**The Silver Lining of the Supreme Court’s Next Harmful Religious Liberty Ruling**

A terrible precedent denies workers of faith their rights. But its replacement could be worse.

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SLATE

JAN 18, 20231:28 PM



Protesters outside the Supreme Court earlier this month. Tasos Katopodis/Getty Images

On Friday, the Supreme Court took up a case that could grant special privileges to religious employees at the expense of their coworkers; it would also legalize discrimination within the workplace. ***Groff v. DeJoy***is a frightening case because this court, and much of the federal judiciary, simply cannot be trusted to adjudicate sensitive disputes about religious accommodations on the job. **The current state of the law is biased against religious minorities with legitimate claims of mistreatmen**t, especially Muslims and Sikhs. **But the remedy may be worse**, favoring conservative Christians who wish to discriminate against colleagues and customers. *Groff*shows what we lose when we cannot rely on the Supreme Court to handle difficult matters of faith without favoritism toward one particular vision of Christianity.

It was only a matter of time before SCOTUS heard a case like *Groff*. The plaintiff, Gerald Groff, is a postal carrier whose religion requires him to observe the Sabbath every Sunday. After USPS ordered him to deliver packages on Sundays, he resigned and sued under Title VII of the Civil Rights Act of 1964. That law bars employment discrimination “because of religion” and [directs employers](https://deliverypdf.ssrn.com/delivery.php?ID=579098091025080120114094001095114126057046084059055038121023115094110121070106123088059057002107022006023123120025087087006013042072002040020074018071105117081069118048047053064029064116095121084077017127010100031064006030093019097091108079094101072070&EXT=pdf&INDEX=TRUE) to “reasonably accommodate” workers’ religious observance. It adds, however, that employers can refuse to provide accommodations that would place “undue hardship on the conduct of the employer’s business.” [Groff lost](https://law.justia.com/cases/federal/appellate-courts/ca3/21-1900/21-1900-2022-05-25.html) in the lower courts.

That’s because, in 1977’s [*Trans World Airlines v. Hardison*](https://supreme.justia.com/cases/federal/us/432/63/), the Supreme Court substantially weakened Title VII’s accommodation requirement. *Hardison*involved an employee who sought to take off Saturdays to observe the Sabbath, as required by his religion. Granting this accommodation would have cost Trans World Airlines just $150 over three months. Still, the airline refused. By a 7–2 vote, the court sided against the employee, rewriting Title VII in the process. **The majority declared that an employer suffers an “undue hardship” when a religious accommodation would impose “more than de minimis cost.”**

Yet those two standards are not the same, as Justice Thurgood Marshall pointed out in a furious [dissent](https://supreme.justia.com/cases/federal/us/432/63/) joined by Justice William Brennan. An “undue hardship” implies significant expense. A “de minimis cost” implies, well, a minimal one. **So the *Hardison*test let employers refuse an accommodation as long as they could cook up some hypothetical reason why it might cost them any real money**. “Despite Congress’ best efforts,” Marshall lamented, “one of this nation’s pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today’s decision is erased.”

A funny thing happened between 1977 and 2023: **The politics of religious accommodations flipped**. Marshall and Brennan, the *Hardison*dissenters, were the Supreme Court’s liberal lions in their time. Today, it is the [three most conservative justices](https://www.supremecourt.gov/opinions/19pdf/18-349_7j70.pdf) [who have called](https://www.supremecourt.gov/opinions/20pdf/19-1388_4f14.pdf) for *Hardison*’s erasure: Clarence Thomas, Samuel Alito, and Neil Gorsuch. Now the court is set to hear *Groff*, a direct challenge to that precedent, and these justices are nearly certain to get their wish. It is unlikely that this trio shares Marshall and Brennan’s vision of religious tolerance.

The politics of religious liberty have shifted significantly over the past half century. Decades ago, these cases typically involved petitioners from minority faiths, like Indigenous religions, requesting accommodations that would harm no one. Today religion cases more frequently involve conservative Christians’ right to discriminate against others. Look at a few of the Supreme Court’s recent religious freedom cases: [Christian schools that mistreat LGBTQ students](https://slate.com/news-and-politics/2022/06/carson-makin-supreme-court-maine-religious-education.html) [and disabled teachers](https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf). [Christian foster care agencies](https://www.supremecourt.gov/opinions/20pdf/19-123_new_9olb.pdf) and [commercial businesses](https://www.supremecourt.gov/opinions/17pdf/16-111_new2_22p3.pdf) that won’t serve gay couples. [Christian corporations that won’t let employees access contraception](https://www.oyez.org/cases/2013/13-354). In each case, Christians’ religious freedom to discriminate trumped others’ freedom from discrimination.

n past decades, the Supreme Court guarded against such injustices. It [held](https://supreme.justia.com/cases/federal/us/472/703/) that the First Amendment’s establishment clause forbids the government from imposing religious accommodations that place “significant burdens” on third parties. And it [recognized](https://supreme.justia.com/cases/federal/us/561/661/) that people of different faiths, or no faith, have a compelling interest in [avoiding discrimination](https://supreme.justia.com/cases/federal/us/390/400/) that’s motivated by religion. This approach [balanced respect](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/Storslee_ART_Post-SA%20%28JJ%29.pdf) for free exercise with an acknowledgment of everyone else’s liberties.

Unfortunately, in recent years, the court has [abandoned this balance](https://harvardlawreview.org/2021/04/reframing-the-harm-religious-exemptions-and-third-party-harm-after-little-sisters/). Instead, the current conservative supermajority has greenlighted or mandated accommodations that directly injure other people. And it has exacerbated third-party harms by [prioritizing religious freedom](https://slate.com/news-and-politics/2020/04/hobby-lobby-scotus-coronavirus.html) over everybody else’s interest.

