No. 18-349

IN THE
Supreme Court of the United States

DARRELL PATTERSON,
Petitioner,
v.
WALGREEN CO.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly held that the particular religious accommodations that Walgreens offered to Patterson in this case were "reasonabl[e]" under 42 U.S.C. § 2000e(j)?

2. Whether the Eleventh Circuit correctly held, in the alternative, that the particular religious accommodation requested by Patterson would have constituted an "undue hardship on the conduct of the employer's business" under 42 U.S.C. § 2000e(j)?

3. Whether the Court should overrule *TWA v. Hardison*, 432 U.S. 63 (1977)?

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INTRODUCTION

Respondent Walgreen, Co. ("Walgreens") employs people of all faiths and is committed to respecting and accommodating the religious practices of its employees. Petitioner Darrell Patterson is a Seventh Day Adventist who formerly worked for Walgreens. For several years before the dispute in this case arose, Walgreens worked with Patterson to ensure that, consistent with his religious beliefs, Patterson would not work on Saturday. Walgreens scheduled Patterson's regular work hours between Sunday and Thursday, and when Saturday work was unavoidable, Walgreens authorized Patterson to swap shifts with his co-workers—an option he used on several occasions.

This dispute centers around Walgreens' need for emergency training that required Patterson to perform his duties as a Training Instructor on Saturday. Several other employees could have filled in for Patterson, but Patterson did not contact them. Instead, after contacting only one co-worker who was unable to swap shifts, Patterson simply chose not to report to work. At that point, Walgreens offered Patterson the opportunity of a transfer to a different position within the company with a larger pool of employees that would make it easier for him to swap shifts. Patterson categorically refused, insisting that the only accommodation he would accept would be maintaining his current position together with an ironclad guarantee that he never work on Saturday, regardless of whether an emergency arose. Walgreens concluded that the accommodations it had offered were reasonable, and that providing Patterson's requested

accommodation would have imposed an undue hardship on Walgreens. Because Patterson made clear he would continue missing work on Saturdays, even during emergencies, Walgreens terminated Patterson's employment.

Patterson sued Walgreens under Title VII, alleging it had failed to accommodate his religious practice. The District Court granted summary judgment to Walgreens, and the Eleventh Circuit affirmed in an unpublished, per curiam opinion. The court concluded, on the particular facts of this case, that Walgreens had satisfied its duty to "reasonably accommodate" Patterson's religious beliefs through other means. 42 U.S.C. § 2000e(j). It further held, in the alternative, that Patterson's insistence on a guarantee that he could stay in his current position while missing work even during emergencies would pose an "undue hardship" on Walgreens' business. *Id.*

Nothing about that fact-bound holding warrants this Court's review. Much of the petition is premised on mischaracterizations of the Eleventh Circuit's holding. For instance, Patterson asserts that the panel found that a transfer involving a pay cut could be a reasonable accommodation. Pet. 10, 32. It did not: rather, the panel went out of its way to make clear that there was no evidence supporting Patterson's assertion that he would receive a pay cut if he was transferred. Pet. App. 10a & n.2. Likewise, Patterson claims that the panel found that "mere speculation" was sufficient to establish undue hardship. Pet. 32. Again, however, that is incorrect: rather, the court identified the particular hardships that Patterson's requested

accommodation would have imposed. Pet. App. 13a.

Patterson identifies no issue of law warranting this Court's review. Patterson asserts that the Eleventh Circuit's decision implicates two distinct circuit splits: a split on whether an accommodation that has the mere potential to eliminate a conflict is "reasonable," and a split on whether an accommodation can pose an undue hardship if it is merely "speculative." No split exists on either issue. In every case cited by Patterson, the court carefully scrutinized the relevant facts to determine whether the employer's accommodation was reasonable or whether the hardship posed by a particular accommodation would be undue. Employers won some cases and lost others, depending on the particular facts of each case. The Eleventh Circuit's decision, likewise, turned on the facts: the court did not adopt any general legal rule on "reasonableness" or "undue hardship" that conflicts with any other court's rule. This case would also be a poor vehicle to consider either question, given that Patterson's arguments hinge on his disagreements with the Eleventh Circuit's interpretation of the summary judgment record.

Patterson also asks the Court to repudiate the following statement from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977): "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Patterson contends that this statement improperly equated "*de minimis* cost" with "undue hardship." Patterson has shown no valid reason to overrule this 42-year-old statutory interpretation decision. Further, this case would be a poor vehicle to reconsider the legal

standard for "undue hardship" because the outcome would not change even under Patterson's preferred approach.

The petition should be denied.

STATEMENT

A. Background

Patterson began working for Walgreens in October 2005. Pet. App. 2a. He started as a Customer Care Representative ("CCR") in the Orlando Customer Care Center. Doc. 60:52. The Orlando Center was part of Walgreens' Customer Care Center business, which operated twenty-four hours per day and seven days per week. Doc. 60:57. Employees in this business were expected to work any scheduled shift, and their schedules or shifts could change depending on business needs. *Id.*; Doc. 63:170.

