No. 19-1388

In the Supreme Court of the United States

JASON SMALL, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS L. HENDERSON
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
6410 Poplar Avenue
Memphis, TN 38119
thomas.henderson@ogletree.com
901-766-4317

RODRICK DARNELL HOLMES
Counsel of Record
Boyle Brasher LLC
80 Monroe Avenue
Suite 410
Memphis, TN 38103
rholmes@boylebrasher.com
901-521-2860

THOMAS M. CHRISTINA
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
300 North Main Street
Suite 500
Greenville, SC 29601
tom.christina@ogletree.com
864-271-1300

Counsel for Respondent

QUESTION PRESENTED

Whether this Court should revisit and perhaps overrule its statement in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that requiring an employer "to bear more than a de minimis cost" to accommodate an employee's religious practice "is an undue hardship" for purposes of Section 701(j) of the Civil Rights Act of 1964, Title VII, 78 Stat. 255, Pub. L. 88-352, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Pub. L. 92-261, codified at 42 U.S.C. § 2000e-2(j).

CORPORATE DISCLOSURE

Respondent Memphis Light, Gas and Water states that it is not a subsidiary or affiliate of a publicly owned corporation, and that there is no publicly owned corporation with a financial interest in the outcome.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitutional Provisions, Statutes, Regulations, and Rules:

Other Authorities:

Legislation:

Other:

STATUTORY PROVISIONS INVOLVED

As relevant here, 42 U.S.C. § 2000e–2(a)(2) provides

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * religion[.]

As relevant here, 42 U.S.C. § 2000e–2(h) provides

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * * .

STATEMENT OF THE CASE

A. *Trans World Airlines, Inc. v. Hardison* and the "*Hardison* Equation"

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court considered the Title VII religious discrimination claim of an employee whose religious

practices included refraining from work on Saturdays.[1] Observance of this practice conflicted with his employment schedule, which was determined under a religiously-neutral seniority system established in a collective bargaining agreement between his employer and his bargaining representative. *Id*. at 67.

The Court ruled against Hardison, concluding that for Trans World Airlines ("TWA") unilaterally to arrange a shift or job swap for him in the face of his union's refusal to compromise the seniority system "would have amounted to a breach of the collective-bargaining agreement." *Id*. at 79. The Court ruled that the duty to accommodate religious observance under Title VII did not "require[] TWA to take steps inconsistent with the otherwise valid [labor] agreement." *Id*. at 79.

Pursuing what it called an "important" issue, the Court next explained,

> In considering criteria to govern th[e] allocation [of weekend work], TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict

[1] As explained below, the Petition's account of *Hardison* is flawed in ways that bear on its claim that this case is a good vehicle for overruling that decision.

> observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment.

Id. at 81–82.

Next, the *Hardison* opinion turned to the question whether, as the Court of Appeals had supposed, TWA could have accommodated Hardison's religious practice by allowing him to work a four-day week if necessary in order to avoid working on his Sabbath. *Id*. at 84–85. The Court of Appeals had recognized that this approach might have left TWA short-handed on the one shift each week that Hardison did not work, but it concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. *See id*. at 84. Alternatively, the Court of Appeals had suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. *See id*.

The Court rejected the analysis put forward by the Court of Appeals, recognizing that the four-day-week suggestion also suffered from an allocation problem:

> By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily[] in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

Id. at 84–85.

It was in this context that the Court stated, "[R]equir[ing] TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id*. at 84. This statement—referred to here for simplicity's sake alone as the "*Hardison* equation"—is the portion of the *Hardison* decision that Petitioner in this case asks the Court to overrule.

B. MLGW and Its Operations

As its name implies, Respondent Memphis Light, Gas and Water ("MLGW") is a three-service utility. It delivers electric, gas, and water service to more than 433,000 customers in Shelby County, Tennessee,

including the City of Memphis.[2] Small's Petition for Cert ("Pet.") 7.

