

No. 26-183

In the Supreme Court of the United States

UNITED AIRLINES, INC., PETITIONER

v.

GENISE KINCANNON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AIRLINES FOR AMERICA AS
AMICUS CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICUS CURIAE

Founded in 1936, Airlines for America (A4A) is the oldest and largest airline trade association in the United States. A4A represents passenger and cargo airlines nationwide, including Alaska Airlines, American Airlines, Atlas Air, Delta Air Lines, FedEx, Hawaiian Airlines, JetBlue Airways, Southwest Airlines, United Airlines, and United Parcel Service. Together, A4A's members directly employ more than 80% of the airline industry's 750,000 workers. And in 2020, A4A's passenger carrier members and their marketing partners carried more than 227 million passengers—approximately 70% of the annual total—and A4A's all-cargo and passenger members together carried 80% of U.S. airlines' total cargo.*

A4A has a strong interest in this case. Many features of the airline industry, such as the diversity of airport layouts and varying obligations under collective bargaining agreements (CBAs), require context-dependent analysis of requests for religious accommodations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to balance the need for meaningful accommodations for employees with the need to avoid undue hardship for airlines. The decision below affirmed class certification on the notion, among others, that one of A4A's members, United Airlines, could have implemented a single religious

* Pursuant to this Court's Rule 37.2(a), counsel for A4A notified counsel of record for both parties of its intent to file this brief on August 28, 2026, more than ten days before the deadline for and filing of this brief. No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

accommodation nationwide based on a unitary religious-accommodation and undue-hardship inquiry. That notion assumes, against this Court’s class-action precedent, that the jury will adopt only the plaintiffs’ evidence; ignores the way the airline industry functions; and opens the door to class actions that, like this one, raise a host of employee-specific issues that require individualized litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit’s endorsement of a company-wide class of United pilots and flight attendants who sought religious accommodations from United’s Covid-19 vaccine requirement contravenes this Court’s class-certification and Title VII precedents and ignores the basic realities—practical, financial, and logistical—about how the commercial aviation industry works. The Court should intervene before the Fifth Circuit’s opinion does serious damage.

Class certification under Federal Rule of Civil Procedure 23(b)(3) requires “common” questions that “predominate over any questions affecting only individual members.” A question is “common” when the “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

The class certified here comes nowhere near this high bar. Among many other individualized considerations, United is entitled to show that accommodating an employee’s religious practice would impose “undue hardship” on the airline. 42 U.S.C. § 2000e(j). In *Groff v. DeJoy*, 600 U.S. 447, 468, 470, 473 (2023), the Court clarified that “undue hardship” is a “fact-” and

“context-specific standard” dependent on “all relevant factors in the case at hand, including the particular accommodations at issue.” That’s the very opposite of a common question.

But the Fifth Circuit blew past that. It reasoned that the undue-hardship standard can be applied on a classwide basis because it’s possible a jury could agree with plaintiffs’ account that the burden of alternative accommodations could be uniform across United’s workforce. *See* Pet. App. 30a.

That sweeping generalization misunderstands both *Groff* and Rule 23 commonality and predominance. It also threatens to wreak havoc across airlines. Accommodating religious practice requires individualized consideration of, among other variables, each employee’s airports and routes as well as any applicable CBAs, federal regulations, and state laws. To be clear, the Court need not decide whether United or the plaintiffs are right about if, for any individual employee’s accommodation, the burden on United rises to the level of undue hardship. Rather, it need only reaffirm that the undue-hardship inquiry *can* vary from employee to employee. *Groff* didn’t eliminate individualized considerations from the undue-hardship inquiry, and Rule 23 doesn’t permit certification in spite of them. Holding otherwise exposes airlines to a flurry of class actions, in Title VII and beyond, riddled with individualized questions.

1. As *Groff* explains, “undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.” 600 U.S. at 468. The Fifth Circuit reasoned that undue-hardship question is answerable classwide because it “does not require United to submit employee-specific evidence.” Pet.