When he was hired, Patterson informed Walgreens that, as a Seventh Day Adventist, his religious beliefs prohibited him from working during the Sabbath—sundown on Friday to sundown on Saturday. Doc. 60:45, 58. Although Patterson claims otherwise, Walgreens has no policy prohibiting religious accommodations and has provided accommodations to employees at the Orlando Center—including Patterson himself. Doc. 68:36-37; Doc. 67-1:122-23, 129; Pet. App. 2a, 23a.[1] While Patterson was a CCR, Walgreens

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[1] In addition, Walgreens maintains numerous policies prohibiting retaliation or discrimination, providing equal employment opportunities in all aspects of employment, and giving its employees several methods to report any problems or conflicts related to their employment. Doc. 60-1:54-59.

accommodated Patterson's scheduling requests. Indeed, Patterson admitted that he never had a conflict with Sabbath observance during his time as a CCR. Doc. 60:68, 116.

On August 1, 2007, Walgreens promoted Patterson to Training Instructor. Doc. 60:99, Doc. 60-1:98. As a Training Instructor, Patterson trained new and existing CCRs. Doc. 60:104.

Walgreens continued to assist Patterson with his scheduling requests following his promotion. *See* Doc. 60:145, 167–71. Walgreens encouraged Patterson to switch shifts with other employees when trainings needed to be scheduled on the Sabbath. Doc. 60:108, 125–26, 200; Doc. 60-1:107. Patterson's supervisors never prohibited him from swapping shifts with other employees. Doc. 61:73; Doc. 60:190.

However, there were some instances where Patterson's scheduling requests could not be met. In 2008, for example, Walgreens' business needs required that Patterson attend a multi-week mandatory training that included Friday evening sessions. Doc. 60-1:107–09. Because Patterson himself would need to receive training during some of the sessions, swapping with another employee was not possible. *Id.* Patterson refused to attend and his absence during that period resulted in progressive discipline for each occurrence. *Id.*

Following the missed training, Walgreens continued to accommodate Patterson's request for religious accommodation through schedule flexibility and shift swaps. *See* Doc. 60:102-03. Walgreens even changed

the general training schedule to Sunday through Thursday to accommodate Patterson. Doc. 60:105; Doc. 60-1:117. Through these accommodations, Patterson had no further issues with Sabbath observance until August 2011. *See* Doc. 60:95.

On August 17, 2011, the Alabama Board of Pharmacy ordered Walgreens to shut down the Walgreens Mail Service ("WMS") activities at the Muscle Shoals Customer Care Center. Pet. App. 24a; Doc. 63:72; Doc. 63-1:1. Through the WMS, Walgreens contracted with corporate clients to perform call center services for mail-order prescriptions. Doc. 63:47-48. These contracts often had performance requirements mandated by the corporate client, which could result in substantial financial penalties—as high as $250,000—for Walgreens if not met.[2] Doc. 63:36, 47-48, 172-78. The Board contended that CCRs were acting as pharmacists without a license by receiving calls from patients in need of a prescription refill and accessing prescription records. Doc. 63:72; Doc. 63-1:1.

The Board gave Walgreens until August 19, 2011, to cease WMS operations in Alabama. Doc. 63:72; Doc. 63-1:1. Walgreens management decided to shift WMS calls to the Orlando Center in order to comply. Doc. 63:92. However, there were not sufficient personnel trained at the Orlando Center to handle the call volume. *Id.* Approximately forty additional CCRs needed to be trained to handle WMS calls. Additionally, even CCRs at the Orlando Center who

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[2] For example, in most cases, contracts would require that Walgreens answer 80% of calls within 20 seconds. Doc. 63:47–48.

were trained in WMS needed further training to handle existing clients' expectations. Doc. 63:92, 107.

Because of the high call volume (roughly 50,000 calls per month) and the need to transition those calls quickly to meet client expectations, training had to happen immediately. Doc. 63:72, 80, 104, 115, 123. In this urgent situation, any training would have alleviated the burden. Doc. 63:105-06. Any training time lost would delay Walgreens' ability to meet required service levels and customer expectations. Doc. 63:132. Failure to shift the business and handle the calls would have an impact on patients' access to their medication, as well as impede Walgreens' ability to meet its contractual obligations to corporate clients, which could have resulted in substantial financial penalties. Doc. 63:172–74, 176–78.

On August 19, 2011, Patterson was informed that he would need to conduct an emergency training session the next day, a Saturday. Doc. 60:173–77. Patterson attempted to call Lindsey Alsbaugh, the other Training Instructor at the Orlando Center, to cover the training, but she informed Patterson that she was unavailable to cover the training because she had to care for her children. Doc. 60:179; Doc. 61:19-20.

Patterson did not attempt to contact any other employees, despite knowing that several other employees at the Orlando facility could have conducted the training session. Pet. App. 3a-4a & n.1; Doc. 60:168–69, 207. In particular, Patterson testified that there were other employees besides Alsbaugh who had that same level of expertise who he had swapped shifts with in the past. Doc. 60:168–69. Some of those

employees could have covered the training session. *Id.*

Ultimately, Patterson left a voicemail for Training Manager Curline Davidson on Davidson's personal cell phone, stating he would not cover Saturday's training session. Doc. 60:175. Employees under Davidson's supervision were supposed to notify her of any absence on her work cell phone. Doc. 62:69. She did not use her personal cell phone at the time and did not have that phone with her because she was out of town on business. Doc. 62:70.

