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 AIRLINES FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Airlines for America ("A4A") is the Nation's oldest and largest airline trade association, representing passenger and cargo airlines throughout the United States. Together, as of July 2022, A4A's members and their wholly owned subsidiaries directly employ more than 90% of the airline industry's 768,000 workers. In the first half of 2022, A4A's passenger carriers and their regional airline affiliates carried 291 million passengers—over 70% of the industry total—and A4A's all-cargo members together carried 70% of U.S. airlines' cargo traffic. Commercial aviation, moreover, drives 5% of U.S. gross domestic product and helps support more than 10 million U.S. jobs.

As part of its core mission, A4A works to foster a business and regulatory environment that ensures a safe, secure, and healthy U.S. air transportation industry—including stable, uniform, and predictable legal rules to govern it. Thus, throughout its seventy-five-plus year history, A4A has been actively involved in the development of the federal law applicable to commercial air transportation, including the application to the airline industry of generally applicable federal laws such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

A4A writes separately to emphasize the immense practical implications for air transportation of the Court's decision in this case. *Trans World Airlines,*

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus curiae* and its counsel made any monetary contribution toward the preparation and submission of this brief.

Inc. v. Hardison, 432 U.S. 63 (1977), rightly held that an employee's religious observances must yield to the rights of fellow employees pursuant to the workings of a bona fide seniority system. Any decision overruling—or even calling into question—that holding would compromise A4A's mission by undermining the basic structure of how all major airlines organize their workforces, allocate job assignments, and thereby achieve operational efficiency. For the reasons explained below, A4A members' operations—and, thus, interstate as well as international commerce—depend on maintaining the integrity of seniority systems in the face of contrary requests for special accommodations. It is thus vitally important to A4A's members (and to the public interest) that the Court not disturb the principle that Title VII does not require accommodations that would interfere with air carrier seniority systems or other collective bargaining agreement provisions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Title VII of the Civil Rights Act of 1964 provides that an employer must provide employees a religious accommodation so long as the accommodation does not impose an "undue hardship" on the employer. The focus of petitioner's challenge to *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), is the Court's holding that an accommodation constitutes an "undue hardship" if it imposes a "more than de minimis cost" on the employer.

But the *Hardison* Court's holding on the "principal issue" in the case, *id.* at 83 n.14—recognized but unchallenged by petitioner—was that Title VII never

requires an employer to grant a religious accommodation that interferes with a collectively bargained seniority system, as the accommodation Hardison sought would have done. And twenty-five years later, this Court extended that holding to non-collectively bargained seniority systems—the Court held in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), that the Americans with Disabilities Act's reasonable-accommodation provision generally does not require employers to grant accommodations that interfere with seniority systems, collectively bargained or not.

This Court should affirm *Hardison* in full as a matter of stare decisis, because employers and employees—and, in particular, airlines, airline employees, and airline unions covered by the Railway Labor Act—have for nearly half a century relied on both rules from *Hardison* when administering collective bargaining agreements setting forth the terms and conditions of employment. But if the Court does reconsider the "no more than de minimis cost" test as the standard for "undue hardship," the Court should expressly reaffirm the longstanding rule that an accommodation that interferes with a bona fide seniority system is not required under the antidiscrimination laws. A contrary rule would severely undermine the operations of the Nation's air carriers, and thus the Nation's commerce.

It is no coincidence that the two main cases in which this Court has held that seniority systems need not yield to requested accommodations both involved airlines. The Railway Labor Act created a regime that encourages collective bargaining between air carriers and their employees to promote stable labor re-

lations—and, thus, the public's interest in uninterrupted air transport—and carriers and their employees' collective bargaining representatives, as in other industries, have for decades upon decades lived in accordance with negotiated seniority systems that govern many crucial aspects of the work of airline flight and ground crews.

