No. A18-___

In the Supreme Court of the United States

Darrell Patterson, Applicant
v.
Walgreen, Co.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

**Directed to the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the
United States Court of Appeals for the Eleventh Circuit**

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To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Darrell Patterson respectfully requests a 30-day extension of the deadline for filing his petition for a writ of certiorari. A panel of the Eleventh Circuit affirmed summary judgment against Patterson on March 9, 2018 (App. A), and the Eleventh Circuit denied rehearing *en banc* on April 26, 2018 (App B). The petition is thus currently due on July 25, 2018. Patterson respectfully requests a thirty-day extension to August 24, 2018. This Court will have jurisdiction under 28 U.S.C. 1254(1).

1. Patterson was fired from his job because he declined to conduct a three-hour training during his Sabbath. A trainer at a Walgreens' call center, Patterson was informed Friday afternoon that he was expected to perform a training on Saturday morning. App. A at 2. Patterson was only permitted to ask one other employee to swap,[1] and was specifically discouraged from asking that employee on that occasion. App. A at 3. When Patterson failed to show, his training was rescheduled for the following Monday. The panel opinion implicitly conceded that this rescheduling caused *no* hardship to n Walgreens. App. A. at 13–14. Nonetheless, the panel opinion concluded Patterson was "reasonably accommodated" within the meaning of Title VII because Walgreens (a) did not forbid swapping with other employees and (b) offered to transfer him to an alternative position, albeit a position where there would be still a risk of

[1] While the panel denied this fact, App. A at 10–11, it is in the record and unrefuted. District Court Doc. 60 at 52.

having to work during his Sabbath. App. A at 9–10. The panel also concluded that because Walgreens asserted that there would someday be undue hardship, it was entitled to summary judgment on that point as well. App. A 13–15.

2. Patterson's forthcoming petition will raise three important issues of federal law regarding Title VII's religious accommodation provision. That provision requires an employer to accommodate an employee's "religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship." 42 U.S.C. 2000e(j). The petition's first two issues have divided the circuits on the proper meaning of Title VII, and the third will ask this Court to revisit the definition of "undue hardship" articulated in *TWA* v. *Hardison*.

The petition's first question will concern the scope of this Court's decision in *Ansonia* v. *Philbrook*, 479 U.S. 60 (1986). In that case, this Court held that an employer is in a "safe harbor"—and is thus entitled to summary judgment on reasonable accommodation—when the accommodation "eliminates" the conflict between the employee's work responsibilities and the employee's religious practice. *Id.* at 70. Four circuits have interpreted *Ansonia* to mean that when the employer is *not* in the safe harbor, the employee wins as a matter

of law.[2] Two other circuits have held that, when the accommodation is outside the safe harbor, the reasonableness of the accommodation is a question of fact for the jury.[3] But the Eleventh Circuit below, joining the First and Fourth Circuits, have extended *Ansonia*'s safe harbor to circumstances where the accommodation concededly did not eliminate the conflict.[4]

This question has divided nine circuits, making it ripe for consideration by this Court.

Second, Patterson's forthcoming petition will ask this Court to resolve a split regarding whether an employer can rely on speculation to demonstrate undue hardship. Four Circuits have all held that an employer may not rely on speculation in making its showing.[5] But the Eleventh and Fifth Circuits—as well as dicta from the Third Circuit—have all indicated that an employer *may*

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[2] *Baker* v. *Home Depot*, 445 F.3d 541, 547–548 (2d Cir. 2006); *EEOC* v. *Ilona of Hung., Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997); *Opuku-Boateng* v. *California*, 95 F.3d 1461, 1467 (9th Cir. 1996); *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994).

[3] *Tabura* v. *Kellogg*, 880 F.3d 544, 553 (10th Cir. 2018); *Sturgill* v. *UPS*, 512 F.3d 1024, 1033 (8th Cir. 2008);

[4] *E.g.* App. A at 11 (upholding proposed accommodation as reasonable as a matter of law despite admitting that the accommodation that may not have eliminated the conflict); *Sánchez-Rodríguez* v. *AT&T Mobility,* 673 F.3d 1, 12 (1st Cir. 2012); *EEOC* v. *Firestone Fibers & Textiles,* 515 F.3d 307, 313 (4th Cir. 2008).

