No. 18-349

In the Supreme Court of the United States

DARRELL PATTERSON, PETITIONER

v.

WALGREEN CO.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

The Government is correct that "[g]ranting review here would present the Court with [a] meaningful opportunity to interpret 'undue hardship' in Title VII," and thereby resolve Question 3. Govt.21. For all the reasons explained by the Government and Patterson, and by Justice Alito (for four Justices) in *Kennedy*, the Court should grant on Question 3. The only remaining question is what to do with Questions 1 and 2.

Question 1—which deals with the "full elimination" requirement—should also be granted. At minimum, such a grant will facilitate the Court's consideration of the Government's interpretation of Title VII, while eliminating any risk that the alternative character of the Eleventh Circuit's holdings would prevent the entire Court from reaching Question 3. Question 2 can also be sensibly addressed in resolving Question 3.

I. As the Government recommends, the Court should grant on Question 3.

The Government correctly explains why Question 3—whether to revisit the *de minimis* standard articulated in *Hardison*—is worthy of this Court's review. It also explains how the Court *could* potentially reach that question without also granting Questions 1 or 2—although (as explained in Section II) the Government is less persuasive on why the Court *should* impede its review in that manner.

1. As the Government shows (at 19-21), *Hardison* flatly misinterpreted Title VII's "undue hardship" standard without the benefit of briefing. Aside from the fact that the Court's analysis was dicta with re-

spect to Title VII (see Pet.28), the Government also explains why "revisiting *Hardison's de minimis* standard" is not "precluded by stare decisis" (Govt.21), especially in light of this Court's subsequent decision in *EEOC* v. *Abercrombie & Fitch*, 135 S. Ct. 2028 (2015). See Govt.21-22.

In calling for review, the Government (at 22) also recognizes the "interest * * * in having [employees' Title VII] rights fully protected," echoing the analysis in the petition and multiple amicus briefs explaining the serious adverse impact of the *de minimis* standard on religious liberty. See, *e.g.,* Pet.31-34; Reply 9; Brief of Church of Jesus Christ 9-10. Indeed, one amicus brief, on behalf of various Christian and Muslim groups, explains in detail how the *de minimis* standard especially harms religious minorities. See Brief of Christian Legal Society and American Islamic Congress, 23-25. That injury is an additional, powerful reason to grant review on Question 3 now.

2. The Government's analysis also reinforces this case's suitability as a vehicle for resolving that question. There is no doubt that the Eleventh Circuit applied *Hardison*'s *de minimis* standard. See Pet.12a-13a. Nor is there any doubt that a higher standard—such as the "significant difficulty or expense" standard applied under the Americans with Disabilities Act—would materially affect the court of appeals' summary-judgment analysis and, indeed, likely require denial of Walgreens' summary-judgment motion on undue hardship on remand. See, *e.g.,* Govt.20.

The Government also persuasively shows that this Court could avoid the binary choice suggested in Question 1 by selecting a third path that would effectively resolve both Questions 1 and 3: The Court could rule

that the proper analysis in all Title VII accommodation cases is to ask whether the employer "eliminated [the work-religion] conflict *to the extent it could* without incurring an undue hardship." Govt.17 (emphasis added). That approach is consistent with the text of the accommodation protection, which broadly prohibits an employer from discharging an employee for a religious practice "unless [the] employer demonstrates that he is unable to reasonably accommodate" the "employee's religious * * * practice without undue hardship[.]" 42 U.S.C. 2000e(j). And that approach would answer Question 1 by providing a third option—requiring more than mere "potential" elimination of a conflict but, sometimes, less than "full" elimination.

Under both the text and the Government's argument, whether a proposed accommodation is "reasonable" is thus necessarily intertwined with undue hardship. Indeed, if a given accommodation would likely eliminate the conflict in all situations without undue hardship, the employer could not carry its burden of showing that it would be "reasonable" to deny that accommodation for an alternative that would eliminate the conflict in fewer situations.

If the Court takes that approach in interpreting the "undue hardship" defense, and also adopts a more robust standard for undue hardship, the Court's decision will require at least vacatur of the decision below. The court of appeals—or, more likely, a jury—will then have to decide whether there is another accommodation that would accommodate Patterson's religious need to the maximum extent possible without imposing on Walgreens an undue burden, "properly understood." Govt.17. If so, Walgreens would be obliged to provide that accommodation because no lesser accommodation could be considered "reasonable."

