NO. _____

In the Supreme Court of the United States

CHAREE STANLEY,

Petitioner,

v.

EXPRESSJET AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 12, 2020

QUESTIONS PRESENTED

The Railway Labor Act (RLA) requires mandatory arbitration of disputes between employers and employees in the railroad and airline industries if they require "the interpretation or application" of a collective-bargaining agreement (CBA) and "concern[] rates of pay, rules, or working conditions." 45 U.S.C. §§ 153(i), 181, 184. In *Hawaiian Airlines* v. *Norris*, the Court held that this "mandatory arbitral mechanism" preempts any "state-law claim" that is so "dependent on the interpretation of a CBA" that it can be "conclusively resolved" by that interpretation. 512 U.S. 246, 252, 260, 263 (1994) (internal quotation omitted).

The circuits conflict over whether the RLA's mandatory arbitral mechanism, and *Norris*'s rule for preemption of *state*-law claims, applies to claims brought under *federal* law. The circuits also divide over whether *Norris* extends beyond the CBA-dependent "claim[s]" *Norris* mentions, *id.* at 260, to CBA-dependent defenses. And they divide further over *Norris*'s application to the Title VII claims at issue in this case, because Respondent insists that the CBA must be interpreted to determine whether Petitioner's requested accommodation imposes "undue hardship." 42 U.S.C. § 2000e(j). But the circuits are divided over whether the "undue hardship" inquiry in a Title VII case is an affirmative defense or not.

The Questions Presented are:

1. Whether, and under what circumstances, claims arising under federal statute are subject to the RLA's mandatory arbitration requirement.

2. Whether the "undue hardship" inquiry in a Title VII case is an affirmative defense to liability.

STATEMENT OF RELATED PROCEEDINGS

Charee Stanley v. *ExpressJet Airlines, Inc.*, No. 19-1034 (CA6) (opinion issued and judgment entered Apr. 8, 2020)

Charee Stanley v. ExpressJet Airlines, Inc., No. 16-cv-12884 (E.D. Mich.) (opinion issued and judgment entered Dec. 7, 2018)

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Petitioner Charee Stanley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

This petition concerns a critically important issue of federal labor law on which the courts are expressly divided: whether workers in the railroad and airline industries governed by the RLA have the same right as other workers to have their federal civil rights claims decided in court, or whether the RLA forces those claims into arbitration.

This issue arises every day in courtrooms across the country, because the RLA mandates arbitration of certain disagreements between employers and employees in covered industries if they "aris[e] out of the interpretation and application" of a CBA. *Bhd. of R. R. Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 32 (1957) (citing 45 U.S.C. § 153(i)). And in the wake of *Hawaiian Airlines* v. *Norris*, 512 U.S. 246 (1994), which developed a test for determining whether the RLA's mandatory arbitration mechanism *preempts* state-law claims, a circuit conflict has developed over the different issue of "*preclusion*," *i.e.*, whether RLA's mandatory arbitral mechanism for "minor" disputes prevents plaintiffs from taking causes of action provided under federal statute to court.

The conflict is fully developed. The circuits are in a three-way deadlock, with three circuits saying federal claims are never precluded, three circuits saying federal claims are subject to Norris's rule for preemption, and one trying to thread its way between those camps. And the Sixth Circuit's position within that conflict is untenable. The Sixth Circuit is among those presuming that the questions of preemption of state claims and preclusion of federal claims are equivalent and should be treated the same, subjecting each to *Norris*'s standard. This cannot be squared with *Norris* itself, which explicitly limited its holding to the preemption of state claims, and explicitly preserved prior holdings that the RLA has no preclusive effect on federal claims.

The divide over the RLA's application to federal claims also feeds into other well-developed splits affecting the RLA's application to claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and similar statutes. A majority of circuits hold that even in

situations where the RLA's mandatory arbitral mandate is applicable, only "claim[s]" that depend upon CBA interpretation are barred—not CBA-impacted defenses. *Norris*, 512 U.S. at 260. And in Title VII cases, CBAs arise most often in defense. Employers frequently argue, as Respondent did in this case, that a plaintiff's requested accommodation would conflict with *other* employees' rights under a CBA—posing an "undue hardship" in violation of Section 701(j) of Title VII. 42 U.S.C. § 2000e(j).

But the Sixth Circuit applies an unusual logic for determining whether something constitutes an affirmative defense, under which it cannot be one unless a statute labels it an "affirmative defense"—by name. And so the court below applied that rule to hold that in Title VII, the "undue hardship" analysis is not an affirmative defense, contradicting the holdings of every other circuit to have considered the issue in Title VII, as well as those to have considered "undue hardship" analyses under other federal statutes.

Because of this confluence of erroneous rules, the Sixth Circuit relegates claims to arbitration that would be heard in court virtually everywhere else. And there, they will likely disappear, set before arbitration panels with no authority to hear them, and no power to provide the employee adequate relief.

This is no way to treat federal civil rights claims under Title VII. Those claims fall into no one's definition of a "minor" dispute. Under any fair preclusion inquiry, those claims are properly understood as having been carved out of the class of "disputes" governed by the RLA, and guaranteed a federal judicial forum, when Title VII was created. And this case highlights numerous conflicts that have not only rendered the RLA's interpretation into

complete chaos but have sown confusion into other areas of federal labor law as well. This is because the RLA's mandatory arbitration rules are interpreted in tandem with the preemption provisions of the Labor Management Relations Act (LMRA), which governs "[s]uits for violation of contracts between an employer and a labor organization representing employees," 29 U.S.C. § 185(a). The Sixth Circuit's divergent labor law for employees subject to CBAs in the railroad and airline industries thus becomes divergent law for every union-member in any industry. And it contributes to a confused state of federal labor law that this Court recognized to exist even before *Norris* was decided—and one that other courts and commentators have recognized as well.