App. 29a-30a. But “does not require” and “does not allow” are two different things. *Groff* requires a “fact-” and “context-specific” undue-hardship assessment of “all relevant factors” for “the particular accommodations at issue.” 600 U.S. at 468, 470-72. That means United is entitled to submit fact-specific evidence for each employee. And as the record shows, United has submitted and will continue to submit volumes of employee-specific evidence. Its undue-hardship defenses are impossible to resolve “in one stroke.” *Wal-Mart*, 564 U.S. at 350.

2. The Fifth Circuit’s misunderstanding of Rule 23 and *Groff* poses special problems for the airline industry. Given the great variation across airports, CBA protections, and state laws, company-wide accommodations raise a host of individualized issues.

Consider airports. For any given airline at any given airport, there are unique limits to making accommodations based on the space, equipment, and staffing available. What can be accomplished using, say, United’s extensive floorspace and staffing at Washington Dulles International Airport might be next to impossible at the Sarasota Bradenton International Airport.

CBAs throw another wrench in the works. Many of their provisions, especially when paired with federal safety regulations, restrict airlines’ flexibility to change employees’ routes and duties. And breaching a CBA or federal law, without more, is undue hardship.

The interstate and international nature of most air travel creates yet another complication. States frequently try to apply their varying employment laws to flightcrew. Those varying laws—including whether they survive federal preemption—create further

employee-by-employee variation in airlines’ ability to make accommodations.

3. Every alternative to United’s vaccine requirement implicates these airline-inherent individualized considerations. As to “masking-and-testing,” for instance, limitations posed by airport characteristics and CBA requirements alike would often make it substantially burdensome for United to require regular testing and respond accordingly whenever an unvaccinated employee tests positive. But the key point here is that the inquiry isn’t the same classwide.

The Fifth Circuit offered two alternative accommodations *sua sponte*, *see* Pet. App. 30a n.9, but they fare no better. Regarding an unspecified “quarantine requirement,” *id.*, United couldn’t quarantine unvaccinated employees without knowing every passenger’s Covid-19 status, which would have been unobtainable on *most*, but perhaps not *all*, flights. And regarding “unvaccinated-only flight crew,” *id.*, that proposal too disregards the reality of airports and CBAs. The bottom line is that these proposals cannot be evaluated classwide, either.

The Court should grant the petition.

ARGUMENT

I. Undue hardship requires a context-specific inquiry that, contrary to the Fifth Circuit’s view, may depend on individualized evidence about employees.

Under Rule 23, class certification requires “questions of law or fact common to the class.” As this Court has emphasized, a question is “common” only if the “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the

claims in one stroke.” *Wal-Mart*, 564 U.S. at 350. Put differently, “[i]f a reasonable decisionmaker left with the evidence may answer ‘yes’ to a question for some class members and ‘no’ for others, the class has not shown that it is common.” *Speerly v. General Motors, LLC*, 143 F.4th 306, 316 (6th Cir. 2025) (en banc). What’s more, as relevant here, those common questions must “predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3).

Title VII lawsuits, and particularly religious-accommodation claims, don’t easily satisfy this rigorous standard. As the Court has recognized, “[t]he facts necessarily will vary in Title VII cases.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973). Among other individualized elements, *see* Pet. 18-23, employers can raise a “fact-specific” defense, *Groff*, 600 U.S. at 468, that will almost invariably fail to meet Rule 23’s commonality and predominance requirements: undue hardship.

A. As *Groff* explained, undue hardship is a “fact-specific inquiry” tailored to the “context” of each employee’s circumstances.

Title VII doesn’t require an employer to accommodate an employee’s religious practice if doing so would impose an “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). As this Court clarified in *Groff*, “‘undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.” 600 U.S. at 468. This showing “takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature,

size, and operating cost of [an] employer.” *Id.* at 470-71 (alteration in original).

1. Such a “fact-specific inquiry,” *id.* at 468, necessitates a host of individualized considerations. For example, where does the employee work? Does that location have staffing and resources to accommodate him, or would he need to be redeployed elsewhere? And are there any jurisdiction-specific laws or arrangements with contractual service providers that might cause some accommodations to be costlier for the employer than others?

