NO. 22-174

IN THE

Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, Postmaster General,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Regulations

Other Authorities

INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus curiae CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program that serves the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. In keeping with its mission, CVEF supports laws that protect the God-given natural right to free exercise of religion to the full extent consistent with civil order. It believes that Title VII of the Civil Rights Act of 1964 was enacted for this purpose and should be interpreted to further the religious liberty of employees in the workplace.

Given its focus on human dignity, CVEF is deeply concerned about the threat *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), poses to the rights of workers seeking religious accommodations, as illustrated by *Groff v. DeJoy*, 35 F.4th 162 (3d Cir. 2022). CVEF believes this Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), is more consistent with the goals of Title VII. Accordingly, CVEF asks this Court to resolve the tension between *Abercrombie* and *Hardison* by clarifying that an employer's duty to accommodate cannot be shirked because of near-*de minimis* burdens. Proper application of this Court's decision in *Abercrombie* will result in employers taking their duty seriously, so that workers will not need to renounce their religious convictions to keep their jobs.

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[1] Under Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court's decision in *Abercrombie* clarified that religious practices are given "favored treatment" under Title VII, furthering the promise of equal access to the dignity of work for persons of all faiths.

The traditions of this nation have long affirmed the idea that work is a blessing that can bring dignity to the human person. Religious social teachings also offer useful insights in this area, urging employers to seek the common good of workers in their many aspects of life—even in religious duties that intersect with the workplace. One reason Title VII was enacted was to ensure that workers of all creeds had access to employment and the dignity of earning a living.

Sadly, this Court's ill-advised *dicta* in *Hardison* has eroded Title VII's goal of equal access for religious persons. Lower courts have attached undeserved importance to a single phrase of *dicta* implying that an employer suffers "undue hardship" whenever a religious accommodation bears more than *de minimis* cost. This reading of Title VII—wrong from the start and inconsistent with other civil rights regimes—singled out "religion" for disfavored treatment among the many protected characteristics insulated from discrimination. Worse still, *Hardison* was a byproduct of this Court's repudiated test in *Lemon v. Kurtzman*, which itself wrought terrible consequences.

The good news is that this Court's rejection of *Lemon* in favor of a more historical approach to its religion jurisprudence provides good reason to discard *Hardison*'s *dicta* in in favor of *Abercrombie*'s "favored treatment" approach, which is more consistent with the origins and intent of Title VII.

The time is right for this Court to bury *Hardison's* legacy and return the promise of dignity to religious workers offered by its decision in *Abercrombie*.

ARGUMENT

Consistent with Title VII's goal of providing religious employees with equal access to the dignity of work, this Court in *Abercrombie* recognized that Title VII favors religious accommodations. Now this Court should jettison the senseless "undue hardship" standard drawn from *dicta* in *Hardison,* which defies *Abercrombie*'s analysis and Title VII itself by limiting an employer to "*de minimis*" accommodation costs.

I. TITLE VII'S "FAVORED TREATMENT" FOR RELIGIOUS ACCOMMODATIONS IN THE WORKPLACE, RECOGNIZED BY THIS COURT IN *ABERCROMBIE*, AFFIRMS THE DIGNITY OF WORKERS OF ALL FAITHS.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, this Court explained that Title VII grants "religious practices" in the workplace "favored treatment" when considering accommodations, allowing workers to practice their religion "despite the employer's normal rules to the contrary."[2] This affirming view of accommodations—supported by the statute's text—imbues employees of all faiths with the dignity of work,[3] a concept woven into the fabric of Title VII.

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[2] 575 U.S. 768, 772 n.2, 775 (2015).

[3] While discussions about "dignity" may be overworked in some circles, and mistaken in others, this Court has not eschewed the term, invoking it in over 900 opinions. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–79 (2011). *See, e.g., Nat'l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 685 (1989) (Scalia, J., dissenting).

A. This Court's interpretation of Title VII in *Abercrombie* requires that employers grant "favored treatment" to religious practices in workplace accommodations.

In *Abercrombie*, a Muslim woman who wore a religious headscarf to her hiring interview sued the store for "disparate treatment" under Title VII when it failed to hire her due to its neutral "Look Policy," which prohibited employees from wearing "caps" because they were "too informal for Abercrombie's desired image."[4] In reversing summary judgment for the store, this Court rejected Abercrombie's argument that an employee could not advance a disparate-*treatment* claim under Title VII if an employer applied a "neutral" policy because such policies could only be attacked using a disparate-*impact* theory.[5]

This Court began its analysis by noting that Title VII—expanded in 1972 to define "religion" to mean more than mere "belief"[6]—now set forth "religious practice" as "one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated."[7]

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[4] *Abercrombie*, 575 U.S. at 770.