This is a compelling case to address the full breadth of this widespread conflict. Petitioner's claims that the Sixth Circuit has forced into arbitration would likely succeed in a judicial forum. That is because the accommodation Stanley requested in this case—which she needed to comply with her sincerely held belief that her Muslim faith prohibits her from handling alcoholic beverages—does not require violating ExpressJet's CBA with its flight attendants, or the contractual rights of other employees, as Respondent alleges. It requires only the modification of employment policies that Respondent has reserved the right to change, and, on extremely rare occasions, voluntary shift changes Respondent had a duty to at least *try* to facilitate. The reasonableness of those accommodations should have been decided by a factfinder in federal district court.

The petition should be granted.

OPINIONS BELOW

The Sixth Circuit's opinion (App., *infra*, 1a-14a) is reproduced at 808 Fed. App'x. 351. Its order denying rehearing (*id.* 65a-66a) is unpublished. The district court's opinion (*id.* 15a-64a) is published at 356 F. Supp. 3d 667.

JURISDICTION

The Sixth Circuit issued its opinion and judgment on April 8, 2020 (App., *infra*, 1a), and denied a timely rehearing petition on May 14, 2020 (App., *infra*, 65a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the United States Code at issue in this case are reproduced in the appendix. (App., *infra*, 67a-68a)

STATEMENT

A. Background

1. Arbitration is normally "a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation omitted). And "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 648–649 (1986) (internal quotation omitted). Yet since 1926, the RLA has imposed a "mandatory arbitral mechanism," *Norris*, 512 U.S. at 252, for certain disputes that arise out of CBAs between employers and employees in particular industries—regardless of whether the parties to those agreements or the employees covered by them consented to arbitration. Congress first made the RLA applicable to workers in the railroad

industry. *Detroit & Toledo Shore Line R.R. Co.* v. *United Transp. Union*, 396 U.S. 142, 148 (1969). But Congress expanded the Act in 1936 to cover airline workers. 45 U.S.C. § 181.

For workers in these two industries, the RLA sets forth a detailed statutory "machinery to resolve disputes * * * as to wages, hours, and working conditions." *Int'l Ass'n of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). The core aspect of this machinery is arbitration, *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377–378 (1968), conducted under the auspices of the National Railroad Adjustment Board, 45 U.S.C. § 153. This arbitral mechanism applies to two classes of disputes. The first class, referred to as "major" disputes, relates to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (citation omitted). The second class, known as "minor" disputes, "grow[s] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). Put another way, "major disputes seek to create contractual rights, minor disputes to enforce them." *Norris*, 512 U.S. at 253. Claims falling between these "major" and "minor" extremes, or falling outside of the RLA entirely, go to court.

2. Where causes of action provided by federal statute ought to fall within this framework *seemed* to have been settled decades ago. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Buell*, 480 U.S. 557 (1987), the Court held, in considering an employee's claim brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, that the RLA cedes to any claim brought "under [a] federal

statute[]" that provides remedies for "substantive prohibitions against * * * conduct that is independent of the employer's obligations under its collective-bargaining agreement" and affords "'minimum substantive guarantees to individual workers'" that are greater than the "limited relief * * * available through the Adjustment Board." 480 U.S. at 564, 565 (quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981)). So "absent an intolerable conflict between the two statutes," the Court was "unwilling to read the RLA as repealing any part of the FELA." *Buell*, 480 U.S. at 566–567. That meant the "RLA does not deprive an employee of his opportunity to bring a FELA action for damages" even if his injury "was caused by conduct that may have been subject to arbitration under the RLA," *id.* at 564, and even when arbitration is "'exclusive,'" *id.* at 565 (quoting *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972)).

Under *Buell*, the RLA cedes to *any* statute that punishes conduct separate from employers' obligations under a CBA and provides "minimum substantive guarantees" beyond what a worker could obtain in arbitration before the RLA adjustment boards. It does not matter if those guarantees concern the right to compensation for "employees injured through an employer's or co-worker's negligence," 480 U.S. at 566, that FELA provides, or the right to be free of workplace religious discrimination that Title VII protects. Accordingly, on the question whether the RLA's mandatory arbitral mechanism would prevent a worker from advancing virtually any claim provided under federal statute, the Court answered with a resounding "No."

3. Yet what once seemed settled by *Buell* became unsettled after *Norris.* There, the Court announced a test

for determining whether the RLA "pre-empts state law," 512 U.S. at 252—one that borrowed from the "virtually identical" (512 U.S. at 247) preemption standards under § 301 of the LMRA, 29 U.S.C. § 185, that the Court had developed in cases like *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985) and *Lingle* v. *Norge Division of Magical Chef, Inc.*, 486 U.S. 399 (1988). Just as *Lingle* held "that the LMRA pre-empts state law only if a state-law claim is dependent on the interpretation of a CBA," *Norris*, 512 U.S. at 262 (citing *Lingle*, 486 U.S. at 405–408), *Norris* held that state claims are "minor" disputes, and preempted by the RLA's mandatory arbitral mechanism, only when they are so "dependent on the interpretation of a CBA" that the claim can be "conclusively resolved" by interpreting it. 512 U.S. at 262, 263.

Norris went out of its way to preserve the Court's prior decision in *Buell*. *Norris* explained that the standards it was announcing were "consistent with the holding in *Buell*," *id.* at 262. And it described how "RLA preclusion of a cause of action arising out of a *federal* statute" presented a very different question from "RLA pre-emption of a cause of action arising out of *state* law," *id.* at 259 n.6 (emphasis in original), since the latter involves "policing the line between major and minor disputes," while the former involves the "threshold question whether the dispute was subject to the RLA in the first place." *Id.* at 266, 267.