Patterson did not report to work on Saturday to conduct the emergency training session. Doc. 60-1:119. Although Patterson claims that Davidson could have conducted the training at the scheduled time, the record shows that she did not know of his failure to appear until the training had already started. Doc. 62:101. As a result, the training was delayed.

The Muscle Shoals Center was able to cease handling WMS calls by August 23, 2011. Doc. 63:80–81, 143, 159; Doc. 63-1:3–38. This transition put a strain on customer and client relationships in terms of Walgreens' capacity to efficiently handle calls. Doc. 63:88. Indeed, one of Walgreens' top clients voiced concerns about the transition. Doc. 66:80–81.

On August 23, 2011, Patterson met with Davidson and White to discuss his failure to attend the training session. Doc. 60-1:119. During that conversation, White again offered Patterson the option to transition back into a CCR role or look for jobs at a neighboring facility operated by Walgreens to resolve the conflict with his religious-based scheduling needs. *See* Doc.

60:203-06; Doc. 60-1:119; Doc. 67-1:165. Patterson refused to consider those options and declined to work toward any other solution or accommodation. *See id.*

In light of Patterson's refusal to consider the accommodations proposed by Walgreens—and his failure to offer any alternative—Walgreens concluded that it would no longer be able to accommodate Patterson in the Training Instructor position. Doc. 62:76, 87; Doc. 67-1:231-32. Alsbaugh would soon be leaving the company and training activity was expected to increase. Doc. 62:76, 87; Doc. 67-1:231-32. Even while Alsbaugh remained, it would put an unfair burden on Alsbaugh to expect her to work any and all shifts on Friday nights and Saturdays. Doc. 62:87-88, 147. Patterson was terminated on August 25, 2011. Doc. 62:76-77.

B. Proceedings below

On December 24, 2014, Patterson sued Walgreens under Title VII, alleging, as relevant here, failure to accommodate a religious belief. Both parties moved for summary judgment.

The district court granted Walgreens' motion for summary judgment and denied Patterson's motion. Pet. App. 20a. It concluded that Walgreens had reasonably accommodated Patterson's religious beliefs by permitting him to swap shifts with other employees when his scheduled shifts conflicted with the Sabbath and by offering him the possibility of transferring to other positions within Walgreens that would make it easier for him to swap shifts when needed. Pet. App. 30a-31a, 32a-33a. It further held that Walgreens would

suffer an undue hardship if required to guarantee that Patterson would never work during Sabbath hours given Walgreens' shifting and urgent business needs. Pet. App. 31a-32a.

The Eleventh Circuit unanimously affirmed in an unpublished decision, holding that "Walgreens met its obligations under Title VII." Pet. App. 9a. The court reasoned that the evidence, viewed in the light most favorable to Patterson, showed that Walgreens had allowed Patterson to swap shifts with other employees, changed its training schedule, and offered him different employment opportunities to help him avoid potential conflicts with his religious practice. Pet. App. 14a–15a. "And Walgreens decided to terminate his employment only after he failed to conduct the emergency training session, insisted that Walgreens guarantee that he would never have to work on his Sabbath, and refused to consider other employment options within the company without such a guarantee." Pet. App. 15a.

The court concluded, in the alternative, that "even assuming the accommodations offered by Walgreens were not reasonable, allowing Patterson to retain his training instructor position with a guarantee that he would never have to work on Friday nights or Saturdays, which is what he insisted on, would have posed an undue hardship for Walgreens' business operations." Pet. App. 11a–12a. Walgreens "would have been required either to eliminate Friday night and Saturday training sessions altogether, regardless of its business needs, or to schedule less-effective non-trainers to train the untrained some of the time." Pet. App. 13a.

The Eleventh Circuit denied Patterson's petition for rehearing en banc. Pet. App. 19a.

ARGUMENT

Title VII makes it an unlawful employment practice for an employer to discharge any individual because of such individual's religion. 42 U.S.C. § 2000e–2(a)(1). "The term 'religion' includes all aspects of 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 on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This Court has held that if an employer offers a reasonable accommodation, it has complied with Title VII; it bears no additional burden of showing that the employee's proposed alternative accommodation would pose an undue hardship. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-69 (1986).

In this case, the Eleventh Circuit rejected Patterson's Title VII claim on two independent grounds, both of which would have to be overturned to afford Patterson relief. First, it held that Walgreens reasonably accommodated Patterson's religious practice. Pet. App. 11a. Under *Ansonia*, this holding was sufficient to defeat Patterson's religious accommodation claim. But the Eleventh Circuit nonetheless reached the undue hardship question, concluding that Patterson's requested accommodation of retaining his position with the guarantee that he never work on Saturday would pose an undue hardship on Walgreens' business. Pet. App. 11a-12a. Neither of

those fact-bound holdings warrants review.

I. The First Question Presented Does Not Warrant Review.

Patterson first seeks review of the Eleventh Circuit's determination that Walgreens offered Patterson a reasonable accommodation. The Eleventh Circuit's decision on that issue does not conflict with the decision of any other court, and is correct. Further, this case would be a poor vehicle to consider the scope of an employer's duty to provide a reasonable accommodation.

