intended the burdens of accommodations to fall primarily on co-workers or other third parties. *Cf. W.R. Grace and Co. v. Rubber Workers*, 461 U.S. 757, 770 (1983) (rejecting efforts

of employer through conciliation agreement with EEOC "to shift the loss to its male employees, who shared no responsibility for the sex discrimination").

The plain text of the statute requires that this Court hold that disruption of an agreed arrangement for distribution of undesirable shifts be considered in assessing whether a proposed accommodation would impose an undue hardship on the conduct of the employer's business.

B. Federal Labor Policy and the Unchallenged Portion of the Holding in *Hardison* Require that Violation of a Collective Bargaining Agreement Fairly Allocating Job Shifts Be Considered an Undue Hardship on the Conduct of the Employer's Business

As the District Court found, Petitioner's proposed accommodation would have required USPS to violate its collectively-bargained Memorandum of Understanding ("MOU") with Petitioner's union, the National Rural Letter Carriers' Association. *See* Pet. App. 56a ("allowing [Petitioner] to be skipped in the schedule every Sunday would be a clear violation of the MOU.") It would also have required USPS to deprive other employees of their legally enforceable rights under the MOU, potentially subjecting USPS to litigation and conflicting arbitral and/or judicial decisions had it assented. A holding that Title VII requires violation of a CBA would be inconsistent with the strong federal labor policy in favor of enforcement of CBAs and would ignore this Court's command to accommodate the policies embedded in all federal statutes that apply to a case. That was the basis of this Court's unchallenged holding in *Hardison* that Title VII does not require violation of a CBA fairly allocating job duties.

1. *Federal Labor Policy Requires that a Breach of a CBA Fairly Allocating Job Shifts Be Considered an Undue Hardship on the Conduct of the Employer's Business*

Section 1 of the National Labor Relations Act ("NLRA") declares that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption," and declares it to be the policy of the United States to "eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151. To effectuate this national policy in favor of collective bargaining, Congress in 1947 made CBAs enforceable in federal court via Section 301 of the Labor-Management Relations Act ("LMRA"), which provided jurisdiction "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce" to "any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).[11]

This Court explained in *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 453 (1957), that the legislative history of Section 301 "indicate[d] a primary concern that unions as well as employees should be bound to collective bargaining contracts." As ex-

[11] Section 1208(b) of the Postal Reorganization Act provides for federal jurisdiction over "suits for violations of contracts between [USPS] and a labor organization representing Postal Service employees," in terms that are identical to Section 301 of the LMRA. *See* 39 U.S.C. § 1208(b); *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 232 n.2 (1983) (White, J., concurring) (noting that this section "is identical to § 301 in all relevant respects"); *Nat'l Ass'n of Letter Carriers v. U.S. Postal Serv.*, 590 F.2d 1171, 1174 (D.C. Cir. 1978) ("[T]his statute is the analogue of section 301(a) of the [LMRA].").

plained in the Senate Report accompanying the legislation, providing that an "aggrieved party should have a right of action in the Federal courts," was a "policy [] completely in accord with the purpose of the Wagner Act [NLRA] which the Supreme Court declared was 'to compel employers to bargain collectively with their employees, to the end that an employment contract, binding on both parties, should be made.'" *Id.* at 452 (citing S. Rep. No. 105, 80th Cong., 1st Sess., pp. 15). In sum, Section 301 "expresses a federal policy that federal courts should enforce [CBAs] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Id.* at 455; *see also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962) (collective bargaining "would be purposeless unless both parties to a [CBA] could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements").