[5] *Id.* at 774.

[6] Civil Rights Act of 1964, §§ 701, 703(a), 78 Stat. 253–255. *See also Abercrombie*, 575 U.S. at 785 (Thomas, J., concurring in part and dissenting in part) (discussing the changes to Title VII).

[7] *Id.* at 774–75 (citing 42 U.S.C. § 2000e(j)).

This Court then went on to explain why a "neutral" policy that does *not* "treat religious practices less favorably than similar secular practices" can still be assailed under a disparate-treatment theory:[8]

> *Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice."*[9]

It is critical to the proper resolution of the question presented by the Petitioner that this analysis in *Abercrombie* be honored. This Court's recognition that Title VII gives favored treatment to religious practices is also a promise that laborers of all faiths will not be deprived of the dignity of work.

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[8] *Id.* at 775.

[9] *Id.*

B. Notions of the "dignity of work" emanate from American history and tradition, as well as from religious social teachings.

As interpreted by this Court in *Abercrombie,* Title VII's requirement to favor religious accommodations in the workplace expands equal access to the "dignity of work." This concept—that labor is both an individual blessing and a societal good—stems from this nation's history and traditions, from faith-based insights about human nature, and from the Civil Rights Act itself.

"As far back as the colonial era, New Englanders invested work with an almost religious character, and white Americans generally spoke of the dignity of work, recognizing that work had much to do with defining the person."[10] Many scholars have recognized that labor "instill[s] a purpose to life" that "allows us to gain self-respect from the dignity that meaningful work allows us to achieve."[11]

In his first inaugural address, Thomas Jefferson argued that people were "happy and prosperous" when Government left them "free to regulate their own pursuits of industry," and did not "take from the mouth of labor the bread it has earned."[12] Dr. Martin

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[10] Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 531 (1997).

[11] C. John Cicero, *Tns, Inc. - the National Labor Relations Board's Failed Vision of Worker Self-Help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19, 80 (1994).

[12] Thomas Jefferson, First Inaugural Address, March 4, 1801.

Luther King, Jr., put a similar concept this way: "[O]ur society will come to respect the sanitation worker if it is to survive, for the person who picks up our garbage … is as significant as the physician, for if he doesn't do his job, diseases are rampant. All labor has dignity."[13]

While many religious traditions have "eloquently … supported the dignity of work,"[14] Catholic social teaching[15] has been especially prescient in the area of workplace accommodations. Its insights illuminate why continued strong support for religious accommodations is critical to furthering the dignity of labor inherent in Title VII.

In 1891, as industrialization transformed the world's workforce, Pope Leo XIII's groundbreaking encyclical, *Rerum Novarum*, appealed to "natural reason" while lauding gainful work, which "enables [a

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[13] Rev. Martin Luther King, Jr., Remarks Delivered at the American Federation of State, County, and Municipal Employees mass meeting, Bishop Charles Mason Temple, Church of God in Christ, Memphis, Tennessee, March 18, 1968.

[14] David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 128 (1988) (citing Jewish scholars, such as Professor Robert Cover).

[15] Unlike faith instruction, Catholic social teachings take the "lived experience of Church communities across time and locale and apply them broadly," making them "accessible to anyone, believer or not … as a tool for public policy across a wide variety of social, political, and economic systems." Nathaniel Romano, *Subsidiarity & Vulnerability Theory: A Case Study for Deepening the Relationship Between Catholic Social Teaching and the Responsive State*, 71 CATH. U. L. REV. 731, 734 (2022).

person] to earn an honorable livelihood."[16] The document urged employers "to respect in every man his dignity as a person," and to ensure "that the worker has time for his religious duties; [and] that he be not exposed to corrupting influences and dangerous occasions…."[17]

Rerum Novarum's surprisingly modern view of labor recognized that, to respect the dignity of work, an employer must respect both the secular and religious aspects of the worker's life. Periodic reflections on the teachings in that document have led later popes to discuss additional concepts that reveal the importance of accommodating religious practices in the workplace.

First, government has a duty to "the common good" to create "the conditions required for attaining man's true and complete good, including his spiritual end."[18] This includes the passage of laws protecting the rights of workers. Title VII has fulfilled this duty with its robust "favored treatment" in workplace accommodations.