Seniority systems are important for airlines for many of the reasons they are important in other industries—"the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment," and thus "encourag[ing] employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years." *Barnett*, 535 U.S. at 404 (quotation omitted). But seniority systems are also crucial for airlines—and the public interest—because they are integral to the ability of airlines to maintain 24/7 operations 365 days a year, including ensuring that flights take off and land on time as much as possible. Recognizing the central role seniority systems play in the orderly functioning of the airline industry, and in an effort to guard against the destabilizing effect of employee losses of their hard-earned seniority, Congress enacted the McCaskill-Bond Amendment to facilitate the fair and seamless integration of employee seniority lists when airlines merge. *See* 49 U.S.C. § 42112 note.

Ensuring that an air carrier's national and international network runs smoothly requires intricate coordination and choreography. A large airline operates thousands of flights a day, and maximizing the likelihood that they take off and land when they are

supposed to requires literally thousands of employees working all hours of the day and night in different capacities and in numerous different locations throughout the country. Rather than rely on management fiat, air carriers manage this intricate coordination through seniority systems that have been developed over decades to ensure a fair and efficient allocation of employee responsibilities.

Take pilot scheduling as an example. Scheduling when and where pilots will fly is an extremely complicated endeavor, and it is made all the more complicated because some flights are obviously more attractive than others—*e.g.*, most pilots would prefer not to fly a trans-continental redeye on Christmas Eve. The seniority systems that airlines and their pilots' unions have negotiated over the years ensure that the work-allocation process runs more or less smoothly, and that pilots are assigned to all the flights that need to be flown. And that process is replicated throughout all employee groups and responsibilities that are necessary for an airline to operate its flight schedule. Moreover, small changes in a seniority system—modifications that affect the seniority rights of even one employee—can ripple through an airline's workforce and disrupt an airline's operations. In brief, seniority systems are integral to the Nation's commerce because air carriers could not function as they currently do without them.

This Court should not upset the basic rule that has long been established, and that has allowed the seniority systems crucial to airline operations to function as intended—namely, employers need not make accommodations if those accommodations will interfere with the operation of a bona fide seniority system,

whether collectively bargained or not. However this Court decides the questions presented in the petition, it should expressly reaffirm that basic rule, and thereby preserve the background legal principles that allow the critical seniority systems to function with certainty and predictability.

ARGUMENT

I. SENIORITY SYSTEMS ARE ESSENTIAL TO THE SMOOTH FUNCTIONING OF THE AIRLINE INDUSTRY, AND THUS OF THE NATION'S COMMERCE

A. Today's major airlines serve destinations around the globe. Carriers must continually update routes and vary staffing levels according to market and economic conditions, as well as the specific directives of the Federal Aviation Administration (FAA) concerning the number of pilots and flight attendants who must work on a flight as well as when and where airplanes can take off and land. Airlines must fill a wide variety of roles around the clock—from pilots, to flight attendants, to ground crew such as mechanics, baggage handlers, and ticket counter and gate agents.

Staffing these jobs across an airline's entire nation-wide network in a manner that ensures on-time departures and arrivals, and a satisfactory traveler experience, requires a complex choreography. The airlines must fill every job needed for a flight to take off and land with a full load of passengers and their luggage, and all of this must be replicated every single day throughout the Nation without regard to the widely varying levels of desirability of the required job assignments and shifts.

The manner in which this feat is accomplished is typically governed by a collective bargaining agreement (CBA).[2] That is because the airline industry is governed by the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, in which Congress recognized the national imperative "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a(1), and, in order to achieve that objective, designed a nationwide system of collective bargaining "as a matter of national [economic] policy," *California v. Taylor*, 353 U.S. 553, 567 n.15 (1967) (quotation omitted). The result is that at most airlines—including A4A's member carriers—CBAs establish elaborate rules for staffing flight and ground crew jobs and, as the *Hardison* Court itself recognized, these CBAs uniformly provide that the allocation of job vacancies and schedules across the airline's workforce is accomplished through seniority-based systems. *See Hardison*, 432 U.S. at 79 ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts.").