Over the years, MLGW has entered into a series of agreements with the International Brotherhood of Electrical Workers (IBEW), AFL-CIO, Local 1288 ("the Union") governing the terms and conditions of employment for service positions, including that of Service Dispatcher, the position Petitioner held during the events giving rise to his claim. The most recent of these agreements, referred to as a Memorandum of Understanding ("MOU"), was referenced by MLGW in relaying its interactive process with respect to Petitioner's requests. District Court Docket ("D.I.") 49-1:22, 62:22.

In addition to carrying out its day-to-day operations, MLGW must stand ready twenty-four/seven to respond to emergency calls reporting service outages and problems. To be prepared to respond to these random, unpredictable calls is a formidable undertaking. In 2019, an average of 68,442 MLGW customers per month experienced an outage, totaling 821,304 service outages for the year.[3] The average time spent on each of these service calls was 204 minutes (3 hours and 24 minutes). Thus, MLGW devoted almost 2.8 million employee hours to its service function in 2019.

---

[2] Memphis Light, Gas and Water Division 2019 Annual Report, at 4. The pdf's url is http://www.mlgw.com/images/content/files/pdf/AnnualReport2019.pdf, but it is available via https://www.mlgw.com/about/annualreport.

[3] *Id.* at 5.

To be certain that it can meet customer service needs, MLGW staffs its service departments, including dispatchers, on each day of the year.[4] Given the unpredictability of outages and repair times, mandatory overtime is also necessary to assure readiness to respond promptly and efficiently to outages. D.I. 54-1:36, 62:20–21.

C. Shift and Overtime Assignments

Naturally, each employee of a service department has a shift preference and a preference regarding week-end and overtime work. At MLGW, these preferences are expressed, and conflicting preferences are resolved, *via* a seniority process established in the MOU. D.I. 54-1:38. ("When a dispatcher is asked for OT and passes, but not enough dispatchers can be obtained after going through the list, the lowest dispatcher on the list will be required to work."). This process applies equally to everyone. D.I. 54-1:46.

The MOU establishes a seniority system applicable to both shift assignments and voluntary overtime in Petitioner's department. Appendix to Cert Petition ("App.") 23a; D.I. 62:22, 54-1:38. More specifically, the MOU instructs that "[s]eniority is the basis for filling shifts. * * * Requests for any shift or time off must be in accordance with the area's policies and procedures and the Memorandum of Understanding." D.I. 54-1:38.

On occasion service dispatchers are required to work mandatory overtime after their shifts end, including on nights and weekends. App. 21a; D.I. 54-

[4] *Id.*

1:36, 62:20–21. MLGW has promulgated a policy that authorizes the Chief of the Service Dispatch Department to assign mandatory overtime shifts to additional personnel to handle heavy volumes of work and to address crisis modes declared by systems operations. App. 47a. Seniority, in addition to the area overtime policy, also governs mandatory overtime assignments. App. 34a; D.I. 62-12:18, 70:3. Thus, the ability of MLGW to make regular shift assignments and to affect mandatory overtime is limited by the MOU, which primarily emphasizes seniority, as well as by the department's detailed policies and procedures. App. 34a.

D. Petitioner's Employment

Petitioner, a practicing Jehovah's Witness, was hired by MLGW in 2002 to work as a Substation Electrician. He became a member of the bargaining unit under the MOU. App. 2a, 16a; D.I. 62:2.

In 2013, Petitioner suffered a job-related injury to his left wrist, which rendered him permanently unable to safely perform the duties of a Substation Electrician. Based on the opinion of his treating physician, Petitioner was removed from this position and given permanent restrictions related to his injury. He also was placed on reduced salary pending reassignment to a vacant position he could perform without substantial risk of further injury – a status that Petitioner refers to as "the Reassignment Pool." D.I. 62:2–3; Pet. 9.[5]

---

[5] MLGW has a written policy that provides up to one year of partial salary continuation for employees whose job-related

Individuals in reassignment pool status are given at most one year in which to find a new position. Early in this process, Petitioner expressed interest in the position of Inspector in the Revenue Protection Department. One reason for his interest was that this position's schedule would not interfere with his religious obligations. However, MLGW did not assign Petitioner to the Inspector position because it determined that his work injury prevented him from performing the essential functions of that job with or without reasonable accommodation. App. 21a; D.I. 62:7–18. At around the same time, MLGW asked Petitioner to consider a position as a Service Advisor. Petitioner declined the position. D.I. 62:6–7.