This Court has already recognized that Title VII "was enacted against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980). Even more directly on point, in *W.R. Grace Co.*, this Court held that the EEOC and an employer could not alter a CBA through a conciliation agreement without the union's consent. "Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored." 461 U.S. at 771. Moreover, in a piece of legislative history that this Court has recognized as "authoritative" in this respect, *Int'l Bhd. of*

Teamsters v. United States, 431 U.S. 324, 352 (1977), the Justice Department opined in a memorandum that "Title VII would have no effects on the duties of any employer or labor organization under the NLRA . . . and these duties would continue to be enforced as they are now. . . . No court order issued under Title VII could . . . . deny to any union the benefits to which it is entitled under [the NLRA]." *See* 110 Cong. Rec. 7207 (April 8, 1964).[12] Accordingly, irrespective of any duties that employers may have under Title VII, they remain subject to the national labor policy favoring the enforcement of CBAs and the remedial authority of the federal courts should a CBA be violated.

Nothing in the text or history of Section 701(j) suggests a contrary result. The text of Section 701(j) is silent concerning the interaction between its reasonable accommodation requirement and any conflicting rights found in CBAs. And, as this Court has recounted, the legislative history surrounding the 1972 amendment to Title VII that gave rise to Section 701(j) "is of little help in defining the employer's accommodation obligation," *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986), because it "consists chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record, and consisting principally of the views of the proponent of the measure, Senator Jennings Randolph." *Hardison*, 432 U.S. at 75 n.9 (citing 118 Cong. Rec. 705-07 (Jan. 21, 1972)). While Senator Randolph explained that the intent of his amendment was to end religious discrimi-

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[12] This memorandum was introduced into the Congressional Record during the Senate's discussion of Title VII in 1964 by Senator Joseph S. Clark. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982) (recounting legislative history and reaffirming *Teamsters* Court's reliance on this document as "authoritative").

nation in employment, he made "no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied," nor did he reference CBAs, the NLRA, or the backdrop of national labor policy in any way. *Id.* Accordingly, nothing in the text or history of Section 701(j)'s 1972 amendment supersedes the recognized intent of the 1964 Congress that Title VII was to leave employers' duties under the NLRA and their CBAs intact.

Petitioner would have this Court wholly ignore the CBA and federal labor policy. But this Court has made clear that enforcement agencies may not "effectuate the policies of [one statute] so single-mindedly that [they] wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather, respect for "the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Id.* Here, that requires a holding that violation of a CBA fairly allocating work among employees would be an undue hardship on the conduct of the employer's business.

2. *Hardison's Unchallenged Holding is Dispositive*

This outcome is further mandated by precedent. As several members of this Court have explained, *Hardison*'s interpretation of the "undue hardship" standard was "announced . . . in a single sentence with little explanation or supporting analysis." *Small v. Memphis Light, Gas, & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari); *see also Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., concurring in denial of certiorari). It is this portion of the analysis in *Hardison*—and this portion of the analysis alone—that Petitioner challenges here.

The bulk of the *Hardison* opinion, however, concerned an entirely separate question. That question was whether "the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees." *Hardison*, 432 U.S. at 79. And, after reaffirming that "[c]ollective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy," the Court answered both questions in the negative, stating that "we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Id.*

Although the *Hardison* decision contains an extensive discussion of the importance of seniority because TWA's collectively-bargained seniority provisions were at issue, the Court's holding is not limited to seniority provisions. Instead, the Court spoke more broadly, stating that Title VII must not be construed to require an employer to "deprive [any employee] of his contractual rights under the collective bargaining agreement." *Id.* at 80.[13] And that reading of *Hardison's* holding has been adopted by every court of appeals that has considered non-seniority provisions of CBAs. *See Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1156 (10th Cir. 2000) (applying *Hardison* to uphold employer's rejection of religious accommodation request that would violate non-seniority-based shift rotation provisions of a CBA); *Lee v. ABF*

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[13] Justice Marshall, who dissented from the *Hardison* majority's holding on the undue hardship standard, also noted the importance of employees' rights arising under the collective bargaining agreement in proposing several possible accommodations that passed muster precisely because they would "not have deprived any other employee of rights under the contract." 432 U.S. at 96 (Marshall, J., dissenting).

Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (applying *Hardison* to uphold employer's rejection of religious accommodation request that would violate non-seniority-based "first-in, first-out" system for assignment of driving routes provided for in CBA); *Getz v. Com. of Pennsylvania, Dep't of Pub. Welfare*, 802 F.2d 72, 74 (3d Cir. 1986) (upholding employer's rejection of religious accommodation request that would violate overtime provisions of a CBA); *cf. Beadle v. Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 593 (11th Cir. 1994) (holding that employer was not required to violate unilaterally promulgated neutral shift-rotation policy because *Hardison* did not "intend[] that its holding apply only to [seniority] systems," but was rather "concerned primarily with the neutrality of the system utilized"). The EEOC takes the same position in its Compliance Manual. *See* EEOC, *Compliance Manual*, § 12-IV(B)(3) (Jan. 15, 2021), *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination ("A proposed religious accommodation poses an undue hardship if it would deprive another employee a job preference or other benefit guaranteed by a bona fide seniority system *or collective bargaining agreement*.") (emphasis added). In fact, the Manual provides an example that is on all fours with this case.

> Susan, an employee of Quick Corp., asks not to work on her Sabbath. Quick Corp. and its employees' union have negotiated a CBA which provides that weekend shifts will rotate evenly among employees. . . . [I]f other employees were unwilling to swap shifts or were otherwise harmed by not requiring Susan to work on the shift in question . . ., then the employer can demonstrate undue hardship.

Id., Example 38.

This portion of *Hardison's* holding is unchallenged and is dispositive here.

C. Accepting Petitioner's Argument Would Be Inconsistent With This Court's Express Holding that Co-Workers' Interests Are Relevant Under the ADA

Under Section 701(j), an employer need not prove "undue hardship in the conduct of [his] business" if he is "unable to *reasonably* accommodate" an employee's religious practice. 42 U.S.C. § 2000e(j). The statute does not require a complete accommodation of all religious practice, nor could it consistent with the First Amendment. *See Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down state statute calling for categorical accommodation without consideration of any mitigating circumstances, including "when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers"). Instead, it requires that a court determine whether an employer has proven that he is unable to "reasonably" accommodate an employee's religious practice before turning to the question of undue hardship. If a proposed accommodation is not "reasonable," the question of undue hardship is never reached.

This Court has already addressed the "reasonableness" requirement in the largely analogous[14] context

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[14] USPS points out that the ADA contains a definition of undue hardship that was adopted to ensure that the term would be construed more broadly than *Hardison* had construed the parallel term in Title VII. Resp. Br. 36-37. But that difference between the two statutes does not lessen the tension that would be created if this Court were to hold that Title VII's undue hardship provision should be construed in line with the ADA, but, at the

of the ADA.[15] In *Barnett*, an injured employee sought reassignment to a less-physically-demanding position which he was not entitled to under his employer's seniority system, and was discharged after the employer declined to make an exception to that system. 535 U.S. at 394. On appeal to this Court, the plaintiff contended that the ADA's reference to "reasonable accommodation" necessarily meant "effective accommodation," authorizing a court to "consider the requested accommodation's ability to meet an individual's disability-related needs, and nothing more." *Id.* at 399. A violation of an employer's seniority system, the plaintiff continued, "ha[d] nothing to do with its 'reasonableness,'" and might, "at most, help to prove an 'undue hardship on the operation of the business.'" *Id.*

This Court rejected that interpretation, observing that "in ordinary English the word 'reasonable' does not mean 'effective.'" *Id.* at 400. While the word "accommodation" "conveys the need for effectiveness," insofar as "[a]n *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations," the Court observed that "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but *on fellow employees*—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the

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same time, not recognize that the frustration of coworkers' legitimate expectations should figure in the analysis under Title VII as *Barnett* requires under the ADA.