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[16] Rerum Novarum: Encyclical Letter of the Holy Father Pope Leo XIII, para. 20 (May 15, 1891), available at https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

[17] *Id*.

[18] Octogesima Adveniens: Encyclical Letter of the Holy Father Pope Paul VI, para. 46 (May 14, 1971), available at https://www.vatican.va/content/paul-vi/en/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens.html.

Further—because gainful labor helps workers to "become[] 'more a human being'"[19]—employers must develop "an authentic culture of work and help workers to share in a fully human way in the life of their place of employment," through "'humane' working hours" and "the right to express one's own personality at the work-place without suffering any affront to one's conscience or personal dignity."[20]

Finally, the workplace is where "many aspects of life enter into play: creativity, planning for the future, developing our talents, living out our values, relating to others, giving glory to God."[21]

In sum, expanding access to the dignity of work for laborers of all faiths is consistent with "our constitutional tradition," which affirms that the "free exercise" of religion "is essential in preserving [a person's] own dignity and in striving for a self-definition shaped by their religious precepts."[22]

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[19] Laborem Exercens: Encyclical Letter of the Holy Father Pope John Paul II, para. 9 (May 14, 1981), available at https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

[20] Centesimus Annus: Encyclical Letter of the Holy Father Pope John Paul II, para. 15 (May 1, 1991), available at https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

[21] Laudate Si': Encyclical Letter of the Holy Father Pope Francis, para. 127 (May 24, 2015), available at https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

[22] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring).

C. Title VII's purpose and text aim to provide equal access to the dignity of work.

One of the underlying purposes of Title VII was to give laborers of all backgrounds and creeds equal access to the dignity of work. That purpose is woven into the very fabric of Title VII itself.

On July 2, 1964, the Civil Rights Act of 1964 was enacted "to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity."[23] The legislative history of Title VII reveals Congress's judgment that "continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity."[24]

Title VII sought "to implement the goals of human dignity and economic equality in employment."[25] Even a "conservative reading" of the statute reveals its vision of "a world in which the opportunity to work and contribute to the economy is determined by merit rather than prejudice. This benefits the individual worker, who has access to the dignity of work and the

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[23] *President Lyndon B. Johnson's Radio and Television Remarks Upon Signing the Civil Rights Bill*, PUB. PAPERS OF LYNDON B. JOHNSON 1963–64, VOL. 2 at 842–44 (1965) (quoted in *Griffith v. City of Des Moines*, 387 F.3d 733, 739–40 (8th Cir. 2004) (Magnusson, J., concurring)).

[24] H.R. Rep. No. 1370, 87th Cong., 2d Sess. 2156 (1962) (discussed in *Boureslan v. Aramco*, 857 F.2d 1014, 1027–28 (5th Cir. 1988)).

[25] *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994) (discussing sex discrimination).

ability to support themselves."[26] Further, it benefits society by ensuring that the nation derives the advantages that can be gained from the diligence and creativity of all its members.

Additionally, Congress has often extolled gainful work as a bedrock principle, declaring that "citizens should have the opportunity to live and work with dignity."[27] When requiring accommodations in the Americans with Disabilities Act (ADA), Congress saw "that the benefits of gainful employment for individuals with disabilities—dignity, financial independence, and self-sufficiency, among others—outweigh simple calculations of ease or efficiency."[28] Likewise, "many state workers'-rights provisions and civil-rights acts spotlight the importance of employment that fosters dignity and diminishes the worry of discrimination, particularly on the basis of religious adherence."[29]

In sum, Title VII stands within a long line of legislative efforts designed to expand access to the

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[26] Steven L. Winter, *Bridges of Law, Ideology, and Commitment*, 37 TOURO L. REV. 1981, 2005–06 (2022).

[27] *See generally* Amicus Br. of Foundation for Gov't Accountability, *Azar v. Gresham*, 141 S. Ct. 890 (2020) (dismissed from merits docket) (quoting Proclamation No. 7600, 67 Fed. Reg. 62167 (Oct. 1, 2002), and many other declarations).

[28] *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018).

[29] Amicus Br. of Amer. Cornerstone Instit., *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) (discussing statutes from Louisiana, Texas, Idaho, and Kentucky).

dignity of work, to include favoring religious practices so that they can be accommodated in the workplace.

II. *ABERCROMBIE*'S RECOGNITION THAT TITLE VII FAVORS ACCOMMODATION OF RELIGIOUS PRACTICES IS IRRECONCILABLE WITH *HARDISON*'S HARMFUL *DE MINIMIS* STANDARD FOR UNDUE HARDSHIP.