Shortly thereafter, a position as a Service Dispatcher came open. The pay was similar to the pay for the Inspector position in which Petitioner had expressed interest. Since Petitioner was qualified for the Service Dispatcher's job, he was informed that under the pay continuation policy, he was obligated to accept the Service Dispatcher position or risk termination for cause. D.I. 62:19–20. Petitioner accepted the position as a Service Dispatcher in the summer of 2013. Simultaneously, he also requested a

---

permanent disabilities render them unable to perform the essential duties of their pre-injury positions. Under the policy, MLGW provides reassignment assistance to the employees, identifying vacancies for which the employees would be qualified. The policy also provides that an employee on partial salary continuation under this reassignment procedure will be determined "eligible for termination for just cause" if the employee refuses to accept a reassignment to a position identified by MLGW for which he or she is qualified. D.I. 71-2:10–11.

religious accommodation to be able to attend his religious services and to complete his community work. Petitioner wrote that the requested accommodation could either take the form of being "put back into the reassignment pool" or of being given an exemption from certain shifts and from mandatory overtime. D.I. 62:21–22.

MLGW informed Petitioner that his request was denied because it would have caused an undue hardship to the conduct of MLGW's business, which assigns shifts according to a seniority policy. MLGW also noted that Petitioner could swap shifts as long as he did so according to MLGW policy, and that he could take his paid vacation time to attend to his religious obligations. D.I. 62:22.

Dissatisfied with this decision, Petitioner filed a complaint with the Equal Employment Opportunity Commission (the "EEOC") that fall, alleging discrimination on the grounds of disability and religion. In October 2014, after Petitioner's accommodation request had been denied, MLGW granted Petition the option to "blanket swap" his shifts, which allowed him to change shifts with another employee for an entire quarter so he could attend religious services. D.I. 62:23. At the time this accommodation was granted, Petitioner no longer worked Wednesdays, but he chose not to use the "blanket swap" for Sundays. D.I. 62:24. Instead, Petitioner missed work on multiple occasions to attend services. D.I. 62:27–28. On the last such occasion, MLGW suspended Petitioner for two days for failing to report for his scheduled shifts. D.I. 62:28.

From the time of his first written request in 2013, Petitioner has renewed his request for accommodation through reassignment or limited hours several times and has been denied each time on the same grounds and with the same reminders. D.I. 62:22.

When the District Court granted summary judgment against him, Petitioner was still a Service Dispatcher with MLGW. He has been required to perform mandatory overtime that conflicts with his religious practices at times, but his regular shift allows him to attend his required activities on Wednesdays and Sundays, and MLGW has allowed him to use a "blanket swap," which would allow him to avoid conflicts by swapping shifts with another employee each quarter. App. 33a–34a. Although Petitioner has noted that the "ideal time" to complete his religious outreach is during his current Saturday shift, it is undisputed that he can fulfill his obligations after his Saturday shift as well.

E. Proceedings Below

Petitioner brought this action against MLGW in the United States District Court for the Western District of Tennessee on February 21, 2017, alleging discrimination, harassment, and retaliation under the Americans with Disabilities Act (the "ADA") and Title VII. App. 15a. The District Court (Hon. Sheryl H. Lipman, United States District Judge), granted MLGW's motion for summary judgment as to all claims on January 19, 2018. App. 15a–43a.[6]

---

[6] Petitioner's discrimination claim under Title VII was two-fold, alleging both a failure-to-accommodate and a hostile work

The District Court ruled that MLGW had demonstrated, through undisputed facts, that it had offered Petitioner accommodations where possible and that where it had not offered accommodations, it was because accommodations would result in an undue hardship. App. 33a. The District Court found that the absences from scheduled work that led to Petitioner's termination were not related to shift assignments; Petitioner's religious need to protect Saturdays, Sundays, and Wednesday evenings had been met when MLGW allowed him to swap shifts in three-month blocks of time. App. 34a. When Petitioner failed to show up for scheduled work, it was because he was asked to work mandatory overtime, assigned based on seniority status. *Id*.