4. But the Sixth Circuit, among others, failed to heed *Norris*'s guidance and ignored *Buell*'s holding. The circuit has decided that rights granted by "federal and state law" should be subjected to the same *Norris*-based test, finding them cognizable in court only if they are not "covered" in the RLA's "minor" and "major" categories. *Int'l Bhd. of*

Teamsters, AFL-CIO, Teamsters Local Union No. 2727 v. *United Parcel Serv. Co.*, 447 F.3d 491, 495–497 (6th Cir. 2006). That means in the Sixth Circuit, a cause of action presents a "minor" controversy subject to RLA arbitration whenever it "relates either to the meaning or proper application" of the CBA, regardless of whether it arises under state or federal law. *Id.* at 496 (quoting *Elgin, Joliet & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 723 (1945)). The Sixth Circuit cited both *Buell* and *Norris* in support of this holding, *ibid.*, but the rule it announced cannot be squared with *Buell*'s holding that federal claims fall outside the RLA's major/minor framework, or *Norris*'s holding that *Buell* should be preserved.

The Sixth Circuit does, however, recognize a significant limitation on its application of *Norris*'s rule relating to "claim[s]" that depend on CBA interpretation. 512 U.S. at 260. And it is one that arises from the LMRA preemption rules that *Norris* drew upon: "[A] defendant's reliance on a CBA term purely *as a defense* * * * does not result in section 301 preemption." *Fox* v. *Parker Hannifan Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) (emphasis added) (citing *Caterpillar, Inc.* v. *Williams,* 482 U.S. 386 (1987)); see also App, *infra*, 8a. Ultimately, this is because, under LMRA preemption standards, "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly [a non-arbitral] claim, transform the action into one arising under" LMRA (and therefore RLA) standards requiring arbitration. *Caterpillar, Inc.*, 482 U.S. at 399; see also *DeCoe* v. *Gen. Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) (emphasis added) ("[T]he defendant's assertion of the [CBA] as an *affirmative defense*" will not turn "an otherwise independent claim into

a claim dependent on the labor contract.") (emphasis added).

5. Yet the Sixth Circuit stands out among the courts that properly confine the RLA's reach to claims and not defenses by improperly restricting the class of CBA-implicating "defenses" that fall outside the RLA's scope. In Title VII cases, and in cases under similar federal civil rights laws like the Americans with Disabilities Act, the CBA will most commonly be raised by the defense. It is usually interposed by employers as a roadblock against the plaintiff's requested accommodation on the basis that it would require the employer to violate *other* employees' rights under a CBA—posing an "undue hardship" in violation of Section 701(j) and similar "undue hardship" provisions in other civil rights laws. 42 U.S.C. § 2000e(j). And an accommodation that requires a party "take steps inconsistent with [an] otherwise valid" CBA constitutes an undue hardship as a matter of law. *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 79 (1977).

But the Sixth Circuit applies a peculiar logic to determine whether a matter constitutes an affirmative defense. It holds that because "[a]ffirmative defenses and exemptions generally come from the statutory text," *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 n.6 (6th Cir. 2014), the act creating a federal cause of action must label "undue hardship * * * an affirmative defense" for it to be one. *Ibid.* In *Hollis*, the circuit followed that rule to hold that "undue hardship" is not an affirmative defense under the Fair Housing Act, 42 U.S.C. § 12112(b)(5)(A)). And in this case, it followed that rule to decide that "undue hardship" is not an affirmative defense under Title VII. (App., *infra*, 9a)

B. Factual background

1. Petitioner Charee Stanley joined Respondent ExpressJet as a flight attendant in 2013 after having recently converted to Islam. By all accounts, ExpressJet considered her an exemplary employee—calling her "very professional and attentive, * * * with no history of customer complaints." (App., *infra*, 20a) Yet things changed about two-and-a-half years into Stanley's employment, when she learned during her religious studies that Islam prohibits adherents not only from consuming alcohol, but also from participating in its preparation and sale. (*Ibid.*)

Stanley brought this problem to her supervisor, who offered a simple accommodation: have the other flight attendant on Stanley's flights prepare and sell any alcoholic beverages. (App., *infra*, 20a-21a) Accounts diverge over whether the supervisor meant for this arrangement to be a permanent solution or simply a temporary fix for Ramadan (*id.* at 22a-23a)—but there is no dispute that it continued after Ramadan ended. After two-and-a-half months, however, ExpressJet withdrew Stanley's accommodation following complaints from a bigoted coworker who intermingled objections about having to assist with Stanley's beverage service with grumbling that Stanley had been seen "reading a small book with foreign writing" and wearing "a headdress upon her head." (*Id.* at 24a) In August 2015, ExpressJet gave Stanley an ultimatum: serve alcohol, find another position within the company, or resign. (*Id.* at 26a-27a) Soon thereafter, ExpressJet put Stanley on unpaid administrative leave while she attempted to find another position. When Stanley was unable to do so, ExpressJet terminated her employment. (Id. at 27a-28a)

After exhausting her administrative remedies, Stanley brought employment discrimination and retaliation claims against ExpressJet in federal district court under Title VII, together with claims under Title VII's Michigan counterpart, the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq*. (App., *infra*, 15a) ExpressJet moved for summary judgment on all of Stanley's claims, arguing that the RLA subjected them to arbitration. (*Id*. at 16a)

2. The district court granted ExpressJet's motion. It held, in line with Sixth Circuit precedent, *Int'l Bhd. of Teamsters*, *supra*, that the RLA's standards for "preemption" of state claims applied equally to the "preclusion" of federal claims. (App., *infra*, 41a n.2) And it noted that ExpressJet had raised its CBA with its flight attendants as part of the "undue hardship" inquiry, holding in line with this Court's precedent, but in conflict with Sixth Circuit law, *Hollis*, *supra*, that this concerned a "defense for the employer." (App., *infra*, 33a) (citing *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028, 2032 n.2 (2015)). Yet the district court held that because ExpressJet's "undue hardship" defense was ultimately dependent upon—and, in its view—resolved by, interpretation of the CBA, that meant Stanley's claim was precluded, in spite of Sixth Circuit precedent making such CBA-dependent defenses irrelevant to the RLA's application, *Fox*, *supra*. (App., *infra*, 41a)