Ill-conceived *dicta* in *Trans World Airlines, Inc. v. Hardison* has led a generation of lower courts to raze Title VII's goal of expanding equal access to the dignity of work. The manifest result of decisions by lower courts applying *Hardison*'s *de minimis* standard has allowed employers to deny religious accommodations that do not impose undue hardships on their business operations. Thankfully, this Court's analysis in *Abercrombie* has undermined the more-than-*de-minimis* standard and laid out an approach that is truer to the text and purpose of Title VII.[30]

A. *Hardison*'s hasty, unsupported *dicta* has created a hollow "undue hardship" test.

In *Hardison*, a clerk subject to a collective-bargaining seniority system sought a religious accommodation to avoid working on his Saturday sabbath.[31] When TWA failed to accommodate his request, purportedly due to its seniority system, Hardison refused to violate his religious principles by

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[30] *See generally* Kade Allred, *Giving Hardison the Hook: Restoring Title VII's Undue Hardship Standard*, 36 BYU J. PUB. L. 263 (2022) (arguing *Abercrombie*'s impact on *Hardison*).

[31] 432 U.S. 63, 66–68 (1977).

working on the sabbath, and he was subsequently fired for insubordination.[32]

In ruling for TWA, this Court's majority opinion found that it would cause "an undue hardship within the meaning of the statute as construed by the EEOC guidelines" to force TWA to violate its collective bargaining agreement.[33] In so doing, the majority explained that the only guidance "in effect at the time the relevant events occurred" was the "EEOC guidelines" written in 1967.[34]

The majority recognized that Congress had added § 701(j) to Title VII in 1972, re-defining "religion" "[i]n part 'to resolve by legislation' some of the issues raised in" prior cases involving the accommodation of religion.[35] Despite this recognition, the majority appeared to opine about the "undue hardship" standard contained not only in the EEOC Guidelines, but also in § 701(j), the amended language *not* at issue in the case.[36] Then, in a single hasty reference, the majority stated, "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[37]

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[32] *Id.* at 69–70.

[33] *Id.* at 77.

[34] *Id.* at 76–77.

[35] *Id.* at 73 (citing 118 Cong. Rec. 706 (1972) (quoting from Senator Jennings Randolph in support of adding § 701(j)).

[36] *Id.* at 74–75.

[37] *Id.* at 84.

The dissenting Justices proved the error in the majority's comment. They recounted the history of the 1972 re-definition of "religion" and pointed out that the majority was acting "in direct contravention of congressional intent" by "effectively nullifying" Title VII in "rejecting any accommodation that involves preferential treatment."[38] Further, they "seriously question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost,' especially when the examples the [EEOC] guidelines give of possible undue hardship is the absence of a qualified substitute."[39]

In recent years, at least three Justices on this Court have openly acknowledged that the majority's more-than-*de-minimis* language—which has worked such mischief in lower courts—was *dicta*, and that the "proposition endorsed by [*Hardison*]" should be "reconsider[ed]."[40] This is so because the majority's loose *de minimis* language "does not represent the most likely interpretation of the statutory term"; "the parties' briefs in *Hardison* did not focus on the meaning of that term; no party in that case advanced

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[38] *Id.* at 89 (Marshall, J., dissenting) (quoting 118 Cong. Rec. 705–06, and recounting Senator Randolph's introduction of § 701(j) "to make clear that Title VII requires religious accommodation, even though unequal treatment would result").

[39] *Id.* at 92 n.6 (Marshall, J., dissenting).

[40] *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 n.* (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari). *See also Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting); *Abercrombie*, 575 U.S. at 787 n.* (Thomas, J., concurring in part and dissenting in part).

the *de minimis* position; and the Court did not explain the basis for this interpretation."[41]

Thankfully, *Hardison*'s ruinous legacy—which undermines Title VII's goal of granting equal access to the dignity of work—cannot survive *Abercrombie*'s erosion of its central, tenuous "endorsed proposition."

B. *Hardison*'s unfortunate *dicta* singularly denies the dignity of work to those who request religious accommodations that require more than a *de minimis* cost.

Hardison's groundless *dicta* allows employers to claim an undue hardship under Title VII for any religious accommodation that carries with it more than a *de minimis* cost. This has resulted in a corrosion of the statute's goal of providing religious employees with equal access to the dignity of work.