Based on these findings, the District Court held that MLGW had "demonstrated, through undisputed facts, that it has offered accommodations where possible by allowing a 'blanket swap' [of shifts] and that where it has not offered accommodations, it is because accommodations would result in an undue hardship." App. 33a. Although the District Court relied on *Hardison*, it did so only for three propositions: (1) that Title VII does not require employers to deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, App. 32a–33a (citing and quoting *Hardison*, 432 U.S. at 80); (2) that an accommodation that violates a seniority system causes undue hardship, App. 34a (citing *Hardison*,

---

environment theory. App. 31a. Only Petitioner's Title VII failure-to-accommodate claim is pertinent here.

432 U.S. at 81–82); and (3) that seniority systems are afforded special treatment under Title VII itself, App. 34a (citing and quoting *Hardison*, 432 U.S. at 81–82). The District Court did not apply the *Hardison* equation.

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, the sole basis on which Petitioner sought reversal of the summary judgment on his Title VII failure-to-accommodate claim was his assertion that the District Court had misapplied the law used to determine whether an accommodation is "reasonable." Appellant's Opening Brief in the Court of Appeals, 43. The Court of Appeals affirmed the judgment of the District Court as to all claims in a *per curiam* opinion filed on March 12, 2020,[7] and this Petition was timely filed.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE.

A phalanx of vehicular problems counsel strongly against granting the Petition. They include waiver by failure to make and preserve the relevant issues when this case was in the Court of Appeals, *see Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved."); the failure of the Court of Appeals even to consider applying the *Hardison* equation to the facts of this case, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005);

[7] App. 1a.

and the impossibility that overruling, modifying, or limiting the *Hardison* equation would have any effect on this disposition of this case.[8]

1. Petitioner waived the argument he seeks to advance in this Court. The only argument Petitioner made in the Court of Appeals regarding his Title VII failure-to-accommodate claim had nothing to do with the *Hardison* equation or "undue hardship." Instead, Petitioner urged the Court of Appeals to reverse the summary judgment against him on the ground that the District Court had misapplied the law used to determine whether an accommodation is "reasonable." Appellant's Opening Brief in the Court of Appeals, 43. Textually and substantively, the question whether an accommodation is reasonable is separate from the question whether an accommodation can be made "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Petitioner made no mention of the *Hardison* equation or even of the *Hardison* decision in the only argument he made respecting his Title VII religious discrimination claim:

---

[8] "This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (emphasis in original) (citing and quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). *Cf. Sommerville v. United States*, 376 U.S. 909 (1964) (denying certiorari despite an acknowledged split of authority on an important and recurring choice of law question where resolution of the question would not have altered the outcome of the case).

> For the most part * * * reasonableness is a matter of degree. For example, an accommodation may be reasonable even though it imposes some costs on the employee. * * * At the same time, the extent of and justification for the costs imposed on the employee are relevant to the reasonableness of the employer's efforts to accommodate. * * * This Honorable Court must reject district court's apparent position that the relevant consideration is the extent to which an accommodation resolves an employee's religious conflict. That is clearly not the law. This Court should further find that the issue of reasonable accommodation is best left for the jury.

Id. at 44–45 (citations omitted). This argument was so distant from the issues Petitioner asks to raise in this Court, that it did not even use the words "undue" or "hardship," singly or together.

2. According to the Petition, the Court of Appeals held that MLGW "did not have to offer any accommodation that would have imposed an 'undue hardship' on its business—meaning (apparently) anything more than a 'de minimis cost.'" Pet. 13. *See also* Pet. 15 (asserting that the Court of Appeals "addressed the issue [of the *Hardison* equation] on the merits"), 35 (to the same effect). These assertions are incorrect.

The Court of Appeals affirmed the District Court's judgment against Petitioner on his Title VII failure-to-accommodate claim without ruling on whether any

accommodation would impose an undue hardship on MLGW. Admittedly, the *per curiam* opinion recited the *Hardison* equation in the course of discussing the "undue hardship" exception in 42 U.S.C. § 2000e(j). App. 6a–7a. However, the critical paragraph of the *per curiam* opinion clearly shows that the Court of Appeals considered the issue waived and did not base its affirmance on an application of the *Hardison* equation.