Consider too how the accommodations process often varies by position. Can the employee work other jobs within the business without needing to, say, take time off for retraining? What if there’s a CBA? Does it limit the employer’s ability to redeploy employees such that otherwise reasonable accommodations are unavailable?

2. As explained below (at 10-19), analyzing those questions and others for all members of the class that the Fifth Circuit endorsed will require answers tailored to each employee based on his location, seniority, and other non-classwide factors. Regardless of whether some employees seek the same type of accommodations, the burden of making that accommodation isn’t the same for all of them. The “practical impact” of a “particular accommodation[]” varies from person to person. *Groff*, 600 U.S. at 470.

B. By considering only Respondents' evidence, the Fifth Circuit incorrectly concluded that undue hardship poses a single question across all employees at all airports.

The Fifth Circuit affirmed class certification based on a misunderstanding of Rule 23 and *Groff*. According to the court, the question of “an undue burden can be answered class-wide” without “requir[ing] United to submit employee-specific evidence” because the airline must prove that any alternative to masking-and-testing “would have imposed a burden that is ‘substantial in the *overall context* of [United’s] business.’” Pet. App. 29a-30a (quoting *Groff*, 600 U.S. at 468; second alteration in original). That was error.

1. Just because a question *can* be answered classwide with common evidence doesn’t mean it satisfies Rule 23’s commonality and predominance requirements. To reiterate, commonality exists only when a question *must* be answered across the entire class “in one stroke.” *Wal-Mart*, 564 U.S. at 350. Considering the countless individualized questions that could produce different answers for different employees, it’s nearly certain that “a reasonable decisionmaker left with the evidence” will “answer ‘yes’ to a question for some class members and ‘no’ for others.” *Speerly*, 143 F.4th at 316.

2. The Fifth Circuit also ignored how undue hardship is a “fact-specific inquiry.” *Groff*, 600 U.S. at 468. An accommodation poses an undue hardship if—in the context of the employee’s relationship to the greater business—the burden is substantial. But rather than take this “common-sense” approach, *id.* at 471, the Fifth Circuit viewed *Groff*’s undue-hardship

analysis to require weighing the burden of an accommodation in a vacuum against the employer’s *entire* business, without consideration of each employee’s circumstances. *See* Pet. App. 29a-30a. Respondents make that erroneous view even more explicit, claiming “[t]he factors [*Groff*] identified ... apply company-wide and do not vary from one class member to another.” Opp. 29.

That view is incompatible with this Court’s command that undue hardship is “context-specific.” *Groff*, 600 U.S. at 473. Indeed, preventing employers from showing hardship specific to a plaintiff’s circumstances would effectively eliminate undue hardship as a defense for large employers whenever a plaintiff sues individually. Consider the facts of *Groff* itself. There, an individual sued the United States Postal Service (USPS), *id.* at 456, which has over 620,000 employees, *see* USPS, *Annual Report to Congress* 3 (2025), <https://tinyurl.com/4hv9a8tb>. It’s hard to imagine how a religious accommodation for any single employee could ever impose a substantial burden on the USPS without consideration of the specific context.

Of course, *Groff* doesn’t support such an absurd approach. If it did, the Court wouldn’t have remanded while leaving open “the possibility that the USPS will prevail” in showing undue hardship depending on the application of this “context-specific standard.” *Groff*, 600 U.S. at 473. That standard requires assessing the “practical impact,” given the employer’s “nature, ‘size and operating cost,’” *id.* at 470-71, of accommodating a particular employee and what it would mean for accommodating similarly situated employees, since employers cannot treat similarly situated employees differently without a legitimate justification. At the

same time, not all employees seeking religious accommodations are similarly situated. Thus, *Groff* clarified that courts must perform a “fact-specific inquiry” to determine whether an accommodation poses a substantial burden. *Id.* at 468.

