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

BRIEF FOR ROBERT P. ROESSER & CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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

LAURA D. NAMMO
CENTER FOR LAW & RELIGIOUS FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road, Ste. 302
Springfield, VA 22160
(703) 642-1070
laura@clsnet.org

Counsel for Amici

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

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

The Equal Employment Opportunity Commission sued Dr. Roesser's employer and union after it found that they violated Title VII. Dr. Roesser intervened. The district court ruled against the EEOC and Dr. Roesser, but the Sixth Circuit reversed. *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990). It remanded the case to determine whether accommodation was possible without undue hardship. But the question was never resolved because the case settled.

Dr. Roesser joins this brief as amicus to highlight this case's national importance for all religious employees who depend on Title VII to practice their faith.

Amicus Christian Legal Society (**CLS**) is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

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[1] Under Supreme Court Rule 37.3(a), the parties consented to this brief's filing. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

Congress responded by adding Section 701(j) to Title VII to further protect religious employees. The amendment clarifies that religious-practice discrimination—even through otherwise neutral rules—is unlawful. Employers and unions must reasonably accommodate employees' religious beliefs and practices. Congress made one exception: accommodation is not required if it would impose an "undue hardship on . . . the employer's business." 42 U.S.C. § 2000e(j).

But *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), gutted these vital protections for religious employees. It rewrote the statute and "disregard[ed] congressional choices that [the] majority . . . [thought] unwise." *Id.* at 87 (Marshall, J., dissenting). The majority rejected religious accommodation to avoid supposedly unequal treatment. And so it let the defendants fire the plaintiff for his faith. *Id.* at 84–85 (majority opinion). The Court encapsulated its holding by stating, without explanation, that an accommodation imposes an undue hardship if it entails "more than a *de minimis* cost." *Id.* at 84.

Hardison's consequences cannot be overstated. In effect, it "nullif[ies]" critical protections that Congress granted religious employees. *Id.* at 89 (Marshall, J., dissenting). And it means that an employer "need not grant even the most minor special privilege to religious observers to enable them to follow their faith." *Id.* at 87. As a result, employers may fire religious

employees for simply practicing their faith. Congress required accommodation to prevent the cruel choice that *Hardison* requires many religious employees to make: surrender your faith or your job.

This Court, however, reversed course in *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768 (2015). The Court in *Abercrombie* almost unanimously rejected *Hardison*'s framework. Even if accommodation is preferential treatment, the Court held that Title VII requires it. "Title VII does not demand mere neutrality"; it gives religious practices "favored treatment." *Id.* at 775. Thus, contrary to *Hardison*'s made-up exception for neutral rules, *Abercrombie* declared that "an otherwise-neutral policy" is no excuse. *Id.* "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

Simply put, *Hardison* harms religious employees. Despite this Court's course correction, lower courts continue to rigidly apply *Hardison*—denying protections that religious employees need. This case is but one example among many. USPS discriminated against Groff when it could have easily accommodated him. USPS could have scheduled another employee for the few weeks needed during peak season so Groff could observe his Sabbath. Pet. App. 31a. Indeed, USPS admitted that this would not have harmed USPS. *Id.* But it chose religious discrimination rather than accommodation.

This is the ignoble path *Hardison* urges others to follow. The courts below took this path. They sanctioned religious discrimination to avoid marginally impacting Groff's employer and coworkers.

* * *

At bottom, *Hardison* conflicts with Title VII's plain meaning, Congress's intent, and this Court's recent Title VII precedent in *Abercrombie*. The Court should take this case to restore the protections that Congress provided and correct *Hardison*'s egregious errors.

ARGUMENT

I. Whether to overrule *Hardison* is an important, recurring question of federal law that affects millions of employees' ability to practice their religion and keep their job.

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

A. *Hardison* rewrites Title VII.

The *Hardison* majority did not faithfully apply Title VII. As three Justices recently affirmed, "*Hardison's* reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari). It does not represent a plausible interpretation at all. For that reason, circuit judges,[2] scholars,[3] and the United

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[2] *E.g.*, *Small v. Memphis Light, Gas and Water*, 952 F.3d 821, 828–29 (6th Cir. 2020) (Thapar, J., concurring).

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

States Solicitor General[4] have all agreed that *Hardison* is wrong and warrants reconsideration.