A. There is no circuit split on what constitutes a "reasonable" accommodation.

Walgreens offered two accommodations to Patterson: the opportunity to swap shifts on Saturdays and the opportunity to switch to a different position within the company. Pet. App. 9a-10a. But Walgreens was unable to offer an ironclad guarantee that there would be no need to work on Saturday under any circumstances. The Eleventh Circuit found Walgreens' accommodations to be reasonable, holding that "[g]uarantees are not required." Pet. App. 10a.

Patterson contends that guarantees *are* required—according to Patterson, if there is even a theoretical possibility of a work/religion conflict, an accommodation is *per se* unreasonable because it does not *completely* eliminate the conflict. Pet. 14. Patterson claims that this holding implicates a circuit split because "[f]our circuits have … held that when an accommodation does not eliminate the conflict, the accommodation is *per se* unreasonable[.]" *Id.*

This contention is meritless. There is no split: The four decisions cited by Patterson do not hold anything close to what Patterson claims they hold.

In *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996), the employer did not offer *any* accommodation to the Seventh-Day Adventist employee that would allow him to avoid work on Saturday. *Id.* at 1469. The question of whether the employer had offered a reasonable accommodation thus did not arise. The opinion addressed the distinct question of whether certain proposals by the employee would have constituted an undue hardship. *Id.* Further, the court endorsed "a system of voluntary shift trades" as a possible proposal that would not cause undue hardship. *Id.* at 1471. That system—which would still yield work/religion conflicts if other employees did not volunteer to switch shifts—is identical to the system Walgreens offered in this case.

In *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994), the employer offered the Seventh-Day Adventist employee the accommodation of switching his shifts from Saturday to Friday night. *Id.* at 1379. Because "the church prohibited all work from sundown on Friday until sundown on Saturday," *id.* at 1377, this accommodation would have shifted the employee's shifts from one time on the Sabbath to a different time on the Sabbath. Not surprisingly, the court held that this was not a reasonable accommodation because it "failed to address her principal objection to working on Saturday." *Id.* at 1379. That accommodation, which would *never* have eliminated the work/religion conflict, was not remotely comparable to the accommodations in

this case. The Sixth Circuit nonetheless affirmed summary judgment for the employer because giving the employee Saturdays off would have caused an undue hardship. *Id.* at 1380.

In *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997), Jewish employees wanted a day off for Yom Kippur; the employer offered the worthless accommodation of a day off on a different day. *Id.* at 1575. The court did not suggest that partial accommodations were *per se* unreasonable—to the contrary, the court faulted the employer for *not* offering other accommodations that would have partially, but not completely, mitigated the work/religion conflict, such as to "offer a partial day off" or to "consider allowing the first employee making a request, but not the second or third, to take the day off." *Id.* at 1576.

Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006) was factually similar to *Cooper*. The employee's religion prevented him from working on Sunday; the employer offered a shift change from early on Sunday to later on Sunday. *Id.* at 547-48. Relying on *Cooper*, the court held that the accommodation was "no accommodation at all" because "it would not permit him to observe his religious requirement to abstain from work *totally* on Sundays." *Id.* Contrary to Patterson's characterization, the court "express[ed] here no opinion as to whether Home Depot's offer of part-time employment or its allowance of the exchange of shifts with other employees would constitute reasonable accommodations," although it noted that "employees are not entitled to hold out for the most beneficial

accommodation." *Id.* at 548 (quotation marks omitted).

Patterson also states that the decision below conflicts with two other decisions, which ostensibly allow juries to consider whether accommodations that do not completely eliminate the work/religion conflict are nonetheless reasonable. Pet. 16. Patterson is incorrect: the two decisions cited by Patterson are perfectly consistent with the decision below.

In *Sturgill v. UPS*, 512 F.3d 1024 (8th Cir. 2008), the district court instructed the jury that an accommodation is reasonable only if it completely eliminates the work/religion conflict. *Id.* at 1030. On appeal, the Eighth Circuit held that the instruction was an incorrect statement of law. It rejected the argument advanced by Patterson here: that "an accommodation, to be reasonable, *must* wholly eliminate the conflict between work and religious requirements in all situations." *Id.* at 1031. It held that "[b]ilateral cooperation under Title VII requires … accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions." *Id.* at 1033. The Eighth Circuit nonetheless upheld the jury verdict in the employee's favor, finding the error harmless because the employer had apparently offered *no* accommodation. *Id.* In attempting to demonstrate a split, Patterson points to the Eighth Circuit's observation that "in close cases," the reasonableness of an accommodation is a "question for the jury." *Id.*; *see* Pet. 17. Nothing in the decision below conflicts with that observation. The Eleventh

Circuit did not abolish jury trials in Title VII religious accommodation cases; it held that, on this factual record, Walgreens was entitled to summary judgment.