Even before the *Abercrombie* decision, *Hardison*'s peculiar reading of "undue hardship" was making Title VII's maltreatment of religious accommodations an anomaly among civil rights statutes.

Perhaps Justice Gorsuch put it best: "Title VII's right to religious exercise has become the odd man out. Alone among comparable statutorily protected civil rights, an employer may dispense with it nearly at whim."[42] To illustrate, he noted that more recent civil rights acts—the Americans with Disabilities Act

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[41] *Patterson*, 140 S. Ct. at 686 n.* (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari).

[42] *Small*, 141 S. Ct. at 1228–29 (2021) (Gorsuch, J., joined by Alito, J., dissenting from denial of certiorari).

(ADA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Affordable Care Act (ACA)—each defined "undue hardship," as "an action requiring significant difficulty or expense, when considered in light of [several statutory] factors."[43] These standards are all much higher than *Hardison*'s suggestion that any cost more than *de minimis* poses an undue hardship.

Nor has this anomaly gone without unjust impact on those seeking equal access to the dignity of work. *Amici* in the instant case have collected examples to demonstrate how *Hardison's* unsupported *dicta* often has assisted employers in denying accommodations in situations where the notion of an "undue" hardship strains credulity: providing an employee even an ounce of space to pray in an entire office building, or slightly shifting a meal break for Muslim employees during Ramadan, to recount only two of their many examples.[44] Justice Gorsuch has contrasted that Title VII Muslim-break case with a similar ADA case, where a court found that the employer of a disabled

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[43] *See id.* at 1228–29 (quoting from ADA, 42 U.S.C. § 12111(10)(A) (added 1990); USERRA, 38 U.S.C. § 4303(15) (added 1994); ACA, 29 U.S.C. § 207(r)(3) (added 2010)). Congressional attempts to statutorily fix *Hardison's* mistake have thus far failed. *See* Mary-Lauren Miller, *Inoculating Title VII: the "Undue Hardship" Standard and Employer-Mandated Vaccination Policies*, 89 FORDHAM L. REV. 2305, 2315–18 (2021).

[44] Amicus Br. of Thomas More Society and The Jewish Coalition for Religious Liberty, *Groff*, 143 S. Ct. 646 (2023) (discussing *Farah v. A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, at *23–25 (D. Kan. Nov. 20, 2013), and *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018)).

diabetic worker could "alter the snack break schedule" without any undue hardship.[45]

The peculiarities began in *Hardison* itself. Justice Marshall noted that, although TWA was "one of the largest air carriers in the nation," it claimed an undue hardship to pay "$150 [in overtime] for three months, at which time [Hardison] would have been eligible to transfer back to his previous department."[46]

Nor have the inane oddities lessened over the years. *Hardison*'s *dicta* recently led to the perverse workplace situation where even "subpar employees" could "receiv[e] more favorable treatment than highly performing employees who seek only to attend church."[47]

Thus, a law intended to provide equal access to the dignity of work for religious persons now *restricts* their access due to *Hardison*'s hasty turn-of-phrase.

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[45] *Small*, 141 S. Ct. at 1229 (Gorsuch, J., joined by Alito, J., dissenting from denial of certiorari) (contrasting *JBS*, 339 F. Supp. 3d at 1181, with *Spiteri v. AT&T Holdings, Inc.*, 40 F. Supp. 3d 869, 878 (E. D. Mich. 2014)).

[46] *Hardison*, 432 U.S. at 91, 92 n.6 (Marshall, J., dissenting).

[47] *Small*, 141 S. Ct. at 1228–29 (Gorsuch, J., joined by Alito, J., dissenting from denial of certiorari).

C. *Hardison*'s disfavor toward religious accommodations cannot be reconciled with *Abercrombie*'s recognition that Title VII favors religious practices.

In addition to furthering inconsistent treatment among comparable civil rights—with accompanying injustices in lower courts—*Hardison*'s anomalous reading of Title VII is also contrary to this Court's modern understanding of Title VII and the proper place of religious practice in the public sphere, as confirmed by *Abercrombie*. In at least three areas, then, *Hardison*'s feeble position has been hopelessly eroded by developments in religious-liberty law.

First, *Hardison*'s compromise, attempting to solve a non-existent problem, is now a useless remnant of a by-gone era. Second, *Hardison*'s anomalous *de minimis* "solution" leads to workplaces that disfavor religious practices—the opposite goal of Title VII. Finally, *Hardison*'s reasoning is grounded on the faulty premise that religious accommodation in the workplace cannot inconvenience other employees.