The record, moreover, already suggests one such accommodation: Walgreens could simply allow the training curriculum creator, and company higher-ups with the necessary training, to fill in for Patterson in a rare, genuine emergency. See Pet.8-9.

Under the Government's approach, therefore, the Court *could* grant and decide only the third question—and on that basis vacate the decision below.

II. The Court should grant on Question 1, in part to facilitate full analysis of Question 3.

While the Government's proposed resolution of Question 3 rejects the binary choice suggested in Question 1 (and the case law), that resolution simply *answers* Question 1 differently; it is not a reason to deny *asking* that Question. And granting on that Question in addition to Question 3 would be highly prudent: (1) it would provide the other side of the framework for the complementary analysis of "reasonable" accommodations and "undue" burdens proposed by the Government; (2) it would facilitate review of other alternatives should the Court not adopt the Government's solution; and (3) it would resolve the widely acknowledged conflict on whether an accommodation that does not fully eliminate a work-religion conflict can be deemed reasonable per se without regard to employer hardship.

1. Given the Government's (and the EEOC's) view that reasonableness and undue hardship are necessarily intertwined, at least in cases like this, it would seem most logical to pair Question 3, which deals only with undue hardship, with Question 1, which deals with reasonableness, so that the Court can clearly

reach and address that interplay in its ultimate decision. Thus, if Question 3 merits review, as the Government urges, it doesn't matter whether Question 1 merits review independently.

Indeed, as Justice Scalia observed in *San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part), this Court often grants review of "attendant" questions that may not be "independently 'certworthy' but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." Thus, under the Government's own interpretation of Title VII, whether or not Question 1 is "independently certworthy," in this case that question is "sufficiently connected" to Question 3 to warrant review.

That is also true for another reason: If the Court granted review *only* on Question 3, Walgreens would undoubtedly argue on the merits that the Court need not and cannot reach that question because the Eleventh Circuit's alternative holding on the reasonableness of Walgreens' proposed "accommodation" was sufficient to sustain the judgment, regardless of undue hardship. Pet.11a ("Because Walgreens reasonably accommodated Patterson's religious practice, *we need not consider the issue of undue hardship*.") (emphasis added). While the Government's proposed resolution of Question 3 would necessarily reject that alternative "reasonableness" holding, *Walgreens'* argument would be consistent with rulings in several other court of appeals, which have expressly treated reasonableness and undue hardship as "separate and distinct" bases for an employer defense. *EEOC* v. *Firestone Fibers*, 515 F.3d 307, 314 (4th Cir. 2008); see also, *e.g., id.* at 315; *Sturgill* v. *United Parcel Service*, 512 F.3d 1024,

1031-1032 (8th Cir. 2008) (collecting additional cases).[1]

Granting review of Question 1 would provide the Court the complementary framework to confront this issue and thus give the Court a more natural way to hold, as the Government urges, that reasonableness and undue burden are intertwined rather than "separate and distinct" bases for avoiding liability. Such a holding would in turn make clear that an accommodation that does not fully eliminate the employee's work-religion conflict cannot be "reasonable as a matter of law," *i.e.,* legally sufficient, without analysis of undue hardship.

2. If some Members of the Court do not accept the Government's view that "reasonableness" and "undue burden" are necessarily intertwined, those Members will also likely find that granting Question 1 substantially aids their ability to reach and resolve Question 3. Indeed, reversal on Question 1 does *not* depend on accepting the Government's position on the intertwining of these two elements. See Pet.14-16 (summarizing decisions in other circuits). As the Government

[1] For similar reasons, the Government is also incorrect in claiming (at 14) that the Eleventh Circuit actually *applied* the "elimination standard" that the Government urges. The passage from the opinion quoted above makes clear that, although the Eleventh Circuit gestured towards "elimination" (at 7a-9a), when it came to applying that standard, the Eleventh Circuit abandoned it: In the passage above, it held that the accommodation Walgreens offered Patterson—which concededly did not eliminate the work-religion conflict—was per se reasonable and thus sufficient to sustain summary judgment in Walgreens' favor, *without* "consider[ing] the issue of undue hardship." Pet.11a. Thus, the Government's recommendation against granting on Question 1 is based on a misreading of the Eleventh Circuit's opinion as well as other leading circuit decisions.

suggests (at 9), the Court could hold, alternatively, that a proposed arrangement that does not eliminate a work-religion conflict cannot even be considered an "accommodation" under the ordinary understanding of that term.