In *Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018), the Tenth Circuit also rejected the argument advanced by Patterson here: that "to be reasonable, an accommodation must 'eliminate' the conflict between the employee's religious practice and his work requirements." *Id.* at 551. It found that such an "absolute rule would read 'reasonably' out of the statute." *Id.* It noted that "few things in life can be conflict-free and Title VII requires only a reasonable accommodation between religion and employment obligations." *Id.* at 551-52. Patterson contends that *Tabura* conflicts with the decision below because the court remanded for trial, rather than holding that the employer was entitled to judgment. Pet. 18. But in *Tabura*, the court remanded because it identified factual disputes in the summary judgment record. 880 F.3d at 556-57. The court did not suggest that a remand would be necessary in every case. Further, contrary to Patterson's suggestion (Pet. 19), *Tabura* was not factually similar to this case. *Tabura* did not involve an employer that had successfully accommodated the employee for several years; it did not involve an employee who declined the opportunity to contact other co-workers to swap shifts; and it did not involve an employer who offered the employee a lateral job change that would have minimized the risk of work/religion conflicts.

To sum up, there is nothing resembling a circuit split here. No court has adopted Patterson's proposed

rule.

B. The Eleventh Circuit's decision is correct.

Patterson's argument is also wrong on the merits. Patterson contends that an accommodation is *per se* unreasonable unless there is an absolute guarantee that the employee will not encounter work/religion conflicts under any circumstances. But Title VII requires only that the employer "reasonably accommodate" the employee, not "totally accommodate."

Patterson does not even try to ground his proposed rule in the statutory text. Instead, he relies on dicta in *Ansonia*. In that case, a high school teacher missed about six school days per year for observance of religious holy days. 479 U.S. at 62-63. The school board's policy required the employee to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement. *Id.* at 70. The employee proposed the alternative accommodation of paid leave on all holy days, and argued that the school had the duty to accept the employee's proposed alternative accommodation unless it would impose an undue hardship. *Id.* at 64-65, 70. This Court ruled for the employer, finding that "an employer has met its obligation … when it demonstrates that it has offered a reasonable accommodation to the employee." *Id.* at 69. Citing legislative history expressing the intent that "accommodation would be made with 'flexibility,'" the Court explained that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Id.*

(quotation marks omitted). It rejected the employee's position, which would have given the employee "every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict." *Id.*

As part of its discussion, the Court observed that "[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work." 479 U.S. at 70. Latching on the word "eliminates" in that sentence, Patterson asserts that *Ansonia* enacted a *per se* rule that an accommodation must completely eliminate any possibility of a work/religion conflict to be reasonable. Pet. 13-14. But the Court said nothing like that. Rather, it simply observed that the accommodation offered by the employer fully resolved the conflict, and was therefore reasonable, notwithstanding the employee's desire for a more favorable accommodation. And it made that observation in the context of *rejecting* the employee's proposed *per se* rule that the employer must accept any proposed accommodation that does not impose an undue hardship.

Every court of appeals to have addressed the issue has rejected Patterson's contention that total elimination of a work/religion conflict is required. *Tabura*, 880 F.3d at 551 ("The Court, however, in *Ansonia* did not hold … that an accommodation could never be reasonable if it failed totally and under every conceivable fact scenario to eliminate every conflict or

all tension between reasonable work requirements and religious observation."); *Sturgill*, 512 F.3d at 1031 ("[T]he Court in *Ansonia* did not hold, indeed did not suggest, that an accommodation, to be reasonable as a matter of law, *must* eliminate any religious conflict."); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (4th Cir. 2008) (Wilkinson, J.) ("Congress included the term reasonably, expressly declaring that an employer's obligation is to 'reasonably accommodate' absent undue hardship — not to totally do so."). Patterson fails to demonstrate any error in those decisions.

Patterson also contests the Eleventh Circuit's determination that the particular accommodations here were reasonable. But Patterson's argument depends on his repeated mischaracterizations of the Eleventh Circuit's holding.

Patterson states that the Eleventh Circuit concluded that a demotion to a lower-paying position could be a reasonable accommodation. Pet. 10 ("[T]he court asserted that Walgreens' offer to demote Patterson to the lower-paying … position was itself a reasonable accommodation."); Pet. 32 ("The panel held that an incomplete accommodation involving a demotion and a large pay cut was *per se* 'reasonable.'") These assertions are false. The panel carefully scrutinized the summary judgment record and concluded that there was no evidence supporting Patterson's assertion that he would receive a pay cut if he was transferred. Pet. App. 10a & n.2. Indeed, the court went as far as to explain that a particular deposition exhibit that Patterson had cited did not

support his assertion that he would receive a pay cut. *Id.*

Likewise, Patterson characterizes Walgreens' accommodation of permitting Patterson to swap shifts as an "incomplete and contingent accommodation." Pet. 19. As Patterson frames the record, it would have been "extremely difficult to arrange a swap with someone else," and when a single co-worker (Alsbaugh) stated she could not swap shifts, Patterson was "[l]eft without options." Pet. 8. This account is inconsistent with a central aspect of the Eleventh Circuit's reasoning—that Patterson could have swapped shifts with "several other … employees," but "he did not attempt to contact any of them." Pet. App. 3a-4a. The panel noted that until oral argument in the court of appeals, Patterson had never argued that switching with Alsbaugh was his sole option. Pet. App. 4a n.1. Nonetheless, the Eleventh Circuit considered Patterson's newly-raised argument on its merits, and found it to be unavailing based on its review of Patterson's deposition transcript. *Id.*

The Eleventh Circuit's actual holding was that Walgreens had offered two reasonable accommodations. First, Walgreens shifted Patterson's regular training schedule to Sunday through Thursday, and when emergencies arose on Saturday, it offered him the accommodation of swapping shifts with a willing employee. Pet. App. 8a-9a. Patterson had swapped Saturday shifts with his co-workers for several years, and might have been able to do so in this case if he had contacted any co-workers other than Alsbaugh to see if they might be available. Pet. App.