The Court of Appeals summarized MLGW's contentions that additional accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system. It then noted that "[o]ur court has found similar costs to be more than de minimis." App. 6a (citing *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517–21 (6th Cir. 2002) and *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994)). However, these statements were not the wind up one might have thought to concluding that the burdens cited by MLGW constituted "undue hardship[s]" because they involved "more than de minimis cost."

Instead, the *per curiam* opinion concluded its discussion of Petitioner's Title VII discrimination claim with this:

> And in any event, [Petitioner] has not challenged whether the accommodations would have imposed an undue hardship on the company—beyond a passing assertion in his brief. Instead, he argues only about whether the company *did* accommodate his religious beliefs. * * * Hence this claim cannot proceed. *See*

> *White Oak Prop. Dev., LLC v. Washington Twp.*, 606 F.3d 842, 854 (6th Cir. 2010).

App. 6a (citation omitted).[9]

a. The *per curiam* opinion's reliance on *White Oak Property* is a definitive indication that the basis of the ruling was waiver. In that case, the Court of Appeals ruled that because the appellant had raised a "void for vagueness" argument only in a perfunctory way, the issue was waived. In so ruling, *White Oak Property* cited and quoted *United States v. Robinson,* 390 F.3d 853, 886 (6th Cir. 2004) ("We have cautioned that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived, and that it is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." (citation and internal quotation marks omitted)). Thus, the Court of Appeals' reliance on *White Oak Properties* in *Small* is a very clear sign that the Court of Appeals did not apply the *Hardison* equation, instead treating Petitioner as having abandoned the question of whether any further accommodation would have caused "undue hardship" to MLGW.

b. This reading of the *per curiam* opinion in *Small* is confirmed by Circuit Judge Thapar's concurrence, in which Circuit Judge Kethledge joined. App. 14a ("[T]his case doesn't involve a challenge to the 'de

---

[9] With respect, Respondent has been unable to locate in Petitioner's opening brief before the Court of Appeals the "passing reference" to which the *per curiam* opinion refers.

minimis' test. Indeed, [Petitioner] hasn't even contested—at least in any meaningful way—his employer's claim of 'undue hardship.'") (Thapar, J., concurring).

3. Reversing, modifying, or limiting the *Hardison* equation would not be outcome determinative in this case, regardless of what (if anything) might replace that formulation as a gloss on the phrase "undue hardship" in Section 2000e-2(e). This is so because there are two independent rules of law applicable to this case, each sufficient to require an affirmance.

a. Although Petitioner claims otherwise, 42 U.S.C. § 2000e-2(h) provides MLGW with an absolute defense to the Title VII discrimination claim in this case. Contradicting the district court, *see* App. 34a, Petitioner asserts that this case does not raise any issue under 42 U.S.C. § 2000e-2(h) because (as Petitioner would have it) "[e]xemptions from the mandatory overtime at issue are not governed by seniority."[10] Both Petitioner's premise and his conclusion are unsound, for several reasons.

First, Petitioner's conclusion relies on an artificially narrow understanding of the scope of Section 2000e-2(h), *see* Pet. 7–8 (stating that the Section "protects bona fide 'seniority' systems" (footnote omitted)). The misimpression implied in Petitioner's reading of Section 2000e-2(h) melts away in the light of the statutory language.

---

[10] As this Court's Rule 10 states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings * * *." This precept should have particular force where, as here, a district court's finding went unchallenged in the Court of Appeals.

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different * * * terms, conditions, or privileges of employment pursuant to a bona fide seniority *or merit* system * * * .

42 U.S.C. § 2000e–2(h) (emphasis added). Although the method for assigning involuntary overtime is based on a seniority system, as discussed immediately below, it can fit into the "merit system" category under the statute with equal ease.

Second, Petitioner's assertion of the supposed inapplicability of Section 2000e-2(h) is based on creating an artificial distinction between the seniority system used to offer overtime and the seniority-based system used to assign involuntary overtime when the offer method yields too few volunteers.