The district court held that having another flight attendant assist with Stanley's drink service on a two-attendant flight could affect seniority rights under the CBA, noting that ExpressJet divided drink-service responsibilities between the first-class and regular cabins, with the senior flight attendant usually handling the first-class

cabin. (App., *infra*, 39a-55a) But the court acknowledged that turning this reassignment of responsibilities into a CBA violation would require expanding the CBA beyond its plain terms, to include certain "implied contractual terms." (*Id.* at 55a) This was because the CBA itself does not divide drink service responsibilities between the first-class and main cabins. That division was made in a separate document: the ExpressJet "Flight Attendant Manual" (*Id.* at 17a-18a), which ExpressJet reserved the right to change. (ROA Page ID 861, 940, 947-949) The CBA itself said nothing about drink-service duties other than that flight attendants were required to "work together and assist one another with completing all required service on the aircraft," including drink service. *Ibid.*

The district court also credited ExpressJet's speculative concern that accommodating Stanley's religious observance might interfere with seniority rights on *single*-attendant flights—an odd complaint, given that ExpressJet had no single-attendant flights operating from Stanley's Detroit-based crew base. RE 33-4, Page ID 925–926. The district court held that *if* a flight had to be downgraded from two attendants to one, and *if* no reserve could be found to take Stanley's place, and *if* the other flight attendant assigned to the flight was more senior, and *if* she would not voluntarily take it, that might violate the CBA, even though none of these things had happened during Stanley's years at the company. (App., *infra*, 26a, 29a)

In so holding, the district court rejected Stanley's contention that ExpressJet had a duty to at least attempt a voluntary resolution of the problem on the exceedingly rare occasions it might arise before declaring Stanley's request an undue hardship for all time. (App., *infra*, 38a)

C. The decision below

1. The court of appeals reached the same result as the district court but tried to put the decision on firmer footing under Sixth Circuit precedent. The court of appeals agreed with the district court that regardless of whether a right is created by "'state [or federal] law,'" then the claim would be "preempted" by the CBA if "interpretation of the CBA is necessary to determine the claim." (App., *infra*, 8a) (quoting *DeCoe*, 32 F.3d at 216) (alteration in original). But it disagreed with the district court that the distinction between claims and defenses was irrelevant, adding the reminder, in line with circuit precedent, that "[a]n employer cannot take an otherwise valid claim and cause it to become preempted by claiming the CBA as a defense." (*Ibid.*) But the court of appeals then departed from Supreme Court precedent, *Abercrombie*, *supra*, while ruling consistently with circuit precedent, *Hollis*, *supra*, that "undue hardship" is not "a defense raised to excuse a Title VII violation." (*Id.* at 9a) Instead, it held that it was "a part of the Title VII analysis," because although "the statutory text of Title VII clearly provides for an exception for accommodations that would be an 'undue hardship' for the employer," the text did not label that exception an affirmative defense. (*Ibid.*) And it backed this up with the inevitability of the undue hardship inquiry: "[a] court presented with a Title VII claim must always examine whether the requested accommodation presents an undue hardship," making it "part of the Title VII analysis" and not a defense. (*Ibid.*)

The court of appeals then agreed with the district court that Stanley's claims were conclusively resolved by the CBA. Like the district court, it held that assessing "undue hardship" would require "determin[ing] whether

permitting Stanley to refuse a downgraded flight with a single flight attendant violates the seniority provisions of the CBA," as would determining whether "requiring a flight attendant to accept the alcoholic beverage service" on two-attendant flights would conflict with the CBA. (CA6) And to the court below, that meant Stanley's claims were "preempted." (*Ibid.*)

2. Stanley sought en banc review, pointing out the inconsistency between the panel's holding that "undue hardship" is not an affirmative defense to Title VII liability and Supreme Court precedent and decisions from other circuits saying that it was. But the Sixth Circuit denied en banc review. (App., *infra*, 65a)

REASONS FOR GRANTING THE PETITION

The traditional criteria of certworthiness are all present here. There are acknowledged, wide-spread, and fully developed spits on both Questions Presented. And those questions are right now leading to different results in similar cases across jurisdictional lines.

This case is a compelling one for resolving these splits, as it presents an opportunity to resolve several doctrinal divergences at once and lend clarity in an area of the law that badly needs a makeover, as this Court and commentators have frequently noted. And the erroneous rule applied below, which forces plaintiffs in industries covered by the RLA to advance federal civil rights claims in an arbitral forum that is not equipped to handle them, cannot be squared with statutory text, precedent, or any rational conception of federal labor law.

A. There are acknowledged, entrenched, circuit conflicts on both Questions Presented.

Review is warranted because there are acknowledged, widespread, and entrenched conflict among the circuits on the Questions Presented.

1.a. On the first Question Presented concerning the RLA's applicability to causes of action created by federal statute, the Circuits are split 3-3-1. The Second, Eighth, and Ninth Circuits depart from the Sixth Circuit, holding claims arising from federal statute are categorically exempt from *Norris*'s framework and the RLA's mandatory arbitral scheme. In *Saridakis* v. *United Airlines*, 166 F.3d 1272 (9th Cir. 1992), the Ninth Circuit expressly followed *Norris*'s instruction that for federal claims like the ADA, it did not matter whether the plaintiff's claims "inextricably implicated" the CBA, because that question was only relevant in "policing the line between major and minor disputes," not the "'threshold question whether the dispute was subject to the RLA in the first place.'" *Id.* at 1277 (quoting 512 U.S. at 265–266. And in *Felt* v. *Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416, 1420 (9th Cir. 1995), the circuit expressly followed *Buell* in holding that "the RLA does not preclude litigation of Title VII rights" at all.