9a. Second, Walgreens offered him the option of a different position within the company, where a larger pool of employees would make it easier to swap shifts. Pet. App. 9a-10a. As just explained, contrary to Patterson's assertion, there is no evidence this would have been a demotion. When accurately described, these accommodations were "reasonabl[e]" for purposes of Title VII.

C. This case would be a poor vehicle.

This case would be a poor vehicle to consider the scope of an employer's duty to offer a reasonable accommodation.

First, Patterson's arguments are largely premised on disagreements with the Eleventh Circuit's interpretation of the summary judgment record. As discussed above, Patterson repeatedly mischaracterizes the accommodations that Walgreens offered. Similarly, in arguing that this case is a good vehicle, Patterson asserts that his supervisors "believed they weren't required to accommodate Patterson *at all*," demonstrating Walgreens' "indifference toward religious employees." Pet. 35. Again, however, this argument is simply an effort to reargue the facts: the Eleventh Circuit found that Walgreens had accommodated Patterson's religion for several years by scheduling his shifts from Sunday to Thursday and permitting him to swap shifts when emergencies arose on Saturday. Pet. App. 8a-9a. Whether the Eleventh Circuit's unpublished opinion correctly interpreted the summary judgment record is not a question warranting Supreme Court review.

Second, this Court's review of the reasonableness of Walgreens' accommodations will be hindered by the fact that Patterson "failed to take advantage of" those accommodations. Pet. App. 11a. Walgreens' offer of the opportunity to swap shifts might have eliminated the work/religion conflict in this case had Patterson contacted his co-workers other than Alsbaugh—yet he did not. Pet. App. 10a & n.2. Similarly, Walgreens' offer of the opportunity to switch jobs might have resulted in a *de minimis* risk of conflict—but because Patterson "was not amenable to changing positions," Pet. App. 10a, there is no record on what the exact degree of risk would have been. The Court should not grant certiorari in a case where there are gaps in the record as a result of Patterson's own conduct.

II. The Second Question Presented Does Not Warrant Review.

The Eleventh Circuit held, in the alternative, that Patterson's proposed alternative—the right to stay in his current position with an ironclad guarantee that he never have to work on Saturday under any circumstances—would have imposed an undue hardship on Walgreens' business. That holding does not merit review.

A. There is no circuit split on whether an undue hardship can be established via "speculation."

Patterson asserts that there is a 4-3 split on "whether an employer can demonstrate undue hardship based on speculation about future events." Pet. 23. There is not. Determining whether there is an undue

hardship requires making an intensely fact-specific judgment about the effect of an accommodation on the employer's business. The fact that some courts have found hardships to be "undue" and other courts have found them not to be "undue" reflects differences in factual records, rather than a divergence in legal standard.

Patterson claims that the Eleventh Circuit's decision "contradicts the holdings of the Fourth, Eighth, Ninth and Tenth Circuits." Pet. 23. But the cited cases—an unpublished case from 1994 and three decisions from the 1970s and 1980s—merely hold that the particular asserted hardships before them were too speculative to be "undue." *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490, 1492 (10th Cir. 1989) (noting that undue hardship determination depends on "the particular factual context of each case," and concluding that employer's assertion that hiring a user of peyote would increase the risk of tort liability was speculative because "accommodating Toledo's practices by requiring him to take a day off after each ceremony would virtually eliminate the risk that the influences of peyote would cause an accident or be a factor in subsequent litigation" (internal quotation marks omitted)); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (noting that the undue hardship determination depends on "the particular factual context of each case," and finding no undue hardship where the facts conclusively showed that one employee's failure to pay union dues did not deprive the union of funds necessary for the union's support (quotation marks omitted)); *Brown v. Gen. Motors*

Corp., 601 F.2d 956, 961 (8th Cir. 1979) (finding no undue hardship where employer argued that "other employees might profess similar religious beliefs," and the cumulative effect could create undue hardship); *Benton v. Carded Graphics, Inc.*, 28 F.3d 1208, 1994 WL 249221, at *2-3 (4th Cir. 1994) (unpublished table decision) (characterizing undue hardship inquiry as "fact-based determination" and finding insufficient evidence of undue hardship). Patterson suggests that *Brown* held that courts may not consider "anticipated hardship," in conflict with the decision below. Pet. 24. But *Brown*'s actual holding was that courts should not consider the "anticipated and multiplied hardship" that might arise if co-workers mimic the religious employee and request their own accommodations. 601 F.2d at 961. The Eleventh Circuit did not do that here. Rather, it analyzed the hardship that Patterson's own requested accommodation would impose, just like every other case Patterson cites.

None of these cases announced any general legal standard that conflicts with the decision below. To the contrary, each of those courts applied the identical "undue hardship" legal standard as the court below. They merely held that, on the particular facts of those cases, the employer had not established "undue hardship." Here, by contrast, Walgreens did establish "undue hardship" based on the particular facts of this case.