Seniority systems are necessary because job assignments and shifts vary greatly in their desirability—a scant few employees would volunteer to work outside on the ramp loading and unloading bags in the dead of night during the winter in Boston or at high noon during the summer in Phoenix. Yet, many employees must, and airlines and their employees'

[2] Whereas the private-sector unionization rate in the United States is only roughly 6%, the average unionization rate for the five largest airlines is 72%.

unions have determined over decades that the most effective, sustainable, and fair way to ensure that the operation runs as smoothly as possible is to assign jobs and shifts by seniority.

Thus, for example, when job vacancies arise, employees may submit bids to fill those positions, which may be in a different city or a different job category, and the vacancies are generally awarded to the employees with the most seniority. Seniority also determines how shift schedules are awarded—who gets to work Monday through Friday, who has to work on weekends or holidays, who gets to work nine-to-five, and who has to work the graveyard. And when faced with a reduction in force, seniority generally dictates which employees retain their job, who is transferred or laid off, and who is re-employed after furlough.

Seniority systems are essential to the smooth functioning of the airline industry not only because they facilitate operational efficiency, but also because they provide a wide range of benefits to the workforce. They best ensure predictability, transparency, and fairness in filling job assignments, and they provide an objective system—in lieu of unfettered management discretion—for ascertaining employee preferences and allocating available employment opportunities in accordance with the preferences of as many employees as possible.

These benefits enhance job satisfaction and employee retention, as long-term employees build up valuable seniority-driven perquisites—pay increases, preferential shifts, promotion opportunities, more paid time off, etc.—that make leaving one employer for another less likely with tenure. *See generally Bar-*

nett, 535 U.S. at 404 (recognizing that seniority systems "provide[] important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment" and by affording workers "job security and an opportunity for steady and predictable advancement based on objective standards").

B. Even small changes in the workings of airline seniority systems can lead to large disruptions in airline operations, because even small changes inevitably have downstream effects. For example, in *Bertulli v. Independent Association of Continental Pilots*, the Fifth Circuit recognized that restoring seniority to "only" eleven pilots significantly affected 1,700 other pilots:

> Defendants argue that . . . since only eleven pilots had their seniority restored, only eleven class members could possibly have lost work assignments because of their lower seniority. . . . This argument fails on its own terms. Restoring a single pilot's seniority could cause many pilots to lose their preferred routes. If one pilot is forced to accept her second-choice route, she may in turn displace from that route another, less senior pilot who in turn must take his second-choice route, and so on. A loss of preferred routes could thus cascade all the way down the seniority list. Moreover, the injury to the class members is not merely loss of a specific work assignment or an identifiable sum of money; loss of seniority is itself a harm.

242 F.3d 290, 296 (5th Cir. 2001). Numerous other judicial decisions have acknowledged this cascading effect. *See, e.g., Rogers v. Air Line Pilots Ass'n, Int'l*, 988 F.2d 607 (5th Cir. 1993) (six-month adjustment in two pilots' seniority caused them to be placed on furlough several times, and to be placed in the lowest category in subsequent seniority-integration proceedings following a merger); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1529 (7th Cir. 1992) (Easterbook, J.) (pilot seniority changes led to "many lost routes, bases, aircraft, and positions in the cockpit [the pilots] preferred"); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 679 (9th Cir. 1980) ("[L]apses in seniority may cause losses of 20 to 40 positions on the seniority roster. . . . A flight attendant . . . will feel the effects of her lowered position on the seniority roster for the remainder of her employment.").

The United States Government also has recognized that a disruption in one part of an airline's system can have ripple effects throughout the airline's entire system. In an amicus brief it filed in the Ninth Circuit in *Bernstein v. Virgin America, Inc.*, the government pointed out that "commercial aircraft operate under tight schedules that require the careful coordination and availability of runways, gates, and crewmembers." Br. for the United States as Amicus Curiae, *Bernstein v. Virgin Am., Inc.*, No. 19-15382, 2019 WL 4307414, at *20-21 (9th Cir. Sept. 3, 2019). Thus, "the provision of regular, frequent, and safe air services requires significant coordination and scheduling of aircraft takeoff, landing, and taxi time." *Id.* at *21. And when that careful coordination breaks down—that is, when a flight is delayed or even cancelled—the result is not just a single delayed flight,

but delays throughout the air carrier's entire network: "delays in one airport—due to any cause—can easily snowball into delays at other airports throughout the country." *Id.*