The Second Circuit has maintained a similar position. In *Bates* v. *Long Island Railway Co.*, 997 F.2d 1028 (2d Cir. 1993), it channeled *Buell* to hold that employees' federal civil rights claims are not precluded by the RLA, so as to make arbitration the plaintiffs' "exclusive remedy," even if resolution of their claims would "require interpretation of the applicable collective bargaining agreement." *Id.* at 1034. "When an employee's statutory civil rights have been violated," the court held, "arbitration should not

be the sole avenue of protection, unless Congress has so specified." *Ibid.* (holding that the RLA did not bar a claim under the Rehabilitation Act). And the Second Circuit has adhered to the same position since *Norris* was decided in 1994. *Goss* v. *Long Island R. Co.*, 159 F.3d 1346 (2d Cir. 1998) (Table opinion) (distinguishing *Bates* and holding that because the employee's "RLA claim is grounded in the collective bargaining agreement and is not a matter of statutory civil rights," it was precluded).

Similarly, the Eighth Circuit held both before and after *Norris* that because an employee "bringing a claim" under a federal statute "seeks to enforce a federal statutory right, not a contractual right embodied by the" CBA, her claim is not precluded by the RLA so long as the federal law "'provides a more extensive and broader ground for relief'" than arbitration. *Benson* v. *Nw. Airlines*, 62 F.3d 1108, 1115 (8th Cir. 1995) (holding that the RLA does not preclude claims under the ADA) (quoting *Norman* v. *Missouri Pac. R.R.*, 414 F.2d 73, 83 (8th Cir. 1969)) (holding that the RLA does not preclude Title VII claims).

Every circuit in this camp has adhered to pre-*Norris* precedent keeping federal claims separate from the RLA's arbitral machinery, and heeded *Norris*'s instruction that this precedent should be preserved.

b. By contrast, the Sixth Circuit joins the Seventh and Tenth Circuits in jettisoning precedent and subjecting both state and federal claims to the RLA and *Norris*'s test. The Seventh Circuit's decision in *Brown* v. *Illinois Central Railroad Co.*, 254 F.3d 654 (7th Cir. 2001) exemplifies this camp's thinking. *Brown* recognized, in considering whether the RLA precludes an ADA claim, that "preclusion" of federal claims requires a different inquiry than "preemption," as "the two types of cases implicate

some different concerns." *Id.* at 662. Yet the Seventh Circuit deemed the inquiries "sufficiently similar" that *Norris*'s test for "RLA preemption cases" could be applied in preclusion cases. *Ibid.* And it held that even federal claims cannot survive the RLA's arbitration mechanism "if the claim's resolution requires the court to interpret the CBA's terms as a potentially dispositive matter." *Id.* at 664.

Brown also recognized that this interpretation of the RLA departed from that of the Second Circuit. See 254 F.3d at 667 n.12 (acknowledging but rejecting *Bates*'s holding that "the RLA did not preclude the plaintiff's claim under the Rehabilitation Act even though it implicated portions of the CBA"). *Brown* likewise recognized that its position departed from that of the EEOC, which urged the court as amicus to hold that the RLA's jurisdiction-stripping power over "*state* law" claims should not "as a matter of course preclude similar claims brought under a *federal* statute." *Id.* at 661 (emphasis in original).

The Tenth Circuit joined this camp in *Fry* v. *Airline Pilots International Association*, 88 F.3d 831 (10th Cir. 1996). It interpreted *Norris*'s and *Lingle*'s *state* preemption standards as making "the threshold question" for *both* "federal and state law claims" whether the claim "requires interpretation or application of the CBAs." *Id.* at 836.

c. Like in *Brown*, the Fifth Circuit has also noted the conflict, expressly recognizing the two camps' differing standards while crafting its own unique standard in *Carmona* v. *Sw. Airlines Co.*, 536 F.3d 344 (5th Cir. 2008). There the Court contrasted the Seventh Circuit's holding in *Brown* that "'a federal claim'" that "'depends for its resolution on the interpretation of a CBA'" is precluded, *id.* at 350 n.25 (quoting 254 F.3d at 667–668 & n.24–25), with the

rule in "[o]ther circuits" that "claims grounded in federal statutory rights are generally *not* precluded by the RLA," *id.* at 350 (emphasis added) (citing the Ninth Circuit's decisions in *Saridakis* and *Felt,* along with the Eighth Circuit's decision in *Benson*). And it expressly rejected the latter camp's approach making "the source of the rights" determinative in deciding whether the RLA required arbitration. 536 F.3d at 350–351. But the Fifth Circuit still did find a claims' federal origins relevant in determining whether the RLA was preclusive, holding that they "further evidence[ed] that the instant suit" was independent of the RLA. *Id.* at 351. Yet the circuit still considered the determinative issue whether the suit "require[d] CBA interpretation." *Ibid.*

2. That conflict gives rise to another implicated by the Questions Presented, because—quite apart from disagreeing about whether the standards for preclusion and preemption should be unified—the circuits differ on what that unified standard ought to be. Here, at least, the Sixth Circuit is in the majority, joining the Seventh Circuit in holding that *Norris*'s rule extends only to "claims," and not defenses, while the Third Circuit disagrees. Compare *Brown*, 254 F.3d at 668 ("An employer cannot ensure the preclusion of a plaintiff's claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim.") with *Capraro* v. *United Parcel Service, Co.*, 993 F.2d 328, 332 (3d Cir. 1993) (holding that the RLA precludes any claim requiring "interpretation of" the

CBA, whether it concern "the employee's claim or the employer's defense relies on the agreement").[1]

3. But the Sixth Circuit stands out from all other circuits as the most extreme in denying a judicial forum for federal civil rights claims in RLA-covered industries—especially in application to claims under statutes, like Title VII and the ADA, that require reasonable accommodations. This is because the Sixth Circuit departs from every other circuit to have considered the issue on the second Question Presented, because every other circuit considers the Title VII "undue burden" inquiry to constitute an affirmative defense. *E.E.O.C.* v. *GEO Grp., Inc.*, 616 F.3d 265, 270 (3d Cir. 2010) (calling "undue hardship" an "affirmative defense" under Title VII); *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 833 (5th Cir. 2013) (calling "undue hardship" part of the Title VII "affirmative defense of reasonable accommodation"); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (calling undue hardship an "explicit affirmative defense" under Title VII); *E.E.O.C.* v. *Sw. Bell Tel., L.P.*, 550 F.3d 704, 710 (8th Cir. 2008) (agreeing with defendant that "undue hardship" is an "affirmative defense" under Title VII); *Tabura* v.