And that inquiry turns on each employee’s circumstances. Here, United can make different undue-hardship defenses for different employees based on their circumstances, and those defenses do not necessarily rise or fall together. A court cannot inject commonality simply by aggregating the burdens of every plaintiff’s proposed accommodations—whether or not they are substantial standing alone—to make one overarching undue-hardship determination that everyone must live by. Doing so would violate the prohibition against “enlarg[ing] ... substantive right[s]” in the Rules Enabling Act. 28 U.S.C. § 2072(b).

II. Diversity across the industry—including among airports, CBA protections, and state laws—makes airlines’ undue-hardship defenses inherently individualized.

The undue-hardship inquiry is inherently individualized in the commercial aviation setting. Airports differ considerably in space and staffing, meaning that an accommodation that is frictionless at one airport could pose an undue hardship at another. Airlines are also typically subject to multiple CBAs across their workforces, and those CBAs limit their flexibility to change employees’ duties to implement accommodations without significant consequences. And the interstate or international nature of most flights means that (absent federal preemption) airlines must confront varying state laws, particularly those about public health. Given all this

heterogeneity, airlines cannot make a single, sweeping accommodation under Title VII that covers every employee nationwide who seeks the same type of religious exemption. Their hardship of accommodating different employees will necessarily vary, and could produce different results under Title VII.

A. Dramatic differences in space, resources, and staffing among airports make company-wide accommodations substantially burdensome.

No two airports are the same. Rather, each has unique parameters regarding space, equipment, and staff available to any given airline. That variability means airlines will be required to tailor their accommodations for employees to each airport's capabilities.

1. Differences among airports are particularly pronounced for the many airlines, such as United, that follow a hub-and-spoke system. By design, the system produces different footprints from airport to airport. As the focal point for all other flights, hubs demand more gates, equipment, and staff than spokes. CA5.ROA.7954. For example, United occupies roughly 80% of the floorspace at Washington Dulles International Airport, one of its hubs, but less than 20% of the floorspace at Ronald Reagan Washington National Airport, one of its spokes. CA5.ROA.7494.

These variations mean that the tools available to accommodate a Title VII claimant will often depend on the employee's location. An airline's hubs may have enough space, equipment, and staffing to make an accommodation viable even if that same accommodation would impose an undue hardship at less-resourced airports. There is no one-size-fits-all solution.

2. Consider the proposed accommodation that captured the Fifth Circuit’s focus: a masking-and-testing requirement where unvaccinated employees could continue working for United so long as they wore masks and regularly submitted Covid-19 test results. According to the court, the burden of that accommodation “can be answered class-wide.” Pet. App. 29a.

But again, that doesn’t mean it *must* be answered classwide—the relevant inquiry under Rule 23. *See Wal-Mart*, 564 U.S. at 350. At its hubs, United might have enough resources to equip unvaccinated employees with masks and tests, as well as have backup staff in case one of those employees tests positive. At smaller airports, however, clearly neither of those approaches is feasible. Take the Sarasota Bradenton International Airport. Most days, just a few United flights depart from it. *See Departures, SRQ*, <https://tinyurl.com/mnj7rrv8> (last visited Sept. 8, 2026). So, the airport only needs a thin staff to serve United’s passengers.

Masking-and-testing could have made the situation untenable. For example, what would have happened when an unvaccinated pilot tested positive for Covid-19? United doesn’t keep reserve crew at Sarasota Bradenton, and federal law prohibits it from running flights short-staffed. *See* 14 C.F.R. § 121.385. So the only options would have been cancelling the flight (likely causing cascading cancellations, *see* CA5.ROA.2120)—and lose ticket sales—or keeping extra staff at the airport—and massively increase labor costs, likely to the point of making the flights uneconomical, *see* CA5.ROA.1676, 8304. Either option could have resulted in serious reputational damage in addition to customers’ loss of services. Masking-and-testing could therefore have imposed an undue

hardship at those airports—and could have done so based on considerations that likely would not apply at larger airports and to other employees. The different pieces of evidence, and the answers they produce, thus could vary across the class, meaning there shouldn't be one in the first place.

B. Accommodating flightcrew poses risks of violating CBAs and federal law, which vary in application to different employees and which alone impose an undue hardship.