The uniquely important role seniority systems play in the airline industry is illustrated by the McCaskill Bond Amendment, part of the Consolidated Appropriations Act of 2008. *See* 49 U.S.C. § 42112 note. Airline mergers necessarily require the integration of the employee seniority lists of the merging carriers. Since its enactment in 2008, McCaskill-Bond mandates that seniority lists of merged airlines be integrated in a "fair and equitable manner"—*e.g.*, employees of the acquired airline may not simply be stapled to the bottom of the acquiring airline's seniority list. *Id*. In enacting McCaskill-Bond, Congress recognized that ensuring the fairness of the seniority-integration process was vital to protecting the smooth functioning of air transportation against the destabilizing effect of wholesale changes to employee seniority.

C. Air transportation is an inherently interstate enterprise, and a major driver of interstate commerce. That is why Congress recognized long ago that the "public interest" requires an "efficient," "complete and convenient system" of "interstate air transportation." 49 U.S.C. § 40101(a). It follows, then, that disruption to airline operations leads to disruption in the Nation's commerce more generally.

Airline employees take their seniority rights seriously—*very, very seriously*. A perceived degradation of employee seniority rights, however slight or even arguably so, is no trifling matter—but rather often will spawn protracted litigation causing internecine

disputes to fester, which in and of itself is quite disruptive to an airline's operations.[3]

Moreover, unhappy airline employees can frequently result in unhappy airline customers. Dissatisfied employees with unresolved—and, in the case of repeated disregard of seniority rights to provide special scheduling accommodations for one or a few employees, unresolvable—grievances inevitably will work less hard: they will "withdraw their enthusiasm" or "work-to-rule" or, in the post-pandemic vernacular, they will "quietly quit." This is true in any

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[3] The cases are legion. For a smattering, *see In re AMR Corp.*, 834 F. App'x 660 (2d Cir. 2021), *affirming* 610 B.R. 434 (S.D.N.Y. 2019), *affirming* 2018 WL 2997104 (Bankr. S.D.N.Y. June 12, 2018); *Beckington v. Am. Airlines, Inc.*, 926 F.3d 595 (9th Cir. 2019); *Bakos v. Am. Airlines, Inc.*, 748 F. App'x 468 (3d Cir. 2018); *Flight Options, LLC v. Int'l Bhd. of Teamsters, Local 1108*, 863 F.3d 529 (6th Cir. 2017); *Flight Attendants in Reunion v. Am. Airlines, Inc.*, 813 F.3d 468 (2d Cir. 2016); *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967 (9th Cir. 2015); *Cunningham v. Air Line Pilots Ass'n, Int'l*, 769 F.3d 539 (7th Cir. 2014); *Comm. of Concerned Midwest Flight Attendants for Fair & Equitable Seniority Integration v. Int'l Bhd. of Teamsters*, 662 F.3d 954 (7th Cir. 2011); *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010); *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004); *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165 (9th Cir. 2002); *Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50 (4th Cir. 1994) (per curiam), *affirming* 815 F. Supp. 1522 (E.D. Va. 1993); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992); *Gvozdenovic v. United Airlines, Inc.*, 933 F.2d 1100 (2d Cir. 1991); *Air Wis. Pilots Protection Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020 (9th Cir. 1990); *Haerum v. Air Line Pilots Ass'n*, 892 F.2d 216 (2d Cir. 1989); *Bernard v. Air Line Pilots Ass'n, Int'l AFL-CIO*, 873 F.2d 213 (9th Cir. 1989); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974).

workplace, of course—but, in the airline industry, employees have unique and more pernicious ways to disrupt their employer's operations, and thereby disrupt the free flow of interstate and international transportation and commerce. Pilots can taxi and fly aircraft more slowly; they can burn more fuel; they can decline to work extra flights; and they can call in sick or "fatigued"; flight attendants can board the aircraft more slowly; ramp workers can load and off-load baggage more slowly; mechanics can write-up minor cosmetic issues like torn carpet and take longer to repair planes, and on and on.