Petitioner says that the mandatory overtime at issue in this case was governed by

> "Work Rules" in the department that Petitioner eventually joined [which] provide: "Service Dispatching personnel may be required to work overtime *when the employee has the least number of cumulative overtime hours and all other available employees have passed the overtime*."

Pet. 8 (emphasis in original). Based on that assertion, the Petition announces without any intervening logic that "[a]ny mandatory overtime accommodation is

thus judged under Title VII's general 'undue hardship' standard." *Id*.

Petitioner's conclusion is a non sequitur. It is self-evident that the involuntary overtime rule functions as the necessary adjunct to the seniority-based voluntary overtime process. Indeed, the involuntary overtime rule is triggered if and only if the seniority-based voluntary overtime component of the process fails to yield sufficient volunteers to meet a pressing need for overtime work. The two sets of rules are integrated precisely like the two sides of a single coin.

Moreover, even if considerations of form managed to pry the Work Rule apart from the seniority system, the two remain fully integrated at the functional level. The Work Rule operates by taking into account the cumulative outcomes of the seniority based voluntary overtime program. An employee who accepts an overtime assignment voluntarily is less vulnerable to a subsequent involuntary overtime assignment. Similarly, an employee who has turned down voluntary overtime relentlessly since the beginning of the year cannot avoid eventually being the "employee [who] has the least number of cumulative overtime hours" when there are not enough volunteers to cover all the needed overtime work.[11]

Third, leaving aside Section 2000e-2(h) and the intricacies of the overtime assignment methodology used at MLGW, there is another, entirely independent

---

[11] It is in this sense that the Work Rule can be characterized as a "merit system." It rewards an individual who demonstrates his or her job-engagement by accepting at least an average amount of voluntary overtime by conferring on such an individual an ever-lower probability of being tapped for mandatory overtime

basis for affirming the judgement in this case, regardless if what may become of *Hardison*'s authority. The uncontested facts show that to accommodate Petitioner further, MLGW would be compelled first to divide its service employees into Sabbatarians and non-Sabbatarians and then to oblige the overtime preferences of the first group whenever overtime preferences were misaligned with business needs. Yet this is one of the very practices Title VII condemns.

That an employer may not allocate benefits and burdens of employment based on religious categorization is not merely a conclusion to be drawn from Title VII's legislative history or its spirit as a law, or a way of making Congress's intent more concrete. It is quite literally an "unlawful employment practice" as defined in the very language of Section 2000e-2(a)(2):

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * religion[.]

A federal statute cannot require one party to provide another with an unlawful remedy in a civil action. An accommodation cannot be a reasonable accommodation if the accommodation is itself prohibited by law.

Petitioner cannot avoid the foregoing conclusion without placing the constitutionality of Section 2000e-

2(h) in serious and perhaps inescapable jeopardy. To be sure, "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987) (footnote omitted). Nevertheless, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie*, 480 U.S. at 145). *See also Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 710 (1994) (recognizing that a law may "cross the line from permissible accommodation to impermissible establishment").

The alternative to the *Hardison* equation that Petitioner would urge this Court to adopt crosses the line drawn by the First Amendment. Under that alternative, a plaintiff's religious practice desires always would trump the preferences of those among his or her colleagues who adhere to a different belief system. Title VII would not merely authorize but would outright require employers to create a faith-based caste system among their employees, according one creed special status (and subordinating its non-adherents precisely because of their differing religious or ethical beliefs).

Fourth, Petitioner's efforts to avoid the First Amendment issues fail. Those efforts are built on a dubious premise. According to Petitioner, the genesis of the *Hardison* equation was the Court's concerns about favoring the religious over the non-religious,

and therefore that the *Hardison* equation was animated by the Court's Establishment Clause concerns. Pet. 21. But it is evident from the Court's opinion in *Hardison* that the Court's concern was the impact of accommodation on both non-believers and believers. *Id.* at 81 (noting the effects on other employees who had "strong, but perhaps nonreligious, reasons for not working on weekends"), 84–85 (noting that an alternative accommodation would also mean that "the privilege of having Saturdays off would be allocated according to religious beliefs). *See also ibid.* ("[W]e will not readily construe the statute to require an employer to *discriminate against some employees* in order to enable others to observe their Sabbath." (emphasis added)).

