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*

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

Walgreens' opposition follows the standard blueprint: erroneously claim there are no circuit splits and that the decision below is fact-bound. But there is no denying that the decision joins two circuit conflicts (one acknowledged), or that the EEOC and Department of Justice both reject the Eleventh Circuit's position on both issues.[1] And Walgreens' argument that this is not a good vehicle for resolving those conflicts—or for reconsidering *Hardison*, see *Kennedy* v. *Bremerton*, No.18-12 (Alito, J., et al., respecting denial of certiorari)—hinges on mischaracterizations of the Eleventh Circuit's analysis.

### I. "Reasonable accommodation"

Walgreens doesn't dispute that the EEOC's Compliance Manual acknowledges the split on Title VII's "reasonable accommodation" standard.[2] Nor does Walgreens dispute that two circuits have *acknowledged* the conflict. *Sturgill* v. *UPS*, 512 F.3d 1024, 1032 (8th Cir.2008) ("declin[ing] to follow" Second, Sixth, Seventh, and Ninth Circuits)*;* *EEOC* v. *Firestone Fibers,* 515 F.3d 307, 314 (4th Cir.2008) (similar).[3] Nor does Walgreens dispute the *amici's* showing

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[1] See EEOC Compliance Manual, Religious Discrimination ("Manual"), Section 12-IV (adopting petitioner's position on Questions 1 and 2); U.S. Attorney General, Federal Law Protections for Religious Liberty, Principle 17 (Oct. 6, 2017) (same).

[2] Manual n.130 (citing circuit decisions as "hav[ing] approached the issue of what is a reasonable accommodation in a manner that conflicts with longstanding Commission and judicial precedent."); *accord* Pet.16,18.

[3] *Accord, e.g.*, *EEOC* v. *JBS USA*, 115 F.Supp.3d 1203, 1228–1229 (D.Colo.2015); *Note, Complete or Partial Accommodation: An*

that the expansion of *Ansonia*'s "reasonable accommodation" safe harbor has devastating effects on religious workers. Church of Jesus Christ of Latter-day Saints et al. at 4-6. Instead, Walgreens twists the facts and holdings of *both* the decision below and the cases with which it and another published Eleventh Circuit decision conflict. Examining those opinions makes plain that there is a split on Question 1—whether reasonable accommodations must eliminate rather than merely mitigate a work-religion conflict—and that this case squarely presents that issue.

1. Walgreens mischaracterizes *Opuku-Boateng* v. *California*, 95 F.3d 1461 (9th Cir.1996), all but ignoring its holding that, if negotiations "do not produce a proposal by the employer that would *eliminate* the religious conflict," the employer only prevails if it shows undue hardship or accepts the employee's choice of accommodation. *Id.* at 1467. Instead, Walgreens argues (at 13) that *Opuku-Boateng could* have been resolved on narrower grounds—that no proposal was offered. But that ignores the plain text of the decision. 95 F.3d at 1467-1469. Unlike the Eleventh Circuit and its allies, *Opuku-Boateng* and other Ninth Circuit opinions[4] expressly limit the employer's safe harbor to that established in *Ansonia*—i.e., "accommodation" means fully eliminating the work-religion conflict. And Walgreen's suggestion (at 13) that *Opuku-Boateng* embraced using shift swaps as an accommodation even if conflicts persisted again misreads the opinion, which

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*Analysis of the Federal Circuit Split*, 25 Regent U.L.Rev. 241 (2012).

[4] See, *e.g.*, *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir.1988); *EEOC* v. *Alamo Rent-A-Car*, 432 F.Supp.2d 1006, 1011 (D.Ariz.2006).

envisioned swaps that "would completely *eliminate* the hypothetical difficulty[.]" 95 F.3d 1471.

As the petition and *amici* explain, the same is true of other circuits that follow the EEOC's rule. Pet.14-15; Founders First 7-8. Each of them likewise holds that a "reasonable accommodation" eliminates the conflict. Pet.14-20.

2. Walgreens similarly tries to avoid *Tabura*'s and *Sturgill's* holdings that "reasonable accommodation" is a jury question when the conflict is not eliminated. Walgreens tries (at 16) to distinguish *Tabura* because Patterson supposedly (1) was previously accommodated through a modified schedule,[5] (2) refused to ask other employees to swap in the situation that led to his firing,[6] and (3) was then offered a "lateral" job change to his entry-level position.[7] As the footnotes explain, this misstates the record. Regardless, it ignores that under *Tabura* and *Sturgill*, such factual questions regarding reasonable accommodation are for the jury, not the court. A conflict over who should resolve factual issues such as this doesn't make the case fact-bound, but rather squarely raises the *legal* question of who should decide, on which there is a circuit split.