This is not idle speculation; it is how airline employees often express dissatisfaction with the terms and conditions of their employment.[4] And, when they

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[4] Again, the cases are ubiquitous. For a sample, *see Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 928 F.3d 1102 (D.C. Cir. 2019); *United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257 (7th Cir. 2009); *United Air Lines, Inc. v. Int'l Ass'n of Machinists*, 243 F.3d 349 (7th Cir. 2001); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300 (11th Cir. 2001); *ABX Air, Inc. v. Int'l Bhd. of Teamsters*, 266 F.3d 392 (6th Cir. 2001); *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574 (5th Cir. 2000); *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *Air Cargo, Inc. v. Int'l Bhd. of Teamsters*, 733 F.2d 241 (2d Cir. 1984); *Nat'l Air Lines v. Int'l Ass'n of Machinists & Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969); *Sw. Airlines Co. v. Aircraft Mechs. Fraternal Ass'n*, 2020 WL 1325224 (N.D. Tex. Mar. 20, 2020); *Am. Airlines, Inc. v. Transport Workers Union of Am.*, 2019 WL 3774501 (N.D. Tex. Aug. 12, 2019); *Spirit Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 2017 WL 2271500 (S.D. Fla. May 9, 2017); *US Airways, Inc. v. U.S. Airline Pilots Ass'n*, 813 F. Supp. 2d 710 (W.D.N.C. 2011); *Allied Pilots Ass'n v. Am. Airlines, Inc.*, 643 F. Supp. 2d 123 (D.D.C. 2009); *Pan Am. World Airways, Inc. v. Indep, Union of Flight Attendants*, 1981 U.S. Dist. LEXIS 13669 (S.D.N.Y. July 20, 1981); *Tex. Int'l Airlines,*

do, the resulting disruption does not just adversely impact fellow employees, who must pick up the slack; it harms the airline's operations and the daily lives of the airline's customers. Simply stated, air carriers could not function as they currently do without the seniority systems that carriers and employees have developed over decades, mostly through collective bargaining. These seniority systems are, quite literally, integral to the Nation's commerce.

II. THIS COURT SHOULD REAFFIRM *HARDISON*, AND ESPECIALLY ITS RULE THAT RELIGIOUS ACCOMMODATIONS ARE NOT REQUIRED BY FEDERAL ANTI-DISCRIMINATION LAW WHEN THEY INTERFERE WITH THE SENIORITY SYSTEMS THAT ARE CRUCIAL TO THE SMOOTH FUNCTIONING OF AIR TRANSPORTATION

Title VII of the Civil Rights Act of 1964, as amended, generally prohibits employment discrimination "because of" an employee's "religion," 42 U.S.C. § 2000e-2(a)(1), and defines "religion" to include "all aspects of religious observance and practice . . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). The Act does not define "reasonably accommodate" or "undue hardship," but this Court held in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), that an employer suffers an "un-

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Inc. v. Air Line Pilots Ass'n Int'l, 518 F. Supp. 203 (S.D. Tex. 1981).

due hardship" whenever an accommodation would require the employer "to bear more than a de minimis cost." *Id.* at 84.

Equally important, though, *Hardison* independently held that an employer need not grant a religious accommodation that would require interfering with a collectively bargained seniority system, such as the one Trans World Airlines had negotiated with its employees' union under the RLA, because granting such an accommodation would constitute an impermissible breach of the seniority provisions of the collective bargaining agreement. *Id.* at 79-81.

Airlines and unions have relied on these holdings for nearly half a century in the collective bargaining process, and especially in administering the seniority systems that allow airlines to provide air transportation with minimal disruption. *See supra* Part I. This Court should not disrupt these holdings, and in fact should reinforce the basic rule that employers need not provide religious accommodations when doing so would undermine seniority systems, especially seniority systems established through collective bargaining.