1. *Hardison* was birthed in woebegone days to solve a non-existent problem.

Hardison did not arrive at this Court as a case seeking an interpretation of "undue hardship" in the 1967 EEOC Guidelines. Rather, the first question presented asked whether Title VII violated the First Amendment "by requiring an employer to grant preferential treatment to an employee solely because of his religious practices by" either "depriving … more senior employees … of their seniority rights," or

"financing an employee's religious observances through payment of overtime wages…."[48]

In other words, the *Hardison* petitioner's efforts to dodge Title VII's duty of religious accommodation—a duty meant to protect the free exercise of religion—was grounded in the fatally flawed decision in *Lemon v. Kurtzman*,[49] which purported to address the law respecting the establishment of religion. In fact, that thorny issue constituted the key discussion in the parties' briefs.[50]

The majority opinion in *Hardison* skillfully sidestepped the petitioner's arguments raising the unprincipled *Lemon* test.[51] Sadly, the price to pay for the compromise of dodging *Lemon* was too high: an overly cautious and poorly reasoned take on Title VII's "undue hardship" standard.[52] As Justice Marshall put it, "The Court's interpretation of the statute, by effectively nullifying it, has the singular

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[48] Br. for Petitioner Trans World Airlines, Inc., p. 4 *Hardison*, 432 U.S. 63. *See also Hardison*, 432 U.S. at 70.

[49] 403 U.S. 602 (1971).

[50] *See* Br. for Petitioner Trans World Airlines, Inc., pp. 21–46, and Br. for Respondent, pp. 23–38, *Hardison*, 432 U.S. 63.

[51] *See Hardison*, 432 U.S. at 70 (noting the issue in passing).

[52] *See* Charles A. Sullivan, *Retaliation and Requesting Religious Accommodation*, 70 CASE W. RES. L. REV. 381, 397 (2019) (recounting arguments by commentators that the majority's "strained interpretation was driven by Establishment Clause concerns should Congress be held to have imposed a too-robust duty to accommodate").

advantage of making consideration of petitioners' constitutional challenge unnecessary."[53]

But with "2023 hindsight," it is now clear that, what the majority thought was the path of least resistance, was actually a blind alley. At the time of the decision in *Hardison*, this Court had embarked on an interpretive approach to the First Amendment that expanded the reach of the text prohibiting "laws respecting the establishment" of religion at the expense of the clause protecting the "free exercise thereof." The majority did not know then what became painfully clear over time: *Lemon*'s "attempt" to craft a "'grand unified theory' for assessing Establishment Clause claims" was an "'ambitiou[s],' abstract, and ahistorical approach" riddled with "shortcomings" that "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators."[54] That is why this Court replaced *Lemon* with an approach that interprets the Establishment Clause by "'reference to historical practices and understandings."[55]

This Court should be equally bold in discarding *Hardison*'s shoddy analysis and *dicta* as a vestige of the woebegone days when *Lemon* "stalked" the Court

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[53] *Id.* at 89–91 (Marshall, J., dissenting) (discussing why Title VII does not violate the *Lemon* test).

[54] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (quoting *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067, 2101 (2019) (plurality opinion), and *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 768–769, n.3 (1995) (plurality opinion)).

[55] *Id.* (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

"like some ghoul in a late-night horror movie"[56]—a time when some worried unnecessarily about whether the Establishment Clause required this Court "'to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'"[57] The Clause requires no such purge. Because this is so, there is nothing to be feared from applying *Abercrombie*'s analysis to find that Title VII protects the dignity of work for employees of faith by favoring the accommodation of religious practices unless there is a truly "*undue*" hardship to employers.

2. Hardison exiles religious workers by injecting "disfavor" into Title VII.

In its effort to avoid a perceived *Lemon* problem, the majority in *Hardison* inserted an element of "disfavor" toward religious practices into Title VII. Remarkably, it accomplished this result through a murky reference in a single line of *dicta*, creating a previously non-existent standard without either an explanation or a justification. The lasting result of this hasty *dicta* has been the exile of persons of faith from the workplace due to failures to accommodate their religious practices.

Thus far, this Court has not returned to *Hardison* to resolve the problem that its *dicta* created. But as the 21st century wheels of justice turned in favor of

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[56] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

[57] *Kennedy*, 142 S. Ct. at 2428 (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment)).

religious freedom, *Hardison* became further isolated and alienated from the rest of this Court's religion jurisprudence, which has marched steadily toward greater religious liberty in the public sphere and less fear of imagined establishments of religion.[58] After *Abercrombie*, it is clear that *Hardison*'s misreading of the "undue hardship" standard is ripe for correction.