But even if Walgreens were correct in its view of the facts here, it doesn't dispute that it offered no assurance that Patterson's religious practice would be accommodated if he agreed to the demotion. The central question thus remains: Is a worker entitled to a

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[5] But see Doc.62:8 (Walgreens' official claims earlier shift arrangement "not changed for [Patterson.]").

[6] But see Doc.60:52 (Patterson explaining he was authorized to swap *only* with Alsbaugh, who could not swap).

[7] But see Pet.6, 9 (proposed position was a demotion).

jury trial when it is at least unclear whether the arrangement is a "reasonable accommodation" because it did not eliminate the conflict? *Tabura* answers yes: what is a reasonable accommodation "is ordinarily a question of fact to be decided by the fact finder." 880 F.3d at 555. By affirming summary judgment for Walgreens, the Eleventh Circuit answers no.

Like *Tabura*, *Sturgill* squarely rejected the EEOC's elimination rule. 512 F.3d at 1033; Pet.16-18. It also concluded that a jury could award relief against an employer that fired an employee for missing even *one* shift. 512 F.3d at 1033. Because the decision below held to the contrary, it split with *Sturgill* on that point as well.

3. Walgreens further claims (at 17) that the text of Title VII requires only that it "reasonably accommodate" Patterson, "not 'totally accommodate.'" That is an interesting, if incorrect, argument on the merits, but it has little bearing on whether certiorari should be granted.

Regardless, Walgreens ignores basic principles of grammar: "According to the ordinary understanding of how [modifiers] work," adverbs cannot contradict verbs. *Weyerhaeuser Co.* v. *United States Fish & Wildlife Serv.*, 139 S.Ct. 361, 368 (2018). "Reasonably" is an adverb, modifying the verb "accommodate." And accommodate means "to reconcile." *E.g., Random House Dictionary* 9 (1968) (definition 3 of "accommodation"); *Ansonia*, 479 U.S. at 69. By insisting that Patterson be willing to work at least occasionally if he accepted the demotion to an entry-level position, Walgreens did not "reconcile" his religious practice with Walgreens' (supposed) work requirements. See Pet.8 (citing Doc.60:45, 52). On that point, there was *no* accommodation—"reasonable" or otherwise.

Indeed, as this Court explained under the analogous Americans with Disabilities Act, "[a]n ineffective 'modification' or 'adjustment' will not accommodate a disabled individual's limitations" because "the word 'accommodation'… conveys the need for effectiveness." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 400 (2002). Those circuits that have rejected conflict elimination under Title VII conflict in principle with *Barnett*: Because an accommodation must be "effective" to be an accommodation at all, a "*reasonable* accommodation" is a subset of all genuine accommodations—not one that falls short of removing the conflict.

4. Walgreens also claims (at 21-22) this is not a good vehicle because Patterson's position depends on a view of the record that differs from the Eleventh Circuit's. Not so. Although the Eleventh Circuit repeatedly failed to evaluate the record in the light most favorable to Patterson (cf., *e.g.,* notes 5-7, *supra*), the court *still* conceded that Walgreens' proposed "accommodation" of shift swapping, whether at his present position or another one, would leave Patterson at risk of having to work on his Sabbath or be fired, Pet.9a, 10a, and Walgreens' proposals thus did *not* "eliminate the conflict."

Accordingly, the decision below affirming summary judgment would have to be vacated, at a minimum, if this Court adopts either the EEOC's "elimination" requirement or the "jury issue" position of the Eighth and Tenth Circuits.

## II. Use of speculation to show hardship

Walgreens uses the same boilerplate maneuvers to challenge the split on Question 2—whether defendants may rely on speculation to establish undue hardship. Walgreens ignores that the EEOC has interpreted Title VII as forbidding such speculation. Pet.24. And it ignores the *amici*, which explain the severe practical problems of allowing employers to rely on speculation. Christian Legal Society 7-15; Church of Jesus Christ 7-8.

1. As to the circuit conflict, Walgreens doesn't dispute that Fifth and Sixth Circuit decisions *allow* reliance on speculation, that the Third Circuit suggests the same in dicta, or that the EEOC guidance forbids such speculation. See Pet.24-25 & n.7.[8] Walgreens' main argument (at 24) is that no circuit forbids speculation as a "general legal standard." But a law review article recognizes the split[9] and the language of several circuit decisions makes clear the disagreement over legal standards.

For example, the Eighth Circuit has cited its *Brown* decision for the "proposition"—that is, the legal standard—"that an employer's costs of accommodation must mean *present* undue hardship as distinguished from anticipated or multiplied hardship," thus forbidding reliance on "speculative evidence or future impact." *Cook* v. *Chrysler Corp.*, 981 F.2d 336, 339 (8th

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[8] See also, *e.g.*, *Jones* v. *UPS*, 2008 WL 2627675 (N.D.Tex. June 30, 2008) (citing *Weber* for the proposition that, "[i]n [the Fifth] [C]ircuit, the 'mere possibility' of an undue hardship is enough to reject a proposed accommodation.").