Many airline employees are unionized and thus work under collective-bargaining agreements, which set terms that employees and airlines must honor. The vast majority of United's customer-facing employees are represented by one of three unions: the Air Line Pilots Association, International; the Association of Flight Attendants; and the International Association of Machinists (covering customer-service representatives, like gate agents). CA5.ROA.1671, 2115, 2705. Each union has a separate CBA with United. *See* CA5.ROA.1679-2112, 2124-701, 2708-840. And each of those CBAs raises multiple individualized complications, both under its own terms and through its interaction with federal regulations, because violating a CBA or federal law necessarily imposes undue hardship.

1. Start with masking-and-testing. That approach would be impossible for many flight attendants—yet would still require an employee-by-employee assessment—based on the CBA and the respective flight attendant's assignments.

To explain: United's CBA with flight attendants prohibits it from changing the scheduled times at

which they must report to the airport when they are flying on certain aircraft. CA5.ROA.1729. And because they already have a host of pre-flight duties (often required by federal regulation, *see, e.g.*, 14 C.F.R. §§ 117.5(d), 121.315(b)), many flight attendants wouldn't have enough time to test and wait for their results before coming into contact with other people. For those flight attendants, United couldn't implement masking-and-testing without breaching the CBA, the law, or both.

At the same time, a reasonable factfinder might determine that it was feasible for *some* employees to have tested at the start of each workday, because the check-in-time requirements can vary by aircraft. CA5.ROA.1658, 1729. And pilots, while subject to their own start-of-shift duties, *see* CA5.ROA.2118-19, don't have the same hard-and-fast CBA-based limits.

Respondents argued below (CA5.ROA.1654) that United could have resolved those concerns simply by requiring employees to test themselves on their own time. But that would likewise have risked running afoul of the CBAs and federal law, which both require United to give pilots and flight attendants sufficient uninterrupted periods of rest between work-related functions. CA5.ROA.1732-34, 2198-99, 2213-15; 14 C.F.R. § 117.25(e).

Because company-mandated medical testing may count as time on duty, CA5.ROA.1654, 1673, 2117, United could have needed to give employees uninterrupted periods of rest before and after at-home testing. But for some employees, that wouldn't be possible. In particular, pilots and flight attendants whose scheduled rest periods are already at the minimum

(under federal law or their respective CBA) wouldn't have enough time to fit testing into their schedule.

Consider too that United's flightcrew CBAs guarantee a certain number of completely off-duty days. CA5.ROA.1728, 2199-203, 2215-16, 2346. If a testing policy required an employee to test on those days, those days may no longer qualify as "off." CA5.ROA.1676, 2120. So for those flightcrew already near the minimum number of off-duty days, the Fifth Circuit's proposed accommodation risks violating their rights under the CBAs, too.

2. Respondents argued below (CA5.ROA.1662) that accommodation-seeking employees could have just "waived" CBA provisions that would have imposed an undue hardship on United. But that approach likewise would have presented serious concerns, because the Railway Labor Act (which applies to airlines) "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548 (1937); see 45 U.S.C. § 152 Ninth. If only the authorized union representative could agree to alter or waive CBA protections, it is unclear how employees and United could have agreed on the necessary waivers.

Indeed, the union representatives here stated that they wouldn't have agreed to waivers that adversely affect other employees' contractual rights. CA5.ROA.2114, 2703. That's a problem for Respondents because the waiver of a CBA provision for one employee (assuming that selective waiver is lawful) can frequently infringe on other employees' CBA rights. For example, to promote fairness and verify attendance, the flight attendant CBA requires that any

changes to one attendant’s check-in time apply to *every* attendant scheduled for the same set of trips. CA5.ROA.1729. Expanding the check-in time to accommodate testing would therefore require vaccinated attendants to arrive earlier to work, too.

3. The concerns laid out above are just a few examples of the CBA-related problems with the notion that accommodations and undue hardship can be determined by classwide evidence. When a workforce has extensive union representation, as is true for many airlines, company-wide accommodations would often run afoul of CBA protections for some—but not all—employees. That matters here because breaching a CBA itself amounts to an undue hardship, no matter the impact to the employer’s bottom line.