A. *Hardison* Held That An Employer Need Not Provide A Religious Accommodation When Doing So Would Violate A Collectively Bargained Seniority System

1. In 1967, Larry Hardison was hired by Trans World Airlines, Inc. ("TWA") to work as a clerk in its Stores Department at Kansas City International Airport ("KCI"). 432 U.S. at 66. That department was "responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI

and throughout its system," and operated "on a twenty-four hour, seven-day-a-week basis." *Hardison v. TWA*, 375 F. Supp. 877, 889 (W.D. Mo. 1974). Hardison's job was covered by a CBA with a seniority system. *Hardison v. TWA*, 527 F.2d 33, 37 (8th Cir. 1975). Under that seniority system, employees bid for their shift assignments. *Hardison*, 432 U.S. at 67.

In the spring of 1968, Hardison began to study the Worldwide Church of God religion, which required its adherents to refrain from working on its Sabbath: sundown on Friday through sundown on Saturday. *Id.* Hardison was able to transfer, with the help of his manager and union steward, to a shift that allowed him to observe his Sabbath. *Id.* at 68.

Later that year, however, Hardison bid for and received a transfer from the Stores Department's Building 1 to Building 2. *Id.* The two buildings had separate seniority lists and, while Hardison previously had enough seniority to observe the Sabbath while working in Building 1, he was near the bottom of the Building 2 seniority list. *Id.* In Building 2, Hardison was asked to work Saturdays when a colleague was on vacation, and he did not have sufficient seniority to bid away from that assignment. *Id.* at 68-69.

TWA rejected three alternate work arrangements for Hardison: (i) permitting him to work only four days a week; (ii) filling his position with an employee from another area, which would have required paying the other employee overtime pay; or (iii) arranging a shift "swap" between Hardison and another employee. *Id.* at 68-69, 76. Hardison subsequently refused to report for work on his Sabbath, and TWA discharged him. *Id.* at 69. Hardison brought suit for religious discrimination in violation of Title VII.

2. This Court rejected Hardison's claim of religious discrimination, holding that TWA made reasonable efforts to accommodate Hardison and that each of the three rejected alternative work arrangements "would have been an undue hardship." *Id.* at 77.

The Court rejected two of the three accommodations Hardison sought—allowing Hardison to work only four days a week, or staffing Hardison's Saturday shift with other personnel and paying them overtime—on the ground that they would have imposed more than a de minimis burden on TWA. *Id.* at 84; *see also Creusere v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 88 F. App'x 813, 819 (6th Cir. 2003) (rejecting proposed accommodation when CBA would have required payment of "premium overtime wage"). The Court rejected the third—TWA unilaterally arranging a "swap" between Hardison and another employee—for a different reason, namely, that it would have been an impermissible breach of the seniority provisions of the CBA.

In particular, the Court flatly rejected Hardison's and the U.S. Equal Employment Opportunity Commission's argument that Title VII's "statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees." 432 U.S. at 79. The Court observed:

> Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have

> been deprived of his contractual rights under the collective-bargaining agreement.

Id. at 80. The Court thus recognized that the duty to accommodate did not require that an employer "deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.* at 81. Accordingly, the Court in *Hardison* held that an employer is "not required by Title VII to carve out a special exception to its seniority system in order to help [an employee] to meet his religious obligations." *Id.* at 83.

B. *Hardison* Warrants Adherence Under The Principles Of Stare Decisis

This Court should adhere to *Hardison*'s "more than de minimis cost" test under the principles of stare decisis.

1. Considerations of stare decisis "have special force in the area of statutory interpretation," where, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Stare decisis in the statutory interpretation context carries this "enhanced force" regardless of whether the Court is "focused only on statutory text or also relied, as [*Hardison*] did, on the policies and purposes animating the law." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

In the nearly fifty years since *Hardison* was decided, Congress has not modified Title VII to alter *Hardison*'s holding in any respect. Despite other

amendments to Title VII,[5] including substantial revisions in 1991 that were heavily debated and attracted widespread public attention, Congress has allowed *Hardison*'s "more than a de minimis cost" standard to guide courts, employers, employees, and unions under Title VII for nearly half a century. If Congress wanted to displace *Hardison*'s interpretation of Title VII, it could easily have altered Title VII to reflect its disagreement. Congress has not done so, so neither should this Court.