On the basis of its interpretation of the concerns underlying *Hardison*, the Petition argues that "any Establishment Clause concerns that may have influenced *Hardison* are foreclosed by later precedents." *Id*. at 14. *See also id*. at 21 (citing *Amos*, 483 U.S. at 338); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012). Those cases are inapposite because they did not concern governmental action disfavoring adherents of one or more given sects.[12]

---

[12] The issue created by burdening the plaintiffs' colleagues because they choose to believe differently might also be evaluated under the Free Exercise Clause. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[W]hen government activities touch on the religious sphere, they must be secular in purpose, evenhanded in

II. THERE IS NO URGENT NEED TO REVISIT THE *HARDISON* EQUATION.

As this Court's Rule 10 states, "A petition for a writ of certiorari will be granted only for compelling reasons." To satisfy this standard, Petitioner notes (correctly) that three current members of this Court have called for considering whether the *Hardison* equation should be overruled, *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari); and that the United States has urged that the *Hardison* equation is "incorrect." U.S. Invitation Br. 19, *Patterson* v. *Walgreen Co.*, No. 18–349 (2018).

Admittedly, the *Hardison* equation very likely is not the best possible gloss on the phrase "undue hardship on the conduct of the employer's business"[13] in Section 2000e(j).[14] Indeed, "more than a de minimis

---

operation, and neutral in primary impact."). *See also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) ("We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.") (O'Connor, J., concurring in part and concurring in judgment).

[13] Petitioner's discussion of *Hardison* proceeds as if the pertinent statutory language were simply "undue hardship."

[14] That said, it is unclear that a single replacement for it can be found. Petitioner and his *amici* urge this Court to interpret "undue hardship" as used in Title VII with reference to its meaning under the Americans with Disabilities Act ("ADA") or the Religious Freedom Restoration Act ("RFRA"). Pet. 27. *See also, e.g.*, Br. for Muslim Advocates and the Sikh Coalition, at 8. These suggestions overlook that Congress has declined several

cost" may not have been the most apt phrase to use in the context in which it appears in *Hardison*, *i.e.*, an elucidation of why it is unacceptable to require an employer to allocate among its employees the benefits and burdens associated with its business needs based on their religions. *See* Statement of the Case, at 10–11 above.

Yet neither sub-optimality nor imperfection is a sufficient reason for granting the writ, especially where the issue is one of statutory interpretation as to which Petitioner has not shown a split of authority among the Courts of Appeals. Petitioner has not shown a compelling need for this Court to grant discretionary review.

1. To begin with, Petitioner's claim of importance fails to show a compelling need for review on certiorari. Petitioner contends that *Hardison* effectively nullified an important civil rights law. Pet. 19. Title VII is indeed an important civil rights law,

---

times to add a statutory definition of "undue hardship" to Title VII.

In any event, the ADA is not an apt model for a judicially-created definition of "undue hardship," because accommodating one employee's disability does not impose a burden on another employee's exercise of his or her own religious beliefs. The RFRA's "compelling interest" standard is wholly inappropriate as a model, since it applies only in the context of governmental action. Indeed, if the RFRA has any significance for the merits of this case, it is to show that Congress has chosen not to prohibit governmental action imposing *insubstantial* burdens on a person's exercise of religion. *See* 42 U.S.C. § 2000bb-1(a), (b) (2018).

but the assertion that the *Hardison* opinion nullified it is overblown to say the least.

a. Taken out of context and subjected to dictionary definitions and other exogenous sources of interpretation, the *Hardison* equation might conjure visions of lower federal courts excusing reasonable accommodation efforts based on their genuinely trivial costs. Yet the decisions of the lower federal courts indicate that this nightmarish vision is a fantasy. Within two years of the Court's decision in *Hardison*, the Eighth Circuit ruled that an employer violated Title VII when it terminated an employee for his request to observe his Sabbath, because the employer had failed to show that an accommodation would have involved more than a de minimis burden.[15]