By watering down the term "undue hardship" to mean no more than a *de minimis* cost to the employer, the majority in *Hardison* effectively negated a fix that Congress had made to Title VII in the wake of cases involving failed accommodations. Specifically, in amending the definition of "religion" in 1972, Congress sought to repair the results of two decisions: *Dewey v. Reynolds Metals Company*, and *Riley v. Bendix Corporation*—both cases affirming the action of employers in firing employees whose religious practices were not accommodated due to neutral work rules.[59] In introducing the amended language, Senator Jennings Randolph referenced *Dewey* and *Riley* by name, arguing that those cases "clouded" Title VII's intent regarding religious discrimination,

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[58] *See, e.g.*, *Galloway*, 572 U.S. 565; *Abercrombie*, 575 U.S. 768; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *American Legion*, 139 S. Ct. 2067; *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Kennedy*, 142 S. Ct. 2407.

[59] *See generally Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971); *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd* 464 F.2d 1113 (5th Cir. 1972). The court in *Riley* had gone so far as to suggest that religious employees should "seek other employment" if they could not abide by neutral work rules—essentially exiling them from the workplace. *Id.* at 590.

and explaining that his proposed change would clarify that religious accommodations are required "even though unequal treatment would result."[60]

Incredibly, the majority's reasoning and *dicta* in *Hardison* adopted a stance that directly contradicted Congress's intent, essentially reaffirming *Dewey* and *Riley* despite the attempted legislative repair. The tragic result of this mistake is the current situation, where employers routinely disfavor religious practices in the workplace without consequence, severely undermining one of the key goals of Title VII.

This Court in *Abercrombie* had a much better grasp of the reasons why Title VII had been amended. Indeed, it was *because* of the 1972 amendment to Title VII that this Court found that "religious practice" cannot be treated disparately and "must be accommodated."[61] This Court rebuffed the idea that neutral rules could defeat requested accommodations, eviscerating the majority's position in *Hardison* by declaring that Title VII "does not demand mere neutrality" but rather "favored treatment," and that "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."[62]

In sum, what *Hardison* perceived as a threat to Title VII—the appearance of favoring religion—turns out after *Abercrombie* to have been the saving grace of the statute. Read properly, Title VII's amended text protects persons of all faiths by allowing them access

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[60] 118 Cong. Rec. 705, 706 (1972).

[61] *Abercrombie*, 575 U.S. at 775.

[62] *Id.*

to the dignity of work without requiring them to check their religious convictions at the workplace door.

3. Hardison encourages a heckler's veto.

A further shortcoming caused by *Hardison*'s *Lemon*-tainted thinking was the majority's concern that accommodating the religious practices of some employees would result in treating others unequally. Instead of pitting Title VII against *Lemon*, the majority avoided the conflict and created the current chaos, where employers are rewarded for disfavoring religious practices and empowering hecklers.

Clearer thinking after *Abercrombie* reveals the mistake in the majority's zero-sum framing of the issue as the "unequal" favoring of religious employees over non-religious ones.[63] The majority declared, "[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[64] But this position failed to appreciate the very nature of granting accommodations in the workplace.

As Justice Marshall explained in dissent, "The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee."[65] Noting that work schedules are often the neutral rules at issue, he pointed out that exempting an employee from such a rule "will always result in a privilege

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[63] *Hardison*, 432 U.S. at 81.

[64] *Id.* at 85.

[65] *Id.* at 87 (Marshall, J., dissenting).

being 'allocated according to religious beliefs' … unless the employer gratuitously decides to repeal the rule *in toto*."[66] He then pinpointed the majority's blind spot: "[I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif(y) nothing.'"[67]

Justice Marshall's sentiment would later be echoed in *Abercrombie*, with this Court recognizing that a "neutral" policy does not protect an employer from an allegation of intentional discrimination under Title VII.[68] Indeed, *Abercrombie* eroded the foundation of the *Hardison* majority by declaring that "Title VII does not demand mere neutrality with regard to religious practices … [but r]ather, it gives them favored treatment…"[69] And what does "favored treatment" mean if not *favored over other employees who do not need a religious accommodation*?