In fact, it is hard to find anyone who thinks that *Hardison* properly interpreted Title VII—including respondents forced to defend it. One recently admitted before this Court that "the *Hardison* equation very likely is not the best possible gloss on the phrase 'undue hardship.'" Br. in Opp'n at 23, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227 (2021) (No. 19-1388). Indeed, Justice Marshall noted when the Court decided *Hardison* that it conflicts with "simple English usage" and Title VII's "plain words." *Hardison*, 432 U.S. at 88, 92 n.6 (Marshall, J., dissenting).

Title VII's text provides robust protections for religion. It requires unions and employers to accommodate employees' religious beliefs and practices unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Yet the majority in *Hardison* asserted in its penultimate paragraph—"almost as an afterthought"—that any accommodation that requires "more than a *de minimis* cost" is "an undue hardship." *Small*, 952 F.3d at 828 (Thapar, J., concurring).

The *Hardison* majority did not claim that its *de minimis* rule came from Title VII's text.[5] *Id.* The majority gave no reason at all for its impromptu rule, and no party endorsed it. Pet. Br. at 40–41, 47, *Hardison*, *supra* (No. 75-1126); Resp't Br. at 8, 21, *Hardison*,

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

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

supra (No. 75-1126); U.S. Amicus Br. at 20–22, *Hardison*, *supra* (No. 75-1126). To the contrary, the briefs in *Hardison* did not question undue hardship's meaning. The parties—including the United States as amicus—all agreed that the term means far more than *any* non-*de-minimis* cost.

Because Congress did not define the term undue hardship, the term retains its original, public meaning. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (affirming this is the normal rule); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (affirming this is a "fundamental canon of statutory construction"). The reason is that "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. These words have accepted meaning that Congress chose, and the President approved. Judges are, therefore, not free to deviate from words' original meaning. They usurp the legislative process and destabilize the law when they do.

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

Indeed, no pre-*Hardison* dictionary defined undue hardship as simply "more than *de minimis*." And for

good reason. A *de minimis* burden—one that is "very small or trifling," comparable to "a fractional part of a penny"—is no hardship at all. *Black's Law Dictionary* 482 (4th ed. 1968). For another thing, the reading conflicts with the established legal principle that applies to "all enactments"—"*de minimis non curat lex* ('the law cares not for trifles.')" *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Dictionaries at the time defined hardship as "a condition that is difficult to endure; suffering; deprivation; oppression." *Random House Dictionary* 646 (1973). *Webster's* and *Black's* law dictionaries from the time agree. *Webster's New American Dictionary* 379 (1965) (defining hardship as "something that causes or entails suffering or privation"); *Black's Law Dictionary* 646 (5th ed. 1979) (defining hardship as "privation, suffering, adversity"). By itself, hardship requires accommodations that are "difficult to endure."

But hardship is not enough. Congress also required that the hardship be "undue." *E.g.*, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013) ("Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that"); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something greater than hardship."); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (same). So the hardship must exceed conditions that are "difficult to endure."

Dictionaries largely defined undue as "unwarranted" or "excessive." *Random House Dictionary*, *supra*, at 1433. *See also Webster's New American Dictionary*, *supra*, at 968 (defining undue as "not due," as "inappropriate" or "unsuitable," and as "exceeding or violating propriety or fitness."); *Black's Law*

Dictionary, *supra*, at 1370 (defining undue as "[m]ore than necessary; not proper; illegal"); *Black's Law Dictionary* 1697 (4th ed. 1968) (same). Thus, undue hardship requires "a condition that is difficult to endure" and serious enough to be called "excessive." That means that "the accommodation must impose significant costs on the company" to qualify. *Small*, 952 F.3d at 827 (Thapar, J., concurring).[6]

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

B. *Hardison* undermines Congress's efforts to protect religious employees.

Not only does *Hardison* conflict with Title VII's text, but it also "adopts the very position that Congress expressly rejected" when it amended Title VII. *Id.* at 87. *Hardison* refused to accept that Congress required religious accommodation to protect employees from otherwise neutral rules.

1. Pre-amendment interpretations of Title VII rejected accommodation and emphasized formal neutrality.

The EEOC first interpreted Title VII through formal (category) neutrality. EEOC Religious Discrimination Guidelines (1966), *quoted in Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971), *rev'd,*

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

464 F.2d 1113 (5th Cir. 1972). It only required employers and unions to refrain from rules and conduct based on protected categories, like religion. Thus, it permitted employers and unions to prohibit religious exercise under formally neutral rules.