B. The Eleventh Circuit's holding is correct.

The Eleventh Circuit correctly concluded that Patterson's proposed accommodation would pose an undue hardship. That fact-bound decision is correct

and should not be reviewed.

As with his argument on reasonableness, Patterson's argument on undue hardship depends on repeated mischaracterizations of the Eleventh Circuit's decision. Patterson asserts that the Eleventh Circuit's determination of an undue hardship was "speculative" because his refusal to attend the emergency training session caused no harm to Walgreens. Pet. 23. But it did cause harm. The Eleventh Circuit concluded that "[t]he circumstances leading to the Saturday … training sessions were a true emergency." Pet. App. 12a. "Because of the Alabama Board of Pharmacy's actions and the two days it gave Walgreens to effectively shut down its Customer Care Center operations in Alabama, the company was forced to redirect approximately 50,000 phone calls per month from the Alabama center to Orlando." *Id.* "The employees in Orlando had to be trained immediately so they could begin handling all of those calls." *Id.* Failure to handle the high call volume might have "impede[d] patients' access to their medication and subject Walgreens to the risk of breaching its contractual obligations and facing significant financial penalties." Pet. App. 24a. Yet Patterson's "adamant refusal to work on Saturday delayed the required training." Pet. App. 12a. Walgreens officials testified at their depositions that although the precise harm could not be quantified, service quality likely was lower during the period of delay. Doc. 63:131-32, Doc. 68:143-44.

Further, contrary to Patterson's assertions, the Eleventh Circuit did not "speculate" as to how

Patterson's requested accommodation would harm Walgreens. Rather, the Eleventh Circuit cited specific facts establishing that Patterson's proposed accommodation would result in undue hardship. It explained that "[t]o ensure that Patterson received the time off for Sabbath observance that he was insisting on, Walgreens would have had to schedule all training shifts, including emergency ones, based solely on Patterson's religious needs, at the expense of other employees who had nonreligious reasons for not working on weekends." Pet. App. 13a. As the court explained, this would have burdened Patterson's co-worker, Alsbaugh, in the short term; even worse, because Alsbaugh was planning to leave the facility, Patterson's proposed accommodation would have required Walgreens "either to eliminate Friday night and Saturday training sessions altogether, regardless of its business needs, or to schedule less-effective non-trainers to train the untrained some of the time." *Id.* The court noted that Walgreens could not eliminate Saturday training altogether because "business necessity—the sudden closing of the Muscle Shoals facility being a prototypical example—sometimes required urgent training." *Id.*

In any event, the Eleventh Circuit plainly did not endorse any general legal standard that an undue hardship could be established through speculation. It held that, on the specific facts here, Walgreens made a sufficient showing of an undue hardship. Patterson's disagreement with that fact-bound ruling does not warrant review.

C. This case would be a poor vehicle.

This case would also be a poor vehicle to consider the "undue hardship" standard. As with Patterson's reasonable accommodation argument, Patterson's undue hardship argument depends on his disagreements with the Eleventh Circuit's interpretation of the record. In arguing that this case is a good vehicle, Patterson claims that because Walgreens "was unable to establish that it was harmed by Patterson's absence on August 20," the opinion below "relied on … speculation rather than any actual hardship." Pet. 36. As described above, this is simply wrong; Walgreens did establish that it was harmed by Patterson's absence on August 20, and the opinion below did not rely on speculation but instead recited specific facts establishing undue hardship. Patterson's efforts to re-litigate the facts make this a poor candidate for further review.

III. The Third Question Presented Does Not Warrant Review.

Finally, Patterson asks this Court to disapprove of the following sentence in *Hardison*: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84. Patterson invites the Court to replace "*de minimis*" with a different adjective, such as "excessive." Pet. 28. The Court should decline that invitation. Patterson has shown no sound basis for overruling *Hardison*, and this case would be a poor vehicle to reconsider it.

A. *Hardison* should not be overruled.

The Court should not take the extraordinary step of overruling a 42-year-old statutory interpretation decision in order to heighten the "undue hardship" standard to some unspecified extent.

"*Stare decisis* … is a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotation marks omitted). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation marks omitted). "What is more, *stare decisis* carries enhanced force when a decision … interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." *Id.* And the force of *stare decisis* is yet greater when Congress has "repeatedly amended" the relevant laws, but "spurned multiple opportunities to reverse" the decision sought to be overruled. *Id.* at 2409-10.

That is precisely the scenario here. Congress has repeatedly amended Title VII since 1977, including making amendments in direct response to this Court's decisions. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250 (1994). But bills to overrule *Hardison* have uniformly failed despite having been introduced in every Congress between 1994 and 2013.[3] Congress'

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[3] *See, e.g.*, S. 3686, 112th Cong. (2012) (proposing to define "undue hardship" as "a significant difficulty or expense on the conduct of

"continual reworking" of Title VII—but never of *Hardison*—"further supports leaving the decision in place." *Kimble*, 135 S. Ct. at 2410.