The true harm caused by *Hardison*'s worry about "unequal treatment" is the application of that concern in lower courts, which have twisted the religious accommodation mandate by shifting the focus from the undue hardship of the employer to the inconvenience of co-workers, who (understandably)

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[66] *Id.* at 88 (Marshall, J., dissenting).

[67] *Id*. (Marshall, J., dissenting).

[68] *Abercrombie*, 575 U.S. at 775.

[69] *Id. See also* Alix Valenti and Vanessa L. Johnson, *The Real Impact of EEOC v. Abercrombie & Fitch Stores, Inc.: "Look Policies"—Effective Business Strategies or Legal Liabilities?*, 36 CORP. COUNS. REV. 1, 28–29 (2017) (arguing that the reasoning in *Abercrombie* weakens *Hardison*'s *de minimis* standard).

often are upset by another employee's perceived "special treatment" in avoiding a neutral rule of general applicability. This reality was on full display in the instant case.

Although the Third Circuit had found that the Postal Service had not reasonably accommodated Groff, it ruled for the employer by turning to the "undue hardship" inquiry and considering factors such as "negative impacts" on personnel, "increased workload on other employees, and reduced employee morale."[70] The court catalogued cases from across seven federal circuits where an undue hardship on the employer actually had been based on "the impact [the accommodation] would have on other employees."[71]

This survey of cases revealed a host of reasons related to co-workers that purportedly justified a finding of undue hardship for the employer. Most notably, hardships were found where the requested accommodations would create the "potential for polarization amongst staff," or a "'lowering of morale' among coworkers," or even a perception that it would "impose" the employee's beliefs "on coworkers and disrupt[the] workplace."[72] Other surveyed cases involved denials of accommodations where fewer

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[70] *Groff v. DeJoy*, 35 F.4th 162, 174 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (2023) (quoting *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021)).

[71] *Id.* (quoting *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 520–21 (6th Cir. 2002)).

[72] *Id.* (quoting *Brown v. Polk Cnty, Iowa*, 61 F.3d 650, 656–57 (8th Cir. 1995); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982); and *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995)).

employees were available due to "vacations, illnesses, and vacancies," or where an employer would need to "overschedule" other employees, or "burden[] co-workers with more weekend work" or "less time off between routes."[73]

In dissent, Judge Hardiman rightly protested that measuring an employer's undue hardship by asking whether an accommodation placed "*any* burden" on other employees was, in effect, "subjecting Title VII religious accommodation to a heckler's veto by disgruntled employees."[74] If this were the proper standard, then this Court's declaration about Title VII's "favored treatment" in *Abercrombie* would be yet another example of words "brimming with 'sound and fury,' [but] ultimately 'signif(ying]) nothing.'"[75]

A heckler's veto is inappropriate in religion cases, whether under the Constitution or under Title VII. As recently as last term, this Court emphasized that "the Establishment Clause does not include anything like a 'modified heckler's veto, in which ... religious activity can be proscribed' based on ' 'perceptions' ' or ' 'discomfort.'"[76] That logic also applies to the free exercise protection provided by the First Amendment, which permits individuals to live according to their

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[73] *Id.* (quoting *Walmart*, 992 F.3d at 659; *Bruff v. N. Miss. Health Servs., Inc.*, 244 244 F.3d 495, 501 (5th Cir. 2001); *Harrell v. Donahue*, 638 F.3d 975, 980–81 (8th Cir. 2011); and *Virts*, 285 F.3d at 520–21).

[74] *Id.* at 177 (Hardiman, J., dissenting).

[75] *Hardison,* 432 U.S. at 88 (Marshall, J., dissenting).

[76] *Kennedy*, 142 S. Ct. at 2427–28 (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001)).

faith regardless of whether the majority approves of their religious convictions.[77]

Without doubt, Title VII's protection against religious discrimination also is intended to serve this same purpose. Unfortunately, the exact *opposite* result is promoted and, indeed, *produced* when courts rely on co-workers' disgruntled views about an employee's request for a religious accommodation. In essence, as interpreted in lower courts, *Hardison* has empowered hecklers in the workplace to veto religious accommodations. If allowed to stand, employers will continue to make end-runs around Title VII's accommodation mandate by reference to the displeasure of others—a tactic that would never pass muster based on the employer's *own* displeasure with the same requested religious accommodation.

In sum, if religious employees are to have equal access to the dignity of work, *Hardison*'s harmful vestiges from the days of *Lemon* must be pruned from the tree of Title VII in the same way this Court has pruned them from the Establishment Clause itself.

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[77] *See, e.g., Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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