[9] See Debbie N. Kaminer, *The Work-Family Conflict: Developing A Model of Parental Accommodation in the Workplace*, 54 Am.U.L. Rev. 305, 354 & n.289, 359 & nn.319-320 (2004).

Cir.1992) (quoting *Brown* v. *Gen. Motors*, 601 F.2d 956, 961 (8th Cir.1979)). This squarely conflicts with the Fifth and Sixth Circuits.

Walgreens attempts (at 24) to distinguish *Brown* by claiming its holding concerns "anticipated *and* multiplied hardship," that is, that *Brown* was concerned only about increased accommodation requests, rather than reliance on speculation. But Walgreens misquotes the holding, which refers to "anticipated *or* multiplied hardship." 601 F.2d at 961. Walgreens' attempt to limit *Brown* and avoid the split is erroneous.

Other circuits' decisions forbidding the use of speculative or future hardships are likewise widely cited and understood as legal, not fact-specific holdings. See, *e.g.*, *EEOC* v. *Aldi, Inc.*, 2008 WL 859249 (W.D.Pa. Mar.28, 2008) (citing Ninth and Tenth Circuit holdings).

2. Walgreens alternatively claims (at 25-27) that this case doesn't implicate the split because the decision below found Walgreens' actions were justified by *actual* hardship. To be sure, the panel justified Walgreens' concern about Patterson's failure to conduct the training on August 21 on the ground that his absence shifted the timing of the *training* of "the employees in Orlando [who] had to be trained immediately so they could begin handling all of th[e] calls" that began flowing in from Alabama. Opp.25 (quoting Pet.12a). But the panel did not conclude that the shift in timing produced *actual* harm. Pet.12a. Shifting the timing of the training alone is not an undue hardship absent concrete subsequent consequences, about which there was only speculation—and no evidence whatsoever.

Recognizing this logical gap, Walgreens adds, as though from the opinion, an argument that is not there: "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." Opp.25. This is not only speculation, it also twists the record, which is probably why the panel didn't assert this point.

Rather, the panel said that "Walgreens decided to [terminate Patterson] because it could not rely on [him] *if* an urgent business need arose that required emergency training" during his Sabbath. Pet.5a. The panel did not say Walgreens terminated Patterson because of any harm that actually resulted from his absence.[10] This focus on what *might* happen in the future was clear speculation.

The circuits are split on this very question: The Fourth, Eighth, Ninth, and Tenth Circuits hold that employers must point to real, concrete harm rather than rely on speculation (such as future weekend training emergencies) to support a claim of undue hardship. Pet.23 (cataloging cases). The Fifth, Sixth and Eleventh Circuits forbid speculation. Pet.23-25.

Because the decision below relied upon speculation about undue hardship, this case squarely presents Question 2—and is therefore a good vehicle for resolving it. The Court should grant review to resolve this legal question, then remand for resolution of any remaining factual disputes, as it did in both *Abercrombie*, 135 S.Ct at 2034, and *Ansonia*, 479 U.S. at 71.

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[10] Given that Walgreens' own employment policy allowed three absences prior to termination, Doc.60-1:36, and the company met its own deadline for transferring the calls, Pet.7, this claim would be disingenuous.

## III. *Hardison's* definition of undue hardship

Walgreens also doesn't dispute that *Hardison*'s undue burden definition is dicta (Pet.2, 28), departs from Title VII's plain text (Pet.28-29), has been criticized by numerous jurists (Pet.34), has been eroded by *Abercrombie* (Christian Legal Society 19-23; Pet.1-5, 12, 23), and is applied in the lower courts in a way that seriously and unjustly harms workers of faith. Pet.33; Church of Jesus Christ 9-10; Christian Legal Society 23-25 & n.6. *Hardison*'s anti-textual, anti-religious character makes it a clear example of "judicial overreach." *Kimble* v. *Marvel Entm't, LLC*, 135 S.Ct. 2401, 2415 (2015) (Alito, J., dissenting).

1. Ignoring these points—and especially Justice Thomas' view that *Hardison's* undue hardship analysis is dicta as to Title VII—Walgreens claims *stare decisis* should nevertheless apply here for three reasons.