What is more, *stare decisis* applies with especially strong force when parties "rely on such precedents when ordering their affairs." *Kimble*, 135 S. Ct. at 2410. Employers, including Walgreens, rely on this Court's decisions in deciding when to grant accommodations to religious employees. At the time Walgreens terminated Patterson, *Hardison* provided the applicable legal framework. Yet Patterson would retroactively apply a new, heightened "undue hardship" standard to Walgreens and every other employer in the country that has denied a religious accommodation within the statute of limitations. That would violate the principle, "deeply rooted" in the Court's jurisprudence, that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265 (holding that 1991 amendments to Title VII did not apply retroactively).

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the employer's business when considered in light of relevant factors set forth in section 101(10)(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(10)(B)) (including accompanying regulations)"; *see also* S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

Patterson cannot overcome this "superpowered form of *stare decisis*." *Kimble*, 135 S. Ct. at 2410. Patterson contends that *Hardison* has proven "unworkable." Pet. 31. But what would truly be unworkable is replacing *Hardison*'s standard with some nebulous, higher standard. That would cause nothing but confusion, with employers struggling to discern what hardships that were undue under prior law are now no longer undue.

Patterson contends *Hardison* is "unworkable" not because it is unclear or difficult to apply, but because in his view, employers win too frequently. To back up this assertion, Patterson compares employers' and employees' rates of prevailing on summary judgment. Pet. 31. This analysis is flawed for multiple reasons. First, the sample size is too small. Patterson claims that employers have prevailed on summary judgment "infinitely more often on appeal, where employees have *never* won summary judgment on that defense." *Id.* But Patterson documents only twice in the past 18 years in which employees have even sought such relief in the court of appeals. One of those cases was the decision below; the other was the Tenth Circuit's *Tabura* case, where the employee actually prevailed, as the court reversed summary judgment for the employer and remanded for trial. Pet. App. 36a, 62a, 64a. Even in district courts, Patterson documents only 14 times in the past 18 years in which employees have moved for summary judgment (Pet. App. 36a), which is hardly sufficient to establish systematic trends.

Moreover, Patterson's statistics reflect the unremarkable fact that plaintiffs are generally less

likely to move for summary judgment, given that plaintiffs bear the burden of proof. An employee with a successful religious accommodation claim is more likely to vindicate that claim via a settlement or a trial. And employees frequently win such cases—even setting aside cases that settle, plaintiffs win "about one-third of their litigated claims for scheduling changes for observance of religious holidays, and nearly one-half of claims for having a beard or hairstyle for religious reasons."[4]

In sum, Patterson has not demonstrated that *Hardison* is "unworkable" or identified any other basis for overruling it.

B. This case would be a poor vehicle.

Even if the Court were inclined to reconsider *Hardison*'s undue hardship standard, this case would be a poor vehicle for three reasons. First, the Eleventh Circuit also held, as an independent basis for affirming the grant of summary judgment, that Walgreens offered a reasonable accommodation. Patterson could not obtain relief unless that ruling was also reversed. Thus, if the Court were to use this case as a vehicle to reconsider *Hardison*, it would also have to separately grant certiorari on Patterson's first question presented, which challenges the reasonable accommodation ruling. As explained above, however, that question is not

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[4] Laura Murphy & Christopher Anders, ACLU Letter on the Harmful Effect of S. 893, The Workplace Religious Freedom Act, on Critical Personal and Civil Rights, ACLU, June 2, 2004, https://www.aclu.org/letter/aclu-letter-harmfuleffect-s-893-workplace-religious-freedom-act-critical-personal-and-civil.

certworthy, as there is no circuit split and Patterson seeks factbound error correction.

Second, there is no basis for believing that the Eleventh Circuit would have reached a different result under Patterson's proposed heightened standard. Although the Eleventh Circuit cited the "*de minimis*" standard in its general background section, Pet. App. 7a, its analysis did not rely on the "*de minimis*" standard. Instead, it closely scrutinized the facts and concluded that under Patterson's proposed accommodation, Walgreens "would have been required either to eliminate Friday night and Saturday training sessions altogether, regardless of its business needs, or to schedule less-effective non-trainers to train the untrained some of the time." Pet. App. 13a. This hardship is "undue" under any standard.

Third, the Court's review would be complicated by the factual disputes raised by Patterson over the extent of the hardship. In other religious-accommodation cases, the scope of the hardship was easily measurable. For instance, in *Hardison*, the employee sought a special exception to the employer's seniority system, or alternatively, a right to a four-day work week in which the employer would pay other employees higher wages to fill his Saturday shifts. 432 U.S. at 83-84. In *Ansonia*, the employee sought paid time off. 479 U.S. at 64-65. In cases of that sort, the scope of the hardship is clear as a matter of fact, and the court's sole task is to determine whether that hardship is "undue" as a matter of law. Here, however, the hardship is Walgreens' inability to conduct emergency training on Saturdays. Patterson's primary

argument is a factual one—he disagrees with the Eleventh Circuit that his absence on August 20 harmed Walgreens, and disagrees about the likelihood that similar circumstances will recur. Patterson's assertion that the hardship would not be undue depends on his effort to reframe the hardship in a manner inconsistent with the Eleventh Circuit's decision. If the Court grants certiorari, the parties will dispute what the summary judgment record says about the scope of the hardship, leaving the Court to sift through deposition testimony and exhibits. If the Court is inclined to reconsider *Hardison*, it should await a case in which such disputes do not arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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