[15] The ADA proscribes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

perspective of the business itself, may be relatively indifferent." *Id.* at 400-01 (emphasis added).[16]

In distinguishing between the reasonableness and undue hardship analysis, this Court emphasized that the first inquiry requires a plaintiff to show that "an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Id.* at 401. Once the plaintiff makes that showing, the burden shifts to the employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

Addressing the particulars of the plaintiff's claim, this Court held that "it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system." *Id.* at 403. This was so not solely because such systems serve employer interests, but also because they provided "important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id.* at 404; *see also id.* (noting that such systems provide employees "an element of due process" and limit "unfairness in personnel decisions").

Barnett, therefore, stands for two important principles, which are as applicable in the Title VII religious-accommodation context as they are under the ADA. First, both statutes require consideration of a proposed accommodation's effects "not [only] on business operations, but on fellow employees," which include,

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[16] *Barnett's* holding on this point is consistent with this Court's construction of the accommodation requirements in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a). *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries").

inter alia, the "modification of employee benefits," such as having Sundays off. *Id.* at 400-01. Second, both statutes require consideration of coworkers' legitimate interests and expectations even if they are not embedded in a seniority system. *Barnett* makes that clear because, even though, unlike Title VII,[17] the ADA does not expressly protect bona-fide seniority systems from challenge, the Court held that employers ordinarily need not depart from a seniority system in order to accommodate an employee under the ADA, even when the seniority system in question is unilaterally imposed by an employer and not legally enforceable. That is because such systems, like the rotation system at issue here, "provide[] important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id*. at 404.

Barnett mandates rejection of Petitioner's argument that frustration of the legitimate rights and expectations of coworkers is not relevant to the assessment of a religious discrimination claim under Title VII.

II. In the Alternative, the Court Should Decline to Answer the Second Question Presented and Remand for Further Consideration by the Court of Appeals

While USPS preserved the above-stated grounds for affirmance, we acknowledge that neither the majority nor the dissent in the Court of Appeals addresses any of the three points we make above.

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[17] Title VII provides, in relevant part, that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h).

Neither the majority nor the dissent addressed the key words in the statutory text—"the conduct of" the employer's business.

Similarly, rather than addressing the legal importance of the breach of the collectively-bargained MOU or the implications of federal labor policy, the Court of Appeals limited itself to a factual determination that Petitioner's proposed accommodation imposed "more than a de minimis cost on USPS because it actually imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." Pet. App. 24a. While the Court of Appeals mentioned the Union grievance in passing, it considered its filing only as an indication of a "negative impact on morale," *id.* at 25a, rather than as an indication that Petitioner's proposed accommodation would have required USPS to violate the rights of Petitioner's co-workers under the MOU contrary to federal labor policy.

Before the Court of Appeals, the parties vigorously disputed whether *Hardison*'s unchallenged holding that Title VII does not require breach of a CBA extended to all CBA provisions or only those pertaining to seniority. *Compare* Appellant's Br. in *Groff v. DeJoy*, No. 21-1900, Dkt. No. 23 (3d Cir.), at 39-44 (arguing generally that "*Hardison* stands for the narrow rule that an employer need not offer an accommodation where doing so would violate the seniority provisions of a CBA") *with* Appellee's Br. in *Groff v. DeJoy*, No. 21-1900, Dkt. No. 27 (3d Cir.), at 56 ("[*Hardison*] did not intend to limit its holding exclusively to seniority provisions. Rather, the Court recognized the importance of [CBAs] generally, as well as the costs, both economic and non-economic, that would be imposed by selective breaches of these agreements."). But the Court of Appeals entirely failed to address the issue of

the MOU or resolve the parties' conflicting arguments about the scope of *Hardison's* holding. For this reason, Petitioner argues that the case must be remanded to the Court of Appeals "should USPS rely on the MOU's scheduling provisions to urge affirmance." Pet. Br. 47 n.9. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (observing that, while the Court has "discretion to affirm on any ground supported by the law . . . restraint is the best use of discretion").