But the EEOC adopted a contrary, accommodation approach one year later. EEOC Religious Discrimination Guidelines (1967), *quoted in Riley*, 330 F. Supp. at 592. Those Guidelines stated that the duty not to discriminate includes an obligation to accommodate religious needs, absent "undue hardship on the conduct of the employer's business." *Id.*

Yet many courts ignored the EEOC Guidelines and applied formal neutrality rather than accommodation. Two cases made this error and motivated Congress to amend Title VII: *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd,* 402 U.S. 689 (1971), and *Riley*, 330 F. Supp. 583.

In *Dewey* and *Riley,* the plaintiffs were fired for religious practices that conflicted with formally neutral work rules. Both courts held that the plaintiffs were not discriminated against because the offending policies applied to all employees regardless of protected class. *Dewey*, 429 F.2d at 328; *Riley*, 330 F. Supp. at 589. Even though the policies uniquely harmed the plaintiffs and prohibited their religious exercise, the courts ignored this disparity.

Dewey and *Riley* held in essence that Title VII does not protect religious exercise—it only protects religious status or belief. *Dewey*, 429 F.2d at 330. *Riley* emphasized that employees with conflicting religious practices must either conform to the workplace or "seek other employment." 330 F. Supp. at 590. Essentially, both *Dewey* and *Riley* held that an employer

need not alter formally neutral rules nor offer *any* accommodation to allow religious practice.

In fact, *Dewey* called accommodation discrimination and therefore rejected it. It reasoned that accommodating the plaintiff would "discriminate against . . . other employees" and "constitute unequal administration of the collective bargaining agreement." 429 F.2d at 330. In other words, *Dewey* objected because religious accommodation is not category neutral.

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

Congress rejected *Dewey* and *Riley*. In response to these decisions, Senator Jennings Randolph encouraged Congress to amend Title VII. 118 Cong. Rec. 705 (1972). Senator Randolph argued that *Dewey* and *Riley* "clouded" religious discrimination's meaning and failed to protect religion as Congress originally intended. *Id.* at 706. So he proposed an amendment to clarify "that Title VII requires religious accommodation, *even though unequal treatment would result*." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (emphasis added).

Senator Randolph explained that his amendment—now Section 701(j)—"assure[s] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972). The amendment, according to Senator Randolph, requires accommodation in most cases and only permits refusal in "a very, very small percentage of cases." *Id.* at 706. Congress intended the amendment, "insofar as possible," to protect employees' religious freedom and "opportunity to earn a livelihood" regardless of religious belief. *Id.*

The Senate unanimously passed Senator Randolph's proposed amendment, and the House similarly approved it. As a guidepost, Congress included copies of *Dewey* and *Riley* in the record because they were the motivation for the amendment. Those decisions thus represent interpretations that Congress never intended and, indeed, rejected by amending Title VII.

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

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

i. *The majority wrongly claimed that neutral rules excuse the failure to accommodate.*

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

majority held that a formally neutral policy precluded liability and eliminated the duty to accommodate.[7]

This holding contradicts Title VII and undermines essential protections for religious employees. Congress amended Title VII to *require* accommodation from otherwise neutral rules "to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye*, 721 F.3d at 456.

Neutrality is not a defense. As Justice Alito observed: "If neutral work rules . . . precluded liability, there would be no need to provide [a] defense, which allows an employer to escape liability for refusing to make an exception to a neutral work rule." *Abercrombie*, 575 U.S. at 779 (Alito, J., concurring). Accommodation is relevant only when an otherwise neutral rule conflicts with a worker's religious practice. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

What is more, Congress foreclosed *Hardison*'s construction. It settled that otherwise neutral rules that prohibit religious exercise are discriminatory. When it amended Title VII, Congress collapsed the distinction cases made between belief and conduct. Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471, 482 (2019). Thus, work rules that prohibit religious conduct (*e.g.*, no employee may cover her head) are the same as work rules that prohibit religious

[7] *Hardison* admitted that the employer could have adopted other policies that would have accommodated the plaintiff. 432 U.S. at 80–81. But it simply called these choices "a matter for collective bargaining." *Id.* at 80.

belief (*e.g.*, no Muslims). Both are unlawful because they discriminate against religion.

The majority argued that the neutral (seniority) rules were special because they came from a collective bargaining agreement ("CBA"). *Hardison*, 432 U.S. at 81. In other words, *Hardison* made a super exception for formally neutral rules in a CBA. It therefore suggested it is *always* an undue hardship for a union or employer to deviate from such rules. *Id.* at 83. But this argument is just as specious. Title VII does not say that a union and employer must accommodate religious employees unless they decide otherwise under a CBA.