The specter of employers' being excused from reasonable accommodations to their employees' religious practices on the authority of the *Hardison* equation can be dispelled by reflecting that Petitioner has not cited a single case—not one—in which a lower federal court has excused an employer from accommodating an employee's religious observances or practices based solely on a showing that the accommodation would involve a trivial or insignificant cost. If the lower federal courts interpreted *Hardison* to support doing so, the federal reporter system might be awash in such cases. It is not.

b. Instead of pointing to intolerable results in cases across the country, Petitioner (fortified by his

---

[15] *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979).

amici) relies on a statistical argument. These statistical arguments are insufficient for the task. For example, it is pure speculation to attribute to the *Hardison* equation the differential rates at which Title VII religious accommodation plaintiffs and defendants file summary judgment motions. Employer-defendants generally move for summary judgment more frequently than plaintiffs.

Petitioner's assertion that *Hardison* discourages employees from bringing religious discrimination claims does not hold water. Indeed, Petitioner's reasoning in this regard appears to be self-contradictory. Petitioner states that religion-based EEOC claims "more than doubled from 1992 to 2007," Pet. 22, but simultaneously asserts that "many employees never file religious accommodation claims, knowing the claims are dead on arrival," Pet. 23. Perhaps more tellingly, Petitioner does not assert that the *Hardison* equation deters the filing of meritorious religious accommodation claims.

2. Even if there were any urgency about rephrasing one statement in *Hardison*, there certainly is not enough urgency to overcome the presumption in favor of *stare decisis*.

"The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike."[16] The doctrine "has long been 'an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to

---

[16] *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

waiver with every new judge's opinion'" *Id*. (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)).

A "special justification"—over and above the belief "that the precedent was wrongly decided"—is always required to reverse course.[17] Indeed, *stare decisis* is the "preferred course because 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."[18]

Stare decisis "carries enhanced force when a decision * * * interprets a statute." *Kimble,* 576 U.S. at 456. That principal is of particular force here, because Congress has considered and rejected measures to correct the *Hardison*'s equation many times.[19] Since 1972, several bills that would have overruled or altered the interpretation provided by *Hardison* have failed.[20] Additionally, despite the

---

[17] *Kimble v. Marvel Entm't*, 576 U.S. 446 (2015) (citing *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

[18] *Id*. at 455 (citing *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991)).

[19] *Kimble*, 576 U.S. at 456 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)).

[20] *See* H.R. 5331, 116th Cong. (2019) (proposing to define "undue hardship" as "a significant difficulty or expense"); S. 3686, 112th Cong. (2012) 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,

pursuit by some lawmakers to amend 42 U.S.C. 2000e(j) through the Workplace Religious Freedom Act, initially introduced in 1994 and reintroduced several times in later Congressional sessions, the bill has yet to pass, at least partially due to Constitutional concerns.[21] In short, Congress has abstained for over forty years from amending Title VII to redefine "undue hardship" in religious accommodation cases. Petitioner has not shown a compelling reason for this Court to do so at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

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). *See also Patterson v. Walgreen Co.*, 2019 WL 193908, Br. of Respondent in Opp., at *28.

[21] *See* S. 1124, 105th Cong. (1997) (Version 2). *See also* S. 92, 105th Cong. (1997) (Version 1); H.R. 2948, 105th Cong. (1997). Hon. Jerrold Nadler of New York introduced the Workplace Religious Freedom Act in 1994. *See* 140 Cong. Rec. E2157-01, (daily ed. Oct. 6, 1994). House Bill 2948 was reintroduced into the House by Hon. William F. Goodling of Pennsylvania on Tuesday, January 27, 1998. *See* 144 Cong. Rec. E4-02 (1998).

Respectfully submitted,

Rodrick Darnell Holmes
RODRICK DARNELL HOLMES
Boyle Brasher LLC
80 Monroe Avenue
Suite 410
Memphis, TN 38103
rholmes@boylebrasher.com
901-521-2860

Counsel for Respondent

October 16, 2020