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[1] This split extends beyond the RLA to the similar question of preemption under § 301 of the LMRA. Here, as the Eleventh Circuit has noted, "[c]ircuits are split over whether a defense, as opposed to a claim, that is substantially dependent on the terms of a CBA compels § 301 preemption." *Atwater* v. *Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1181 n.14 (11th Cir. 2010) (noting that *Fry*, *Smith* v. *Colgate–Palmolive Co.*, 943 F.2d 764, 770–71 (7th Cir. 1991), and *Hanks* v. *Gen. Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) hold that even where CBA interpretation is initiated by a defense, claims are preempted, while *Ward* v. *Circus Casinos, Inc.*, 473 F.3d 994, 996–98 (9th Cir. 2007) holds that defenses are not relevant to § 301 preemption).

Kellogg USA, 880 F.3d 544, 557 (10th Cir. 2018) (calling "undue hardship" an "affirmative defense" under Title VII). And several other circuits have held "undue hardship" to be an affirmative defense under statutes applying a similar framework to Title VII.[2]

The comparative unfairness of the Sixth Circuit's rules extends further, as other circuits recognize that the RLA's arbitral mechanism should extend no further than its reason for being: ensuring uniform interpretation of CBAs. In the Seventh Circuit, for example, if CBA interpretation is necessary to resolve a claim, the litigation is not dismissed, but only "stayed" until the interpretive problem is resolved, whereupon "the suit can resume." *Tice* v. *Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002). But in the Sixth Circuit, the need for CBA interpretation does not produce a stay for arbitration, but a dismissal with prejudice—closing the courthouse doors completely and leaving arbitration as the only forum where these claims could be addressed. (App., *infra*, 14a, 64a)

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Employees in industries regulated by the RLA who seek to bring Title VII claims in the Sixth Circuit therefore face a two-fold disadvantage when compared to

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[2] *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 217, 223 (2d Cir. 2001) (holding that "undue hardship" is an affirmative defense under the ADA, which applies the same "framework" as Title VII); *E.E.O.C.* v. *St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1341 (11th Cir. 2016) (holding that "undue hardship" is an affirmative defense under the ADA); *Woodruff* v. *Peters*, 482 F.3d 521, 527 (D.C. Cir. 2007) (citing 29 C.F.R. § 1630.15(d) as "confirming that 'undue hardship' is an affirmative defense" under the Rehabilitation Act).

similar employees in every other circuit. The first is that their federal claims are subject to a risk of preclusion that does not exist elsewhere. The second is that the Sixth Circuit's rules for RLA preclusion are uniquely slanted toward arbitration. The upshot is that for plaintiffs like Stanley, claims are subject to arbitration that would have been heard in court virtually anywhere else. This Court's intervention is necessary to end the multifaceted conflicts that have allowed such jurisdictional unfairness to develop.

B. The decision below is incorrect.

1. This Court's review is also essential because the Sixth Circuit's standards for preclusion of federal claims under the RLA are wrong and cannot be squared with this Court's precedent—for the very reasons the Court explained out in *Norris* and *Buell*: The RLA is not meant to preclude federal civil rights claims.

That much is evident from the tests the Court has utilized to determine the scope of the RLA's mandatory arbitral mechanism. *Norris*'s test for determining which disputes fit within the RLA's category of "minor" disagreements is designed for "pre-empt[ion]" of "state law" claims, 512 U.S. at 262. And the standard it "adopts" is likewise a "preemption" standard—*Lingle*'s framework for applying LMRA § 301, in hopes of harmonizing the two "virtually identical" preemption standards. *Norris*, 512 U.S. at 260. Neither concerns the determination whether the RLA precludes federal claims. And the reason why is ultimately rooted in "the Supremacy Clause." *Coker* v. *Trans World Airlines, Inc.*, 165 F.3d 579, 584 (7th Cir. 1999). The question in preclusion is whether the RLA means to displace a co-equal federal law, and thus involves

asking whether the RLA has any application to claims created by federal statute. And that question cannot be answered by examining *Norris*'s test, which presumes the RLA's applicability, and aims to help courts decide how much law the RLA displaces—by "policing the line between major and minor disputes." 512 U.S. at 265. The inquiries are not "sufficiently similar" that they can be treated as equivalents. *Brown*, 254 F.3d at 662.

Preclusion therefore requires a different toolkit—one meant to help courts determine how to read the RLA together with other federal statutes. That toolkit is supplied by *Buell*, which is why the Court took such pains to leave *Buell*'s holding intact. Under *Buell*, the RLA cedes to any statute that provides "minimum substantive guarantees" to particular workers beyond what they could obtain before RLA adjustment boards. 480 U.S. at 565. The Court's reasons for this rule is obvious: The RLA claims no specific power over claims created by other federal claims, and federal statutes like Title VII give no indication that they meant to cede to *any* arbitral mechanism in *any* other statute. Accordingly, when Congress added Title VII after the RLA and granted a class of employees a substantive protection against discrimination, that carved out these matters from the "disputes" that might have fallen within the RLA and gave them entirely separate treatment. And if there were any doubt on this score, Title VII ought to control, as the act enacted later in time. *United States* v. *Estate of Romani*, 523 U.S. 517, 530–531 (1998) (holding that the "a later federal statute should control").