This Court recognized—in the aviation setting—that CBA violations impose undue hardship. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66-69 (1977), an aircraft-parts clerk requested time off of work to observe the Sabbath. The Court held that the employer’s inability to accommodate him didn’t violate Title VII because permitting his requested absence would have “deprived” more senior employees of their “contractual rights under the[ir] collective-bargaining agreement” to have priority when bidding for shifts. *Id.* at 80. The Court held “that the duty to accommodate” does not “require[] [the employer] to take steps inconsistent with the otherwise valid agreement.” *Id.* at 79.

Groff’s clarification of the undue-hardship test, 600 U.S. at 468, does not undermine *Hardison*’s holding that breaching a CBA amounts to an undue hardship. Indeed, in *Groff*, the “continued vitality of *Hardison*’s core holding on its ‘principal issue’—

“seniority rights” in the CBA—was unchallenged. *Id.* at 462 & n.10. And for good reason: Because undue hardship under Title VII looks to “the *conduct* of the employer’s business,” 42 U.S.C. § 2000e(j) (emphasis added), it “may include undue hardship on the business’s employees,” such as by depriving them of their CBA-guaranteed rights, *Groff*, 600 U.S. at 475 (Sotomayor, J., concurring). For that same reason, the breaches of the CBAs that some plaintiffs demand here would have amounted to an undue hardship.

4. The same goes for proposed accommodations that require an employer to break the law. “Every circuit to consider the issue has” reached “the same, sensible conclusion: ‘[A]n employer is not liable under Title VII when accommodating an employee’s religious beliefs would require the employer to violate federal ... law.’” *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015) (per curiam) (alterations in original).

That’s a critical problem for class certification here. As discussed above, employees’ rights under airlines’ CBAs often intersect with federal regulations to doubly prohibit changing the terms of employment for flightcrew. The Federal Aviation Administration imposes strict duties on pilots and flight attendants, while those employees’ CBAs guarantee them various protections. The result is that airlines have little flexibility to make accommodations for many employees, and making that determination on a classwide basis is impossible.

C. Interstate and international flights require confronting different state and foreign laws and thus require individualized inquiries.

Most major airline flights, including United's, cross state or international borders. That routine business exposes airlines to a complex web of different jurisdictions' laws, which can often vary or even conflict. Here, those varying laws require yet another set of individualized inquiries.

1. Some states purport to require employers to pay for any medical examinations, including Covid-19 tests, that are a condition of employment. *See, e.g.*, Cal. Lab. Code § 222.5; Ill. Admin. Code title 56, § 300.860; Va. Code Ann. § 40.1-28. At the time of United's vaccine mandate, each Covid-19 test cost the airline around \$97. CA5.ROA.1079. Incurring that expense for unvaccinated employees every week (if not every day) could well pose an undue hardship. Other states don't require employers to pay for Covid-19 tests, but instead allow expenses to be split with employees. That difference could produce a different result as to undue hardship.

2. The tension between state law and commonality is no surprise. Many courts—including the Fifth Circuit—have recognized that “[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance.” *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *accord, e.g., In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108, 127 (2d Cir. 2013); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1261 (11th Cir. 2004).

To be sure, the fact that a class action involves different state laws doesn't necessarily defeat

commonality. And courts have several tools for making class actions with varying state issues more manageable, such as by limiting the action “to particular issues” or “divid[ing]” the class “into subclasses.” Fed. R. Civ. P. 23(c)(4)-(5). But neither the Fifth Circuit nor the district court tried using them to mitigate the potential state- or foreign-law complications.