It is irrelevant whether the offending policy comes from a CBA, negotiated by a union and employer, or an employer. Rules that prohibit religious exercise under a CBA are just as discriminatory as rules mandated by an employer that prohibit religious exercise.[8] Both prevent employees from practicing their religion.

If anything, resorting to a CBA worsens the problem Congress tried to solve. At its core, accommodation shields individuals from uncaring and sometimes hostile groups. And it often protects minorities who cannot enact policies to protect their beliefs. Adding a union—that eliminates an individual's right to negotiate his own working conditions and that by law represents the majority at the minority's expense—increases, not decreases, the need for accommodation.

Title VII, Section 703(h), does not support the majority's conclusion as it claimed in *Hardison*. That section provides that employers may establish seniority

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

and merit systems that do not otherwise violate the Act. It does not create a safe harbor for duties required elsewhere in Title VII. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976).[9] The CBA exception is thus made up out of whole cloth.

Simply put, unions and employers cannot discard employees' civil rights—even if they agree to do so in a CBA. As the majority conceded, neither a CBA nor seniority system "may be employed to violate the statute." *Hardison*, 432 U.S. at 79. But it held, nevertheless, that the duty to accommodate does not require unions and employers "to take steps inconsistent with [a CBA]." *Id.* This holding violates Title VII. As Justice Marshall recognized, "an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations." *Id.* at 96 (Marshall, J., dissenting). Work rules that prohibit religious exercise violate the statute—even when a union also agrees to discriminate.

ii. The majority wrongly claimed that accommodation is discriminatory.

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

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[9] Section 703(h)'s legislative history also shows that Congress intended that section to only prevent challenges to pre-act seniority and merit systems. *Franks*, 424 U.S. at 761–62.

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

Accommodation, moreover, does not discriminate against other employees. *Hardison*'s charge to the contrary, according to Judge Thapar, is "unreasonable on its face." *Small*, 952 F.3d at 828 (Thapar, J., concurring). Consider the Americans with Disabilities Act, which requires accommodations for disabled employees. "No right-minded person would call such accommodations a form of impermissible discrimination against *non*-disabled employees." *Id.* The singular opposition toward religious accommodation reflects our society's increasing hostility toward religion—and the urgent need to protect it.

Congress amended Title VII to prevent employers from firing religious employees just as the statute protects other employees from discrimination. No accommodation means that employees, like Groff and Hardison, must often choose between their job and their God. Accommodation simply allows these employees the same opportunity to earn a living as other employees who do not share their religious beliefs. For this reason, Justice Brennan called accommodation "nothing more than . . . neutrality in the face of religious differences." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

Refusing to accommodate causes inequality: employers may exclude religious employees from the workforce while others are protected. Hardison and Groff—along with those who have similar religious beliefs—suffer employment capital punishment for their faith. Others do not. After *Dewey* and *Riley*, Congress determined that accommodation is necessary to protect religious employees. *Hardison* "disregard[s] [these] congressional choices" and permits religious discrimination. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Thus, USPS may fire Groff when it could just as easily accommodate him.

C. *Hardison* harms religious employees.

Hardison "deals a fatal blow to all efforts under Title VII to accommodate . . . religious practices." *Id.* at 86. The decision in effect eliminates the duty to accommodate and erodes our nation's commitment to religious freedom and diversity. In practice, *Hardison* means that unions and employers "need not grant even the most minor special privilege" to allow religious employees to keep their job and their faith. *Id.* at 87. And so employees under *Hardison* must often "make the cruel choice" between "surrendering their religion or their job." *Id.*

1. *Hardison* allows any cost to negate critical protections for religious employees.

Hardison held that an employer need not tolerate more than a *de minimis* cost to accommodate an employee's religion. But almost any cost, by definition, is more than *de minimis*. As the Supreme Court wrote elsewhere: *de minimis* costs are "trifles," mere "[s]plit second absurdities" or inconveniences. *Sandifer*, 571 U.S. at 233–34 (quoting *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680, 692 (1946)). Such costs are so trivial, the law does not recognize them. *Id.* Yet *Hardison* claims that Title VII does. Any cost greater than a "trifle" or "[s]plit second" inconvenience under *Hardison* excuses religious discrimination and refusal to accommodate.