For these reasons, too, Question 1 is "sufficiently connected" to Question 3 to warrant review of both questions.

3. In any event, Question 1 *is* independently "certworthy." The Government does not deny that the EEOC's own Compliance Manual expressly notes the circuit conflict on Question 1, *i.e.*, whether an accommodation can be deemed per se "reasonable"—and therefore a complete defense to liability—without regard to undue hardship. The manual reflects the EEOC's legal judgment (also reflected in the Government's brief) that "a reasonable accommodation must eliminate the conflict between work and religion *unless* such accommodation would impose an undue hardship[.]" *EEOC Compliance Manual* §12-IV(A)(3), 52 n.130 (2008) (emphasis added). But the Manual then correctly notes that "[s]ome courts have approached the issue of what is a reasonable accommodation in * * * *conflict*[] with longstanding Commission and judicial precedent." *Ibid*. (emphasis added).

Nor does the Government deny that both *Sturgill* and *Firestone* have expressly acknowledged the circuit split on Question 1. See Reply 1; *Sturgill*, 512 F.3d at 1032; *Firestone*, 515 F.3d at 314.

The Government's further claim that the conflict identified in the Guidelines and in these decisions is "illusory" (Govt.14) is incorrect. As noted in the petition (at 17-22) and reply (at 1-5), in flat contradiction to the First and Fourth Circuits, the Second, Sixth,

Seventh, Eighth, Ninth and Tenth Circuits hold that an accommodation that does not fully eliminate the conflict *cannot* be considered per se reasonable (or reasonable "as a matter of law")—and therefore provide a complete defense to liability on summary judgment—regardless of undue hardship.

The Government agrees (at 16) with Patterson's characterization of the latter group of cases. But those cases cannot be reconciled with decisions like *Firestone*. That decision squarely held that, once the plaintiff has established a prima facie case, "the burden is on the employer to show *either* (1) that it has provided the plaintiff with a reasonable, though not necessarily a total, accommodation *or* (2) that such reasonable accommodation was not possible without causing undue hardship[.]" 515 F.3d at 315 (emphasis added). And the court then went on to rule in the defendant's favor *solely* on the ground that it had "provided [the plaintiff] with a reasonable accommodation." *Id.* at 309; *accord id.* at 315-319.

Thus, as both the petition and an amicus amply demonstrate, the determination of whether Walgreens' attempted accommodation was per se "reasonable" would have been different had it been heard elsewhere. Brief of Founders' First Freedom 6-10. In most circuits, Walgreens' failure to eliminate the conflict would have *prevented* the proposed accommodation from being considered reasonable per se, without consideration of undue burden. The Eleventh Circuit, by contrast, expressly affirmed the district court's summary-judgment holding that the accommodation was per se reasonable even though it failed to resolve

the conflict, and *independently* of Walgreens' asserted hardship. Pet.11a.[2]

4. The evidence in the summary-judgment record also makes this case an excellent vehicle for resolving the conflict on Question 1. Although the Government, like the Eleventh Circuit, recites the facts in a way that favors Walgreens, that ignores the basic rule that, on summary-judgment review, the evidence must be read in the light most favorable to the *non-moving* party—here, Patterson. *E.g., Abercrombie*, 135 S. Ct. at 2031.

When viewed through the proper legal lens, the record paints a different picture. Although this Court need not second-guess the Eleventh Circuit's view of the record to reverse, on this record a reasonable jury could well determine (without addressing hardship) that Walgreens' proposed "accommodations" were *not* reasonable, much less reasonable per se:

- The episode that led to Patterson's firing arose only because he had been told, in a departure from prior policy, that he could seek shift swaps *only* with one other employee—Alsbaugh—rather than being allowed to swap with several other senior employees who were fully qualified to substitute for him and likely would have been willing to do so. Compare Pet.8 (citing Doc.60:52) with Pet.11a n.1; Doc. 62:11,26,32.