3. Of course, state and local laws are often preempted in the commercial-aviation context. *See, e.g.*, 49 U.S.C. § 41713(b)(1); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). But courts nonetheless sometimes require application of those laws even when they should not. *See, e.g., Bernstein v. Virgin America, Inc.*, 3 F.4th 1127, 1138-41 (9th Cir. 2021) (rejecting several theories of preemption regarding the imposition of state meal-and-rest-break laws on airlines), *cert. denied*, 142 S. Ct. 2903 (2022); *see also* U.S. CVSG Br. 10-17 (No. 21-260) (explaining at length how the Ninth Circuit’s preemption reasoning “was misguided”). Regardless, preemption questions themselves raise different questions depending on different jurisdictions’ laws, and thus only compound, not eliminate, the lack-of-commonality-and-predominance problem with trying to certify a class to assess company-wide accommodations.

III. The Fifth Circuit’s sua sponte alternative accommodations to masking-and-testing pose even more individualized questions.

The Fifth Circuit spent most of its attention addressing the burden posed by a masking-and-testing policy. *See* Pet. App. 29a-30a. But in a footnote, the court offered two other accommodations that it thought could be assessed on a classwide basis: “a quarantine requirement or the creation of an

unvaccinated-only flight crew for customers not apprehensive of the virus.” Pet. App. 30a n.9. Although the court offered those proposals without any briefing from the parties, it faulted United for failing to mention them, charging the airline with violating Title VII’s obligation to “[c]onsider[] ... other options” for accommodations. *Groff*, 600 U.S. at 473; see Pet. App. 29a & 30a n.9.

In reality, United considered but had to reject many other options, including expanding sick leave to allow absences whenever an employee reports a symptom of Covid-19, and allowing unvaccinated employees with natural immunity from a prior Covid-19 infection to return to work. See CA5.ROA.1660-61. Not preemptively discussing the Fifth Circuit’s two proposals in its briefs doesn’t reflect any failure on United’s part to “consider[] ... other options.” It simply reflects how many individualized problems the Fifth Circuit’s proposals created such that they didn’t warrant discussion at this procedural stage in the first place.

A. A quarantine requirement would have posed an undue hardship for most, but perhaps not all, employees.

Start with the quarantine requirement. While the Fifth Circuit didn’t explain its thinking, its proposal presumably refers to a policy where unvaccinated employees would have been required to refrain from working for a specified period if they tested positive for Covid-19 or were exposed to another person with Covid-19. Either approach raises a host of individualized questions.

1. For starters, if the proposal would have required unvaccinated employees to test for Covid-19 at

regular intervals, it runs into the same set of individualized questions as the masking-and-testing policy discussed above. *See supra* pp. 10-19.

2. Without regular testing, a quarantine requirement would presumably depend on “contact tracing,” which would have required United to monitor whether unvaccinated employees had been exposed to anyone with Covid-19. If an employee was exposed, he would then have needed to take leave until he could confirm either that he hadn’t contracted Covid-19 or that he had contracted the virus and had since recovered.

a. For many routes, that proposal would have been a nonstarter. On a typical workday, flightcrew interact with hundreds of passengers for hours at a time and in tightly confined spaces. CA5.ROA.365. If any of those passengers have the virus, they risk spreading it to employees. To implement any effective form of contact tracing, then, an airline would have needed to determine the Covid-19 status of every passenger on every flight carrying unvaccinated employees.

But that information is costly, if not impossible, for airlines to obtain. Many passengers would balk at an airline’s requiring them to submit a Covid-19 test result before every flight, just as non-customer-facing United employees balked at the testing requirement in this case. *See, e.g.*, CA5.ROA.5857. And an airline couldn’t simply rely on passengers’ attestations to being free from Covid-19, because those responses risk inaccuracies from, for instance, asymptomatic individuals who haven’t recently tested for the virus.

True, at the time of United’s vaccine mandate, some countries required that all inbound travelers show proof of a negative Covid-19 test result. *See, e.g.*,

Transport Canada, Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 18 § 10.3(1) (Jan. 7, 2021), <https://tinyurl.com/mumxmac6>. But governments wield far greater power to enforce public health protocols than companies. Most notably, prospective customers frustrated by a testing requirement could almost always change to an airline that doesn't require test results, imposing undue hardship from the loss of business whenever such an airline is available and a substantial number of passengers switch. By contrast, those same people cannot readily make such a switch regarding their country of residence.

b. Assuming the Fifth Circuit was right that a quarantine requirement might have been feasible for *certain* routes, that only underscores the lack of commonality and why a classwide answer to accommodations or undue hardship isn't guaranteed. As just discussed, during the period of United's vaccine mandate, numerous countries (including many serviced by United) had adopted policies mandating that all inbound passengers, but not flightcrew, on international flights provide documentation to their airlines of a negative Covid-19 test result. *See id.* §§ 7(a), 10.3(1).