Walgreens first claims that, because Congress declined to correct *Hardison* in subsequent amendments or other proposed legislation, this Court should not disavow or repudiate that decision. Apart from this being a merits argument—not a challenge to the importance of the question—and an argument that assumes *Hardison's* comment was a holding rather than dicta, the case Walgreens cites, *Kimble*, 135 S.Ct. at 2410-2411, is poor support for Walgreen's claim. There, unlike this case, the statute had been "*repeatedly* amended[.]" *Id.* at 2409-2410. And Title VII's single significant amendment since *Hardison*—in 1991—did not codify *Hardison*'s "bald act of policy-making." *Id.* (dissent). Instead, the 1991 Amendments were in response to decisions years after *Hardison,* such as *Wards Cove Packing* v. *Antonio,* 490 U.S. 642 (1989).

Moreover, this Court has overturned old statutory precedent even after Congress modifies a statute. See *Cent. Bank* v. *First Interstate Bank*, 511 U.S. 164, 186 (1994) (cited favorably in *Kimble*, 135 S.Ct. at 2418 (2015) (Alito, J., dissenting)). Every current member of the Court agrees that *stare decisis* is no absolute bar to overruling statutory precedent. See *Kimble*, 135 S.Ct. at 2415 ("What we can decide, we can undecide."); *id.* at 2418 (dissent). Indeed, just last week, four Justices indicated their willingness to revisit what *Hardison* "opined" about the "undue hardship" analysis. See *Kennedy* (Alito, J., respecting denial of certiorari).

Second, Walgreens claims that employers are relying on *Hardison*. But *stare decisis* applies only to holdings, not dicta, and in any event it "accommodates only '*legitimate* reliance interest[s].'" *South Dakota* v. *Wayfair*, 138 S.Ct 2080, 2098 (2018). Walgreens doesn't dispute that *Hardison* has been used by employers in patently illegitimate ways. See Pet.33 & Appendix; 9, *supra*. For example, no employer has a legitimate interest in forcing a religious employee to forego a modest facial piercing required by her faith, *Cloutier* v. *Costco Wholesale Corp*., 390 F.3d 126, 134-137 (1st Cir.2004), or refusing to prioritize the schedule preferences of religious workers over other workers' non-protected preferences, *Adams* v. *Retail Ventures, Inc.*, 325 Fed. App'x 440, 443 (7th Cir.2009).

The latter abuse of *Hardison* occurred here: Patterson was fired for missing his shift for religious reasons, but Alsbaugh was not disciplined because Walgreens prioritized her non-protected needs over Patterson's religious needs. See Pet.8. Employers lack legitimate reliance interests in maintaining such policies—espe-

cially after *Abercrombie*'s statement that religious employees must receive "favored treatment." 135 S.Ct. at 2034.

Finally, Walgreens claims that Patterson's survey of summary judgment cases in the lower courts is irrelevant because "[a]n employee … is more likely to vindicate that claim via a settlement or a trial." Opp. 31. But that ignores *Hardison*'s effect in ensuring that employers, even though they bear the burden of proof on their affirmative defenses, can almost always survive a summary judgment motion by claiming more than a *de minimis* cost. See Pet.31. Walgreens provides no evidence refuting the logical link between *Hardison*'s employer-friendly *de minimis* standard and the employer-friendly outcomes catalogued. That so few *employees* move for summary judgment on undue hardship merely shows that *Hardison* makes summary judgment in an employee's favor so unlikely that it is rarely worth the attempt.

2. Walgreens also wrongly contends (at 30) that a higher standard for undue hardship would be "nebulous" and "unworkable." In fact, employers regularly comply with higher undue hardship standards under the ADA and state laws that depart from *Hardison*. See 42 U.S.C. 12111(10); Pet.29 & n.11; Cal.Gov.Code 12926(u), 1294 (l). These statutes offer one compelling approach to applying Title VII's "undue hardship" standard—requiring that the employer show at least a "*significant* difficulty or expense." 42 U.S.C. 12111(10). As nearly thirty years of experience shows, these standards are concrete—not "nebulous"—and entirely workable. See, *e.g.*, *Barnett*, 535 U.S. at 402 (lower courts reach "functionally similar" results under "significant difficulty or expense" standard).

3. Walgreens does no better in denying (at 31-33) that this case is an excellent vehicle. To be sure, reversal on Question 1 *and* either Question 2 or Question 3 is required for Patterson to receive relief. However, as the petition explains (at 35)—and Walgreens ignores—this is a "plus," as it allows the Court to consider both accommodation and hardship in the same case, thus examining "the broader context of the statute as a whole." See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Moreover, this Court regularly grants certiorari on multiple questions where the petitioner needs to prevail on at least two in order to obtain relief.[11] And all three questions here are worthy of review.

## CONCLUSION

The petition should be granted. At a minimum, the Court should call for the views of the Solicitor General so that the EEOC, the Justice Department, and other interested agencies can weigh in.

Respectfully submitted,

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[11] *E.g.*, *Kansas* v. *Carr*, 136 S.Ct. 633, 640 (2016); *EPA* v. *EME Homer City Generation*, 134 S.Ct. 1584 (2014).