It is also obvious that Title VII provides the "minimum substantive guarantees" to particular workers necessary to reflect Congress's intent to displace the RLA arbitral mechanism. Title VII "is a comprehensive statute

designed to end * * * discrimination in the workplace in all industries, and it does not exempt the railroad and airline industries from its reach." *Brown*, 254 F.3d at 659 (emphasis added). "The enactment of Title VII provides a more extensive and broader ground for relief" than available through the RLA arbitral process. *Norman*, 414 F.2d at 83. It is also "specifically oriented towards the elimination of discriminatory employment practices," *ibid.*, and it provides a broader set of remedies—including damages and injunctive relief, 42 U.S.C. §§ 1981a(a)(1), 2000e–5(g)—than the "back pay" and "reinstatement" remedies available in RLA arbitration. *Lewy* v. *Southern Pacific Transportation Co.*, 799 F.2d 1281, 1295, 1297 (9th Cir. 1986). And the substantive rights Title VII provides are specifically "enforceable by individuals in the District Courts." *Norman*, 414 F.2d at 83. That is plainly greater than what a worker can get in RLA arbitration.

There is also a deeper incompatibility between the RLA arbitral forum and substantive Title VII rights that indicates the former did not mean to preclude the latter. The only matters that the RLA delegates to arbitrators and the RLA Adjustment Board are "disputes invoking contract-based rights." 512 U.S. at 254. Accordingly, such contract disputes over the meaning of a CBA are the only matters that the RLA empowers them to decide. That means arbitrators are not empowered to make the legal decisions necessary to decide federal civil rights claims. They are simply not part of the delegation of authority provided by the RLA. And that comports with the Board's understanding of the limits of its own authority. See NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award

No. 19790 (1973) ("[T]his Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreements"); *Northwest Airlines/Airline Pilots Ass'n., Int'l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 ("[B]oth the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]"); *United Airlines, Inc.*, 48 LA 727, 733 (BNA) (1967) ("The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act"). Accordingly, forcing federal civil rights claims into RLA arbitration would lead to a truly "radical" result: The claimant would not be able to "assert *in any forum*" the rights conveyed to her by federal statute. *Carlson* v. *CSX Transp., Inc.*, 758 F.3d 819, 834 (7th Cir. 2014) (emphasis in original). That cannot be the correct reading of the RLA, a statute that "reflects a strong congressional interest in seeing that employees are not left remediless." *Pyles* v. *United Air Lines*, 79 F.3d 1046, 1052 (11th Cir. 1996). This is strong evidence that the RLA leaves Title VII claims intact, even when they might require interpretation of a CBA for their resolution.

2. This carving out of Title VII claims from the RLA's mandatory arbitral mechanism does nothing to undermine the uniformity the RLA provides. The RLA's arbitral mechanism displaces state law for the same reason section 301 of the LMRA preempts state law: "[T]he application of state law" to a CBA "might lead to inconsistent results since there could be as many state-law principles as there are States." *Lingle*, 486 U.S. at 406. But the chances for fractured CBA-interpretation are drastically reduced for federal claims. These can be heard in federal court, with a

single set of CBA construction and interpretive principles. And this Court sits to ensure those rules are kept uniform. Accordingly, allowing federal claims to proceed in court creates far less concern of interpretive incoherence than allowing state claims. In any event, if the RLA's need for uniform treatment of CBAs necessitates that arbitral bodies—and only arbitral bodies—be entrusted with interpretation of those agreements, then the answer is not to subject federal claims to dismissal, as the Sixth Circuit does. It is instead to afford parties a stay while the contract is interpreted in the arbitral forum, as the Seventh Circuit does, and then allow the federal claim to go forward when interpretation is complete. *Tice*, 288 F.3d at 318. That better balances Congress's desire to allow workers to have their federal civil rights claims heard in court with its concern for uniform interpretation of CBAs. The Sixth Circuit erred in concluding otherwise.

3. The Sixth Circuit does get one thing right, however. If, as *Norris* suggests, courts should employ the § 301 standard under the LMRA to determine the RLA's preclusive effect, they should at least apply the entire standard. And that means holding that only CBA-based claims, not CBA-based defenses, should be able to trigger a mandatory arbitral forum under *Caterpillar*, 482 U.S. at 399. Just as a worker cannot avoid RLA arbitration by repackaging claims for breach of a CBA as claims arising under state law, so too should an employer be prohibited from manufacturing a right to an RLA arbitral forum by asserting CBA-based defenses.

4. Yet as right as the Sixth Circuit might be it treating CBA-based claims differently from CBA-based defenses, it gets the contents of the category of "defenses" entirely wrong. This is because the Sixth Circuit erred in

determining that the "undue hardship" analysis in a Title VII case is not an affirmative defense.

There are two basic, universally recognized markers of an affirmative defense: *first*, whether the matter defeats the defendant's liability "even if all the allegations in the complaint are true," and *second*, whether it is a matter on which the "defendant bears the burden of pro[of]." *Black's Law Dictionary* (11th ed. 2019). The "undue hardship" analysis exhibits both markers. It is clear, for example, that the undue hardship inquiry allows a defendant to succeed regardless of the strength of the plaintiff's case. As Justice Alito's concurrence in *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) explained, the allocation of burdens in a Title VII failure-to-accommodate case can be summarized like this:

> An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice *unless* the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.

Id. at 2034 (Alito, J., concurring) (emphasis added). Everything coming after the italicized "unless" constitutes an affirmative defense, creating a defense for the employer, *id.* at 2032 n.2. That includes "undue hardship," because it means the employer triumphs regardless of what the plaintiff can prove on the other side of that "unless," which encompasses the plaintiff's Title VII *prima facie* burden. *Abercrombie* also makes clear that the employer defendant bears "the burden of establishing" this "'undue

hardship' defense." *Ibid.* And that is exactly why *Abercrombie* calls "undue hardship" a "defense."

By contrast, the Sixth Circuit's quixotic approach to identifying affirmative defenses improperly places the focus on labels and irrelevant details. It should make no difference whether the act creating a federal cause of action labels something an affirmative defense, *Hollis*, 760 F.3d at 543, if it does not operate as a defense. Nor for that matter does the "inevitability" of an issue make it anything less than affirmative defense. (App., *infra*, 9a) Many defenses are routinely asserted, but their popularity does not change their character. Accordingly, the Court was wrong to conclude the Title VII "undue hardship" inquiry was a part of Stanley's claim, and to hold that the RLA precluded courts from considering those claims for that reason.