Such are the sorts of special rights that *Groff* is designed to require. How do we know? The law firm that [brought *Groff*](https://www.supremecourt.gov/DocketPDF/22/22-174/234280/20220823143151190_Groff%20Cert%20Petition.pdf)to the Supreme Court is a far-right firm called the First Liberty Institute. It represents litigants who oppose LGBTQ equality, reproductive rights, secularism in public schools, and a host of other conservative bugaboos. At the same time that First Liberty is litigating *Groff*, it is [suing on behalf](https://fingfx.thomsonreuters.com/gfx/legaldocs/myvmoggqzvr/011123%20--%20ND%20Tex%20--%20Strader%20v%20CVS%20Health%20Corp%20et%20al%20complaint.pdf) of J. Robyn Strader, a CVS employee who [seeks the right](https://www.reuters.com/legal/litigation/cvs-sued-by-fired-nurse-practitioner-who-refused-prescribe-birth-control-2023-01-11/) to not prescribe contraception. Strader demands a religious accommodation under Title VII because her religion opposes birth control.

Under the old Supreme Court’s doctrine of third-party harm, her argument would be a nonstarter. The accommodation would clearly hurt customers, whose ability to obtain medication would be delayed or denied. And it could hurt employees, whose workload could balloon as they covered for Strader. At this ultraconservative Supreme Court, though, that principle is no longer good law. First Liberty knows that. And it wants to knock out *Hardison*so that clients like Strader can discriminate on the job.

It’s easy to envision what those cases will look like, because plenty of them [have already arisen](https://scholar.smu.edu/cgi/viewcontent.cgi?article=1197&context=smulr). A Walmart employee who [repeatedly told colleagues](https://casetext.com/case/matthews-v-wal-mart-stores-inc) that gays are going to hell. An HP employee who [posted Bible verses](https://caselaw.findlaw.com/us-9th-circuit/1423047.html) on his cubicle calling for gays to be executed. A Cox employee who continually [told a gay subordinate](https://caselaw.findlaw.com/us-9th-circuit/1270052.html) that homosexuality was wrong and sinful. A Walmart pharmacist who [refused to fill](https://casetext.com/case/noesen-v-med-staffing-network) birth control prescriptions. All lost under *Hardison*. All might prevail at this Supreme Court after *Hardison* is overturned. And it won’t stop there.

Imagine a manager who refuses to hire a transgender applicant. Or an employee who won’t work with a client who’s had an abortion. Or a cop who won’t patrol an abortion clinic. These are not the people whom Marshall and Brennan sought to protect. But *Groff*could grant them all a religious accommodation under Title VII.

So, it’s difficult to get too excited for the Supreme Courtto overturn *Hardison*. And yet it is also impossible to defend *Hardison*itself.

The “de minimis” test enshrined in that case has a disproportionate impact on religious minorities like Muslims and Sikhs, whose religious garb and observances are met with suspicion in Christian-dominated workplaces. Civil rights groups have [identified a shocking number](https://www.supremecourt.gov/DocketPDF/19/19-1388/148059/20200717165327033_19-1388_Brief%20for%20Amici%20Curiae.pdf) of cases in which courts have let employers deny accommodations for hijabs, brief prayer breaks, and faith-mandated beards.

These accommodations would harm nobody. Still, federal courts routinely hold that accommodating such beliefs would impose a “more than de minimis cost” because [customers](https://casetext.com/case/camara-v-epps-air-serv-inc-1) and [colleagues](https://scholar.google.com/scholar_case?case=215392197235469801&hl=en&as_sdt=6&as_vis=1&oi=scholarr) [might react negatively](https://www.supremecourt.gov/DocketPDF/19/19-1388/148059/20200717165327033_19-1388_Brief%20for%20Amici%20Curiae.pdf). As the courts interpret *Hardison*, customers’ bigotry against Sikhs is good enough reason to fire an observant Sikh. That’s ridiculous, and it cannot be squared with the text or [history of Title VII](https://deliverypdf.ssrn.com/delivery.php?ID=579098091025080120114094001095114126057046084059055038121023115094110121070106123088059057002107022006023123120025087087006013042072002040020074018071105117081069118048047053064029064116095121084077017127010100031064006030093019097091108079094101072070&EXT=pdf&INDEX=TRUE).

If only we could trust the Supreme Court to replace *Hardison* with a responsible standard that weighs respect for religion against genuine burdens on the rest of the workplace. The facts of *Groff*itself show how hard this task can be, even when there are no lurking culture war issues. Gerald Groff’s post office employed [just four people](https://www.vox.com/policy-and-politics/23559038/supreme-court-groff-dejoy-religion-twa-hardison-workplace), and when he took off Sundays, his colleagues had to take on extra work. [This led to](https://www.supremecourt.gov/DocketPDF/22/22-174/247569/20221128172439118_22-174%20Groff%20opp%20-%20final.pdf) “resentment toward management” and “morale problems” that created a “tense atmosphere” in the workplace. It seems unfair that some postal carriers had to take on additional duties because they practice a different religion from Groff.

**A better court could sift through these competing interests to identify what sort of compromise Title VII requires**. The court we have is more likely to put its thumb on the scale in favor of religious employees every time. Swinging the law of accommodations from one extreme to another will only create more discord and [generate endless litigation](https://www.vox.com/policy-and-politics/23559038/supreme-court-groff-dejoy-religion-twa-hardison-workplace). That’s good for business at law firms like First Liberty. But it is not a recipe for the kind of religious tolerance that Marshall and Brennan demanded.