Finally, while the Court of Appeals cited *Barnett* for the proposition that "the word 'accommodation' . . . conveys the need for effectiveness," Pet. App. 13a (citing *Barnett*, 535 U.S. at 400), it failed to advert to *Barnett*'s interpretation of the word "reasonable" to encompass adverse impact on coworkers as we describe above. Moreover, despite *Barnett*'s clear holding that an adverse impact on coworkers is relevant under the ADA, courts of appeals' decisions are split concerning the meaning of the adverb "reasonably" in the context of Title VII's religious accommodation requirement. On the one hand, the Fourth Circuit has followed *Barnett*, holding that Title VII's requirement that an employer "reasonably" accommodate an employee's religious practice "incorporates more than just whether the conflict between the employee's beliefs and the employer's work requirements have been eliminated," and includes "an accommodation's impact on both the employer and coworkers." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 314 (4th Cir. 2008). The Eighth and Tenth Circuits have also rejected the notion that assessing the reasonableness of an accommodation involves only consideration of its efficacy in resolving a conflict between job requirements and religious practice. *See Tabura v. Kellogg USA*, 880 F.3d 544, 551 (10th Cir. 2018) (rejecting *per se* rule that "to be reasonable, an accommodation must 'eliminate' the conflict

between the employee's religious practice and his work requirements"); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2007) (reasonableness of an accommodation under Title VII depends on "fact-intensive issues" including "the terms of an applicable CBA, and the contractual rights and workplace attitudes of co-workers"). On the other hand, in this case, the Court of Appeals held that the phrase "reasonably accommodate" refers solely to the elimination of the conflict between an employer's job requirement and an employee's religious practice, while the adverb "reasonably" merely "requires that an adjustment to an otherwise neutral policy need not go beyond what is necessary to eliminate the conflict." Pet. App. 18a.[18]

As this discussion demonstrates, there is division among the courts of appeals concerning whether the interests of coworkers can be considered under the reasonableness prong of the analysis under Title VII despite this Court's clear ADA holding in *Barnett*. But that question is not presented to the Court in this case. That is crucial because courts must address the question of whether an employer "is unable to reasonably

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[18] In reaching this conclusion, the court of appeals appears to have misread this Court's decision in *Ansonia*, citing it for the proposition that an accommodation is reasonable only if it "eliminates the conflict" presented by the employee. Pet. App. 13a (citing *Ansonia*, 479 U.S. at 70). As several courts have noted, however, while *Ansonia* did make the common-sense observation that such an accommodation would meet an employer's obligations under Title VII, it "did not hold the reciprocal, that an accommodation could never be reasonable if it failed totally and under every conceivable fact scenario to eliminate every conflict or all tension between reasonable work requirements and religious observation." *Tabura*, 880 F.3d at 551; *see also Sturgill*, 512 F.3d at 1031 ("*Ansonia* did not hold, indeed did not suggest, that an accommodation, to be reasonable as a matter of law, *must* eliminate any religious conflict.").

accommodate to" an employee's religious practice before addressing whether doing so would constitute "an undue hardship on the conduct of the employer's business." If courts must consider coworkers' interests as part of the reasonableness analysis, that would affect whether and how they consider such interests as part of the undue hardship analysis, as this Court made clear in *Barnett*.

Because the reasonableness question is not presented in this case and because the Court of Appeals did not address any of the three central points made above, we suggest, in the alternative, that the Court not address the second question presented, but rather remand it to the Court of Appeals for further consideration.

CONCLUSION

For the above-stated reasons, this Court should hold that the violation of a CBA provision ensuring seven-day-per-week coverage and fairly allocating undesirable shifts among employees would impose an undue hardship on the conduct of the employer's business and affirm the judgment in favor of USPS on that ground. In the alternative, the Court should decline to address the second question presented and remand to the Court of Appeals to fully address the question in the first instance.

Respectfully submitted,

/s/ Harold C. Becker
HAROLD C. BECKER
Counsel of Record
MATTHEW GINSBURG
ANDREW LYUBARSKY
815 Black Lives Matter Plaza, N.W.
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org