C. The Questions Presented are of obvious national importance, and this is the appropriate vehicle to address them.

1. Certiorari is also warranted because the question presented in this case is a recurring one of national significance. The conflicts implicated by this case incorporate all but two of the regional circuits. That widespread conflict has been recognized by the lower courts, see *Carmona*, *supra*, and *Brown*, *supra*, and it has persisted since 1995, less than two years after *Norris* was decided. Compare, e.g., *Benson*, *supra*, with *Fry*, *supra*. And these conflicts are not confined to the RLA itself, but extend to the LMRA too, when they ought to be producing harmony.

2. These conflicts are right now leading to different case outcomes and different treatment of CBAs, in different circuits. That makes for bad treatment of CBAs—

which "'peculiarly * * * call [] for uniform law,'" since they often operate across jurisdictional lines. *Local 174, Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quoting *Pa. Ry. Co.* v. *Pub. Serv. Comm'n*, 250 U.S. 566, 569 (1919)). Allowing these jurisdictional differences to persist therefore deprives parties to CBAs of certainty when they apply and enforce the agreement, and could make negotiating a CBA more difficult "because neither party could be certain of the rights which it had obtained or conceded." *Ibid.* And the resulting uncertainty "would inevitably exert a disruptive influence" on the bargaining and administration processes. *Ibid.*

These festering conflicts are also bad for labor law writ large, contributing to a confusion that this Court recognized in *Lividas* v. *Bradshaw*, 512 U.S. 107 (1994). There it recognized that "the courts of appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and *Lueck*." *Id.* at 124 n.18. Lower courts agree: "[S]ection 301 has been the precipitate of a series of often contradictory decisions, so much so that federal preemption of state labor law has been one of the most confused areas of federal court litigation." *Galvez* v. *Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (internal quotation marks omitted). And numerous commentators have noted the widespread confusion as well. E.g., Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687, 702 (1997) ("The section 301 preemption doctrine is an awful mess."); Laura W. Stein, *Preserving Unionized Employees' Individual Employment Rights: An Argument Against Section 301 Preemption*, 17

Berkeley J. Emp. & Lab. L. 1, 6–17 (1996) (noting that the Court's decisions "did not clearly define the test for preemption" and identifying at least three tests for preemption in the Court's jurisprudence). And as this case illustrates, the conflicts have only grown worse since these articles and decisions were written. The Court's intervention could fix all these conflicts—within the RLA, within the LMRA, and between the two—and give the entire area of the law a course-correct.

3. The issues encapsulated in the Questions Presented are also obviously important. Not only do they affect each of the millions of employees in the railroad and airline industries affected by the RLA who might experience discrimination in the workplace, but they could reach many more—because of the ties between the RLA and LMRA. And that means the issues in this case could control worker relations in every industry in which companies are subject to CBAs negotiated by labor unions. Accordingly, left unchecked, the Sixth Circuit's erroneous approach to RLA preclusion could spread to harm virtually all union members and anyone subject to a CBA. It will deny all employees subject to the RLA or the LMRA of any federal judicial forum for Title VII claims—under a logic that will shunt many other types of federal civil rights claims into arbitration as well, before arbitral boards that lack the power to consider federal civil rights claims. And that will lead to a disappearance-through-arbitration of claims that other circuits reserve for a judicial forum. The end result will be that employees in the Sixth Circuit will have fewer civil rights than those virtually everywhere else—the price workers must pay to collectively bargain or join a union.

4. This case is an excellent vehicle to overturn the Sixth Circuit's erroneous precedent and resolve the festering conflicts in federal labor law. It highlights several conflicts in a way that allows them all to be resolved at once—fostering the inter-statutory harmony this Court has long sought to develop. And this is a good case to resolve these splits because the standard is outcome determinative under Sixth Circuit precedents that have stood for years and that the Court refused to fix in this case to bring them in line with Supreme Court precedent.

This case also provides an opportunity to resolve these issues on sympathetic facts, because leaving the lower court's judgment standing will force the death-by-arbitration of claims that ought to succeed in district court. The lower court may have been correct that issues of CBA interpretation might have been implicated by Stanley's claims if ExpressJet's position were adopted. But the better reading of the CBA is that it has no impact on Stanley's claims or ExpressJet's "undue burden" defense. Indeed, Stanley's request to have the division of cabin responsibilities be adjusted to relieve her of responsibility for assisting with drink service on two-attendant flights does not involve the CBA at all, and therefore does not involve other employees' contractual rights. It instead involves a manual that has not been incorporated into the CBA and that ExpressJet reserved the right to change at its pleasure.

The only accommodation that might implicate the CBA itself would be Stanley's request to be relieved of staffing one-attendant flights—because it at least implicates other flight attendants' rights to pick their assignments. But Charee offered her own accommodation that would not require violating anyone's contractual rights.

She said would be willing to take an "unexcused" absence for any single-attendant flight that might arise, and ExpressJet could call up a reserve. The only way that might require forcing a flight attendant to take an assignment against her will would require a chain of hypotheticals that is unlikely to ever happen. It would arise only if (1) a flight had to be downgraded from two attendants to one, (2) a reserve was unavailable, (3) another senior flight attendant objected to taking the spot. And in any event, ExpressJet had the obligation under Title VII to at least ask for voluntary waivers from other affected employees before denying Stanley's request outright. "The employer's obligation is to make a good faith effort to allow voluntary substitutions and shift swaps." 29 C.F.R. §1605.2 (d)(1)(i); see also Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 605 (2000) (citing cases).

Accordingly, the concern for CBA interpretation and application so often raised in Title VII cases—that accommodating would require violating the contractual rights of other workers—are simply not implicated in this case. This is the paradigm case where ExpressJet is employing "a collective bargaining contract" and a "seniority system" as an excuse to "violate [a] statute"—rather than being required "take steps inconsistent with the otherwise valid agreement." *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 79 (1977).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 12, 2020