But *Hardison* goes further. While the majority stated that an employer need not accept *more* than a *de minimis* cost, it held, in effect, that an employer need not bear *any* cost. No cost options were available in *Hardison*. 432 U.S. at 92 n.6 (Marshall, J., dissenting). Another employee could have done Hardison's work, but the Court rejected this option out of hand based on "efficiency loss"—without evidence showing that efficiency would be lost. *Id.*

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

Thus, *Hardison* did not even require a *de minimis* cost to accommodate a religious employee. The practical result is that many employers and courts view *Hardison* as carte blanche to discriminate against religion. Religious employees suffer as a result.

In effect, courts apply *Hardison* as a per se rule: "virtually all cost alternatives"—no matter how large or small—are "unduly harsh." Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After* Ansonia Board of Education v. Philbrook, 50 U. Pitt. L. Rev. 513, 547 (1989); *see also* Debbie N. Kaminer,

Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees, 20 Tex. Rev. L. & Pol. 107, 139–40 (2015) ("[C]ourts have almost unanimously held that employers" need not bear "any economic costs or [efficiency] costs . . . to accommodate a religious employee.").

For courts, it is immaterial whether the costs are direct—like paying a temporary replacement or additional wage—or indirect—like lost efficiency or increased administrative work. Zablotsky, *supra*, at 544–45. Accommodation is considered an undue hardship "if it requires an employer to bear any additional cost whatsoever." *Id.* at 544.

Courts have even rejected accommodations that require *no* economic costs at all. Kaminer, *supra*, at 141; Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 392 (1997). Many courts have reasoned that it is an undue hardship for an employer to alter otherwise neutral policies or provide an accommodation that *potentially* affects coworkers.[10]

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[10] *See, e.g.*, *EEOC. v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008) ("If an employer reasonably believes that an accommodation would . . . impose 'more than a *de minimis* impact on coworkers,' then it is not required."); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact on co-workers" based on *Hardison* "is sufficient to constitute an undue hardship."); *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988) (holding an employer need not rearrange its otherwise neutral schedule, particularly if other employees oppose changes); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145 (5th Cir. 1982) (holding a flexible

The result is that Title VII provides little, if any, protection for employees to practice their religion. Religious employees, like Groff and Hardison, suffer for following their faith—because *Hardison* allows it.

2. *Hardison* allows a heckler's veto and harms religious minorities.

Hardison conditions religious employees' civil rights on co-worker preferences. The majority in *Hardison* rejected accommodation because it thought that an accommodation would impact co-workers. 432 U.S. at 81. *Hardison* thus invites, if not requires courts to consider whether coworkers favor accommodation.

On that basis, many courts have inferred an atextual rule from *Hardison*: "an accommodation that causes more than a *de minimis* impact on co-workers creates an undue hardship." Pet. App. 26a.[11] Based on that rule, the courts below sanctioned USPS's refusal to accommodate Groff's religious beliefs. *Id.* at 24a.

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

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scheduling system was adequate accommodation); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977) ("[A]n employer should [not] have to adjust its entire work schedule to accommodate individual religious preferences.").

[11] See cases cited *supra* note 10, for further examples.

Congress enacted Title VII to protect unpopular minorities from those who prefer discrimination. Yet *Hardison* counts coworkers' unwillingness to accept and accommodate religious employees as a defense rather than a defect. Consider any other protected class: Title VII prohibits discrimination even if coworkers prefer it. *Hardison*'s coworker rule simply discriminates against religion. Accommodation under Title VII is particularly needed when employers and coworkers *disfavor* it. A legal duty is unneeded when accommodation is favored.

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

Or take the Family Medical Leave Act ("FMLA"). The FMLA applies to the USPS, and the USPS states that employees may use "up to 12 workweeks of leave within a Postal Service leave year" under the Act. USPS, *515 Absence for Family Care or Illness of Employee*, https://about.usps.com/manuals/elm/html/elmc5_005.htm (last visited Sep. 23, 2022). This leave requires coworkers to do more work or employers to wait (at least) 12 weeks until the employee returns to work. Leave does not depend on its impact on coworkers. And because our society accepts family medical and

maternity leave, it is not considered discriminatory—even when it burdens coworkers.

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

Furthermore, even when courts do not directly consider coworker preferences, *Hardison* encourages them to do so subtly by elevating majoritarian work rules. Work rules reflect cultural beliefs—they are not neutral. Many businesses close on Sunday because that is a day when many Americans attend church. And Christmas is a federal holiday rather than Eid Al-Fitr because many consider it an important day. Individuals who share dominant cultural beliefs rarely need accommodation. Their workplaces and work rules reflect their beliefs.