But even if relieved of a requirement of tracking passenger status, United couldn't simply reassign all unvaccinated employees to work on only flights entering countries with negative-test-result policies. Flightcrew CBAs set forth strict rules around the bidding process for routes, prioritizing individual characteristics like seniority. *E.g.*, CA5.ROA.1740, 2343. And as explained above (at 13-17), breaching a CBA (including, specifically, seniority rights therein)

itself constitutes an undue hardship. *Hardison*, 432 U.S. at 77; *see also* 42 U.S.C. § 2000e-2(h).

c. All of that means the Fifth Circuit’s quarantine requirement would require yet another set of individualized inquiries making the case unsuitable for classwide resolution. For flights where passengers wouldn’t have needed to show proof of a negative Covid-19 test result (such as all domestic travel in the United States), contact-tracing would have been next to impossible. For flights where different jurisdictions’ laws required provision of the information, tracing might have not been substantially burdensome.

B. Unvaccinated-only flightcrews would be feasible, if at all, for only a limited subset of routes in well-resourced airports.

Equally unavailing is the Fifth Circuit’s suggestion that United could have offered class members routes staffed by unvaccinated-only flightcrew. Aside from perhaps senior employees at United’s busiest and most spacious airports, a reasonable factfinder couldn’t possibly find that accommodation to impose an acceptable burden on the airline.

1. Recall that variations between airports make any company-wide masking-and-testing policy unworkable. *See supra* pp. 11-13. The same reasoning applies with even greater force to trying to maintain an unvaccinated-only flightcrew.

At smaller airports where United retains a comparatively thin workforce, there wouldn’t have been enough unvaccinated-only employees to staff entire flights. Indeed, there often wouldn’t have been enough demand from customers “not apprehensive of the virus,” Pet. App. 30a n.9, for another flight offering in the first place. For these airports, then, United would

have needed to determine, among other things, that the demand for additional unvaccinated-only flights would justify allocating the necessary unvaccinated flightcrew to service them. The likely result would be needing to stop servicing the airport altogether.

Many airports also don't have enough space and equipment to sufficiently separate unvaccinated employees from vaccinated employees, let alone the public. For example, employees on different flights regularly come near one another during security screening, which is often adjacent to the screening for passengers. So except for airports with ample space and equipment and numerous security agents to maintain an isolated security checkpoint for unvaccinated flightcrew, those employees would still risk spreading Covid-19 to numerous people who *are* apprehensive of the virus.

2. The Fifth Circuit likely conjured up its unvaccinated-only-flightcrew suggestion based on the incorrect premise that United could have reassigned unvaccinated employees to airports with sufficient staffing and to routes with sufficient demand. But as with the quarantine requirement, that approach would have disturbed the comprehensive seniority-based bidding system for routes set forth in United's CBAs with pilots and flight attendants. *See, e.g.,* CA5.ROA.1740, 2343. Thus, the approach likely would have worked, if at all, for *only* senior employees willing to work *only* in large, well-equipped airports and *only* on routes with sufficient demand for flights staffed by unvaccinated workers. Such a specific set of qualifications cannot possibly come close to describing the entire class.

* * *

While the Fifth Circuit applied its errant commonality reasoning in the Title VII setting, unless this Court intervenes, that reasoning likely will spill over into many other areas of class-action litigation affecting airlines (and other companies, too). Consumer protection, Employee Retirement Income Security Act, antidiscrimination, and other claims will often involve *some* amount of classwide evidence that passengers or employees can point to. But if that were enough for Rule 23, “no putative class would ever fail the commonality requirement.” Pet. App. 44a (Willett, J., concurring).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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