[5] *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981); *Benton* v. *Carded Graphics*, No. 93-1675, 1994 U.S. App. LEXIS 14196 (4th Cir. June 9, 1994) (unpublished).

rely on speculation to demonstrate undue hardship.[6] Here again, six circuits have squarely addressed this issue—seven counting the Third's dicta—illustrating the need for this Court's review.

Finally, the decision will invite the Court to reconsider its holding in *TWA* v. *Hardison*, 432 U.S. 63 (1977), that an "undue hardship" means simply a "more than *de minimis* cost," *Id.* at 84. That holding is plainly counter to Title VII's text, as numerous judges and commentators have explained.[7] Given the increasing religious diversity in America—and the accompanying increase in requests for religious accommodations—*Hardison*'s effect on employees of faith grows more damaging each year, and richly merits this Court's reconsideration.

3. To adequately present these issues for the Court's consideration, undersigned counsel needs an additional thirty days. Counsel's other obligations include:

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[6] Slip op. at 14; *Weber* v. *Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000); *Ward* v. *Allegheny Ludlum Steel Corp.*, 560 F.2d 579, 583 n.22 (3d Cir. 1977).

[7] See *Hardison,* 432 U.S. at 92 n. 6 (Marshall, J., dissenting) ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost[.]'"); *Nakashima* v. *Bd. of Educ.*, 131 P.3d 749, 758 (Ore. App. 2006); *Anderson* v. *General Dynamics Convair etc.*, 589 F.2d 397, 402 (9th Cir 1978) ("Undue hardship means something *greater than* hardship.") (emphasis added); Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 Ark. L. Rev. 515, 537 (2010) (Noting *Hardison* "has proved to be a way for employers to avoid making more than token accommodations for employees who have conflicts between their faith and their work obligations.")

- For the past six weeks, Counsel of Record has been consumed with representing the six Catholic Dioceses of Puerto Rico, which are at present subject to a multi-million dollar seizure order to fulfil the obligations of three Catholic schools. See *Acevedo Feliciano* v. *Iglesia Católica Apostólica y Romana*, 2018 TSPR 106 (P.R. 2018). Counsel has spent a great deal of time over the past few weeks in litigation regarding this seizure order, which contradicts settled First Amendment and due process precedents, and additional lines of statutory and constitutional authority. Counsel anticipates preparing filings throughout the month of July in this matter.

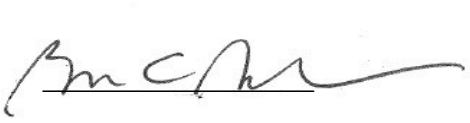
- Counsel of Record has recently spent a good deal of time representing the Utah Republican Party, preparing to file a petition for certiorari in a Tenth Circuit case, *Utah Republican Party* v. *Cox*, No. 16-4091 (10th Cir.). That case involves important questions concerning efforts by a state governments to influence the positions and views of a political party. *En banc* review was denied on June 8, 2018, and counsel has been required to devote significant time to laying the groundwork for a petition in that case.

- Counsel of Record is also counsel of record for the petitioner in *Spencer* v. *Abbott*, No. 17-1397. The petitioner there is seeking this Court's review of important questions concerning the Eighth Amendment, and whether the Court should reconsider the doctrine of qualified immunity. A response brief is due in that case on July 25. Once he receives the response brief, counsel will need to quickly prepare a reply brief in that case.

- Finally, Counsel of Record and co-counsel have long-planned vacations for much of July.

Because of these and other obligations, counsel needs an additional thirty days to adequately prepare the petition. This extension—from July 25 to August 24—will ensure that the important questions the petition will present are adequately explained and supported.

Respectfully submitted,



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