[2] That the Eleventh Circuit ruled in the alternative and thus considered both questions even though it could have stopped after the first illustrates how viewing the tests as independent can potentially interfere this Court's reviewing *either* issue alone, and thus favors granting both questions here.

- In that episode, Patterson's supervisor made it virtually impossible for him to find a swap by (a) discouraging him from approaching the only employee with whom he was authorized to swap and (b) giving him insufficient time to seek permission to approach someone else. See Doc.60:45-46; Doc.62:11, 18,26; Doc.65:6-7.
- Walgreens' "offer" to return Patterson to a customer care position—which still would not have eliminated the work-religion conflict—represented a substantial demotion (from which a substantial pay cut could be inferred), and was designed to provoke a rejection by Patterson so that Walgreens could justify firing him. See Pet.9 (citing Doc.60: 47-48); Doc.60:25; Doc.75:13.
- Walgreens had another alternative that would accommodate Patterson without hardship to Walgreens. See *supra* 4.

In short, not only is this a good vehicle for resolving Question 1, but that question is certworthy. And a grant on that question in addition to Question 3 would be both prudent and helpful to all employees of faith by leading to much-needed clarity on the reasonableness standard.

III. Question 2 also merits review and can most sensibly be answered in conjunction with Question 3.

As to Question 2—which deals with reliance on speculation to show undue hardship—the Government begins (at 17) by arguing that "no court, including the [Eleventh Circuit], has endorsed such speculation." Citing *Weber* v. *Roadway Express*, 199 F.3d 270, 275 (5th Cir. 2000), the Government maintains (at 17) that the Fifth Circuit merely allows employers to "*predict* that the proposal, if implemented, *likely* would impose a hardship" rather than requiring the employer to wait and see. *Ibid.* (emphasis added). Although the Court could consider the Government's phrasing of that standard if it were to grant review on Question 2, that is not the language *Weber* actually used, or its holding.

In fact, *Weber* held that the "mere possibility" of future hardship was "sufficient to constitute an undue hardship." *Weber*, 199 F.3d at 274. And the Sixth Circuit's latest decision on this topic—*Virts* v. *Consolidated Freightways*, 285 F.3d 508, 520-521 (6th Cir. 2002)—cited *Weber* for this same speculative approach, holding that the accommodation requested there "had the *potential*" to affect others—not that it likely would. 285 F.3d at 520-521 (emphasis added).

The Government further claims that the decision below does not conflict with other circuits because it merely allowed Walgreens to rely "on known conditions to project future hardships." Govt.18. But a reasonable jury could determine that the facts here, especially when viewed in the light most favorable to Patterson, see *Abercrombie*, 135 S. Ct. at 2031, show that Walgreens was just speculating.

For example, Walgreens had already "changed the general training schedule" to accommodate Patterson, so there was no foreseeable need for Friday night or Saturday trainings according to the general schedule. Pet.12a. Indeed, according to the Eleventh Circuit, the training that Patterson missed was a "true emergency" which, by definition, *cannot* be foreseen. Emergency, Black's Law Dictionary (11th ed. 2019); Pet.12a-13a. Yet the court below determined that Patterson had been fired "because [Walgreens] could not rely on [him] *if* an urgent business need arose that required *emergency* training" between Friday and Saturday evening. Pet.5a (emphasis added). The opinion below, then, was based on the speculative prediction of an unpredictable emergency, similar to the speculative hardships endorsed in *Weber* and *Virts* but rejected by the Fourth, Eighth, Ninth and Tenth Circuits.

By contrast, clarifying that employers must be fairly certain that they will experience hardship in the future based on "known conditions"—the Government's proposed standard, see Govt.18—would be a vast improvement over the decision below and others like it.

To be sure, if Question 3 is granted, the Court *could* resolve Question 2 simply by clarifying that whatever "undue hardship" standard it adopts cannot be satisfied through speculation. But precisely because Question 2 can be resolved as part of Question 3, there would be minimal additional briefing or argument required, and thus minimal burden, in *granting* on that Question along with Question 3.

CONCLUSION

The petition should be granted on all three Questions, with Question 1 (especially) and Question 2 being addressed incidentally to the resolution of Question 3.

Respectfully submitted,

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