2. In addition, considerations favoring stare decisis "are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 688-703 (1999) (surveying historical support for stare decisis in cases implicating property and contract rights). "That is because parties are especially likely to rely on such precedents when ordering their affairs." *Kimble*, 576 U.S. at 457.

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[5] *E.g.*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII to prohibit discrimination on the basis of pregnancy); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amending Title VII to "strengthen and improve Federal civil rights laws, to provide damages in cases of intentional employment discrimination, [and] to clarify provisions regarding disparate impact actions"); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending Title VII to "clarify that a discriminatory compensation decision or other practice that is unlawful . . . occurs each time compensation is paid pursuant to the discriminatory compensation decision").

Employees and employers—and, in particular, airlines, their employees, and the unions representing those employees—have administered their CBAs for generations against the backdrop of *Hardison*'s holding and statements to the effect that CBA provisions need not be breached in the name of religious accommodation. This is certainly the case with respect to CBA seniority provisions, as seniority is a significant subject of discussion and compromise in every CBA governing airline workplaces. Employees have settled expectations that their careers will progress and their benefits will accrue in accordance with their hard-earned seniority rights. Indeed, "[o]nce a seniority system is in place, many employees come to think of their position in the pecking order as a form of property. Higher seniority means more desirable assignments and greater security of employment." *Rakestraw*, 981 F.2d at 1535.

But these reliance interests are hardly limited to seniority systems; air carriers and their employees have relied on *Hardison* in negotiating and implementing numerous CBA provisions that could be thrown off completely if *Hardison* is disturbed. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (Rehnquist, C.J.) (stating that "[w]e think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one," but remanding for additional fact-finding regarding how the CBA leave provisions had been applied in practice); *Ansonia Bd. of Educ. v. Philbrook*, 925 F.2d 47 (2d Cir. 1991) (affirming district court's decision on remand that school board's adherence to limitations in CBA's leave provisions did not violate

its reasonable accommodation obligation under Title VII). Thus, adherence to the decades-old decision from *Hardison* will continue to ensure that religious accommodations cannot be raised to interfere with seniority and other rights grounded in CBAs and will thereby preserve decades of settled expectations on the part of airline employees.

The Court should thus decline to disturb *Hardison* under ordinary principles of *stare decisis*, and leave it to Congress to alter *Hardison*'s rule if it so chooses.

C. Even If The Court Were To Modify The "De Minimis" Standard, It Should Reaffirm That A Religious Accommodation Inconsistent With An Established Seniority System Is Not Required By Title VII

Even if the Court does reverse *Hardison*'s "more than de minimis cost" test, which is the focus of petitioner's challenge here, Pet. i., it should make clear that when proposed religious accommodations would require interfering with an established seniority system, such accommodations are not required by Title VII, in light of the definition of "religion" in 42 U.S.C. § 2000e(j), because: (i) they are not "reasonabl[e];" and/or (ii) they impose an "undue hardship" under any definition of that term.

1. As an initial matter, there should be no doubt that *collectively bargained* seniority systems are immune from religious accommodations under *Hardison*'s main holding. As explained earlier, *Hardison* held—independent of "undue hardship" and the "more than de minimis cost" standard—that a religious accommodation that interferes with a CBA's

seniority provisions is not required by Title VII. *See Hardison*, 432 U.S. at 81 ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far."). Indeed, petitioner recognizes that holding from *Hardison* and does not challenge it. *See* Pet. Br. 29; *see also* Pet. Reply at 5 (acknowledging *Hardison*'s holding "that an employer is 'not required by Title VII to carve out a special exception to its seniority system in order to help [the employee] to meet his religious obligations,'" but contending that this holding does not apply to collectively bargained non-seniority systems (emphasis omitted) (quoting *Hardison*, 432 U.S. at 83)).