In Pennsylvania during the 17th and 18th centuries, for example, there was no exemption from military service or oath taking while the Quakers were politically dominant. At that time, the laws reflected the Quakers' values and required no one to serve in the military or take oaths. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1802 (2006). The Quakers only needed accommodation when they lost control—"when the Crown imposed oath requirements and

when a new political majority enacted conscription to raise an army for the Revolution." *Id.*

In short, *Hardison* endangers minorities who most need protection from the majority by elevating rules that reflect the majority's values and conditioning accommodation on coworker acceptance. *Hardison* thus undermines religious freedom and diversity.

3. *Hardison* allows religious discrimination.

Hardison allows employers to discriminate against religious employees. As the United States explained, accommodation "removes an artificial barrier to equal employment opportunity * * * except to the limited extent that a person's religious practice *significantly and demonstrably affects* the employer's business." U.S. Amicus Br. at 21, *Patterson*, *supra* (No. 18-349) (quoting U.S. Amicus Br. at 20, *Hardison*, *supra* (No. 75-1126). In this way, *Hardison* allows ambivalent employers and those governed by CBAs to resurrect barriers that exclude religious individuals.

Hardison also trivializes religion by allowing religious practice discrimination. It limits Title VII's protection to mere belief. The right to believe, however, is hollow without the right to practice—it subjects believers to persecution for following their faith. Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 176 (2009). *Hardison* claimed that policies that discriminate against Sabbatarians and exclude them from the workforce are not discriminatory because they apply equally.[12] 432 U.S. at 78. But the Court failed to appreciate that the

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[12] *Hardison* admitted that the employer could have considered its employees' religious needs when it scheduled work, but the majority denigrated this option as non-neutral. 432 U.S. at 80.

policy excluded no other protected classes. It did, however, exclude members of Sabbatarian religions.

General policies that ban religious practices ban believers. Laycock, *Exemption Debate*, *supra*, at 150. It is immaterial whether employers explicitly prohibit Sabbatarians from employment or simply require all employees to work on the Sabbath. It is also immaterial whether an employer bans Muslims and Jews or forbids head coverings and beards. Many Sabbatarians, Muslims, and Jews cannot work under such policies. Simply put, banning religious practices bans believers—even if the policies apply generally.

Congress, therefore, protected both belief and practice under Title VII. *Hardison*, however, undermines Congress's intent and allows employers to exclude believers through policies that discriminate against religious practices. Thus, *Hardison* allows religious discrimination and employment persecution.

II. *Hardison* conflicts with this Court's recent Title VII precedent protecting religion.

In *Abercrombie & Fitch Stores*, 575 U.S. 768 (2015), this Court held that Title VII requires more than neutrality.[13] There, the Court rejected the argument that Title VII *only* prohibits rules "that treat religious practices less favorably than similar secular practices" *Id.* at 775. While formal neutrality may apply elsewhere, the Court declared it does not apply to religion. As the Court put it, "Title VII does not demand mere neutrality" for religion—*e.g.*, employers must treat religious practices "no worse than other practices." *Id.* The statute requires "favored

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[13] To be sure, *Abercrombie* did not discuss undue hardship. 575 U.S. at 772 n.1. But its reasoning refutes *Hardison*'s framework.

treatment." *Id.* Unions and employers must accommodate religious practices or show why accommodation is impossible without undue hardship.

The Court clarified that employers may adopt otherwise neutral policies, like the no-headwear policy at issue in *Abercrombie*. But when an employee requires religious accommodation "an otherwise-neutral policy" does not excuse the duty to accommodate. *Id.* That a policy is formally neutral "is no response." *Id.* Rather, "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

Abercrombie's reasoning contradicts *Hardison*. The majority in *Hardison* rejected accommodation to avoid supposedly favored religious treatment. *Abercrombie*, however, holds that Title VII demands "favored" religious treatment. *Id.* Formally neutral rules are not a defense. In short, even if accommodation is preferential treatment rather than neutral treatment, *Abercrombie* recognizes that Title VII requires it.

CONCLUSION

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

Respectfully submitted,

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

LAURA D. NAMMO
CENTER FOR LAW & RELIGIOUS
FREEDOM
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road, Ste. 302
Springfield, VA 22160
(703) 642-1070
laura@clsnet.org

Counsel for Amici

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