Thus, regardless whether the Court alters *Hardison*'s "more than de minimis cost" test, there is no plausible basis to disturb *Hardison*'s main, unchallenged holding that Title VII does not require employers to provide religious accommodations that would run afoul of collectively bargained seniority systems.

2. The Court should also confirm, moreover, that Title VII does not require interference with seniority systems that are not collectively bargained but rather are established as a matter of employer policy. That is so for at least two reasons.

a. To start, Title VII itself makes clear that application of seniority systems—collectively bargained or not—are generally exempt from liability. In relevant part, Section 703(h) of Title VII provides:

> Notwithstanding any other provision of this subchapter, 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 . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h). "[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352 (1977).

b. Moreover, this Court has already held that an accommodation request that conflicts with an airline seniority system that is *not* collectively bargained is generally not required by the Americans with Disabilities Act ("ADA"). *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002).

The *Barnett* Court held that a proposed accommodation under the ADA that would violate the rules of a seniority system is not "reasonable in the run of cases" and that an "employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to demonstrate that a requested accommodation is unreasonable and therefore not required by the statute. *Id.* at 403, 405. As Justice Souter's dissent pointed out, *id.* at 420 (Souter, J., dissenting), the ADA does not contain a statutory safe harbor for seniority systems like Title VII does. Yet, the Court held that accommodations that violate seniority systems

are generally unreasonable even without such an express statutory carveout, emphasizing the value and importance of seniority systems to the orderly operation of workplaces, especially in the airline industry.

In particular, the Court in *Barnett* highlighted the centrality of seniority systems to the airline industry, explaining that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment," which in turn "encourage employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years." *Id.* at 404 (quotation omitted). A rule that allows accommodations to interfere with seniority systems "might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend," because "such a rule would substitute a complex case-specific 'accommodation' decision made by management for the more uniform, impersonal operation of seniority rules." *Id.* This Court found "nothing in the statute that suggests Congress intended to undermine seniority systems in this way." *Id.* at 405.

Thus, no matter what the Court holds with respect to *Hardison*'s "more than de minimis cost" test, it should make clear that Title VII does not require religious accommodations that interfere with or violate seniority systems, whether collectively bargained or not.

3. Finally, it is worth emphasizing that the foregoing analysis applies regardless of how the Court answers the second question presented in the petition—*viz.*, "[w]hether an employer may demonstrate 'undue

hardship on the conduct of the employer's business' under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself." Pet. i. This is so for two reasons.

a. In both *Hardison* and *Barnett*, the Court ruled that a proposed accommodation that would require the carrier to breach a CBA's seniority rules was not a "reasonable accommodation." *See supra* at 17-18 and 24. Because those requested accommodations were not "reasonable," there was no occasion for the Court to even consider whether the accommodations would have imposed an "undue hardship"—"on the conduct of the employer's business," or otherwise. Stated simply, the question of "undue hardship" was irrelevant.

b. In any event, accommodations that interfere with seniority systems not only impose burdens on co-workers, but on "the business itself." And while that is presumably true of many businesses, it is nowhere more true than in the airline industry. As explained in Part I above, seniority systems are critically important to airline employees; even the slightest encroachments upon employee seniority rights can have ripple effects throughout an airline's entire workforce, and result in lengthy, costly and disruptive litigation as well as large numbers of employees being dissatisfied with their jobs; and when airline employees are unhappy with their jobs, that inevitably leads to a degradation of employee performance and, in turn, the airline's operational (*i.e.*, on-time) performance. *See supra* at 11-14.

Moreover, because of the crucial role air transportation plays in interstate commerce, the integrity of

airline seniority systems are vital not only to the carriers, but to the traveling public and the public interest more generally. *See supra* at 6-9. Air carriers should not be required to entertain bespoke religious accommodations when such accommodations could risk significant interference not only with the carrier's operations, but with the Nation's commerce.

This Court should thus make clear, no matter how it answers either of the questions presented in this case, that it is not disturbing the basic principle that religious accommodations that interfere with seniority systems or CBAs are not required by Title VII.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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