No. 19-1461

In the Supreme Court of the United States

MITCHE A. DALBERISTE, *Petitioner*,

v.

GLE ASSOCIATES, INC., *Respondent*.

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

BRIEF FOR JEWISH COALITION FOR RELIGIOUS LIBERTY; THE COALITION FOR JEWISH VALUES; THE SIKH COALITION; THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; AND CHURCH OF GOD IN CHRIST, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
EMILY R. HAWS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the Court should reconsider *Trans World Airlines* v. *Hardison* and set a proper legal standard for determining what constitutes an "undue hardship" under 42 U.S.C. § 2000e(j).

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INTERESTS OF AMICI CURIAE[1]

Religious organizations and associated faith communities representing millions of Americans appear on this brief. Although our beliefs and practices are diverse, we are united in supporting robust legal protections for religious freedom. That freedom must include a vibrant right for religious Americans to worship on their Sabbath day, participate in other religiously significant events, and comply with religious dress and grooming standards in the workplace, without the loss of employment. Yet the promise of legal protection for such religious practices has been hollow since *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). With *Hardison*'s sanction, employers routinely deny or disregard an employee's request for religious accommodation. We submit this brief to support petitioner's effort to restore full legal protection for religious employees.

SUMMARY OF ARGUMENT

"No Adventists need apply." That is effectively the message delivered by Respondent GLE Associates, Inc. when Petitioner Mitche Dalberiste tried to live his faith. Days after telling GLE that he was unavailable to work on his Sabbath, Dalberiste lost his job—without *any* effort by GLE to accommodate his request. See App. 15a; Pet. 9. His loss is directly traceable to the

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[1] Pursuant to Supreme Court Rule 37.2, *amici* state that counsel of record for all parties received notice of the intent to file this brief at least ten days before it was due and have consented to this filing. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Hardison decision that the petition asks the Court to reconsider.

Forcing an employee to choose between his faith and his job contravenes the original public meaning of the Civil Rights Act of 1964. Title VII of the Act requires employers to reasonably accommodate an employee's religious practice unless an accommodation would impose "an undue hardship." See 42 U.S.C. § 2000e(j). But this Court reduced the law's protection to a virtual nullity by deciding that an employer may deny a religious accommodation without legal consequence if it would incur "more than a de minimis cost." *Hardison*, 432 U.S. at 84.

We wholeheartedly support petitioner's plea to reconsider and overrule *Hardison*. American workers from diverse faith communities face the same conflict as Dalberiste, torn between the imperative requirements of faith and the inflexible demands of an employer. Without this Court's intervention, religious employees will continue to face religious discrimination and all its attendant harms.

The petition ably describes several reasons for granting review. But perhaps the most compelling reason is that *Hardison* stands as an obstacle to applying a vital statute on its own terms. Employers and courts cite *Hardison* as reason to brush aside virtually any request for religious accommodation, no matter how reasonable or inexpensive. The guarantee of religious accommodation simply cannot be honored by redefining the ordinary meaning of "undue hardship" to mean a little more than "de minimis cost." Inconvenience is not hardship.

This case offers the vehicle to reconsider *Hardison* that the Court has been waiting for. The petition presents a single question of law—the meaning of "undue hardship" under 2000e(j)—on which the judgment below solely rests. That question holds national significance for the millions of religious Americans desiring to practice their faith without sacrificing their livelihood. And to an unusual degree, this case comes to the Court free of material factual disputes since it is uncontested that Dalberiste produced a prima facie case of religious discrimination under 2000e(j). See App. 18a. *Hardison* is the only obstacle to the reasonable accommodation he seeks.

In short, review should be granted in this case to reconsider *Hardison* and return 2000e(j) to its textual moorings.

ARGUMENT

I. *TWA* v. *Hardison* Should Be Overruled.

A. *Hardison*'s interpretation of Title VII withholds protection that Congress enacted for employees of faith.

1. *Hardison* tore a hole in the Civil Rights Act of 1964, the Nation's signature civil rights law. Title VII of the Act prohibits an employer from discriminating against a person because of religion and defines religion to include "all aspects of religious observance and practice." See 42 U.S.C. §§ 2000e-2(a), 2000e(j). Under the statute, an employer can lawfully deny a request "to reasonably accommodate" an employee's religious observance or practice only by showing that an accommodation would inflict "undue hardship on the conduct of the employer's business." *Id.* 2000e(j). In *Hardison*, the Court read "undue hardship" to mean that such an

accommodation can be refused whenever it requires an employer "to bear more than a de minimis cost." 432 U.S. at 84. Justice Marshall rightly pointed out that this interpretation of 2000e(j) "makes a mockery of the statute." *Id.* at 88 (Marshall, J., dissenting). *Undue hardship* did not mean *more than a de minimis cost* when the statute was enacted. See *Small* v. *Memphis Light, Gas and Water*, 952 F.3d 821, 826–27 (6th Cir. 2020) (Thapar, J., concurring). Nor does *undue hardship* carry that meaning today. See U.S. Invitation Br. 19, *Patterson* v. *Walgreen Co.*, No. 18-349 (2019). And it is passing strange for *Hardison* to have distorted the meaning of 2000e(j) when the case turned on the interpretation of an EEOC guideline, not on Title VII itself.[2]

No wonder three members of this Court agree that the Court should "grant review in an appropriate case to consider whether *Hardison*'s interpretation [of undue hardship] should be overruled." *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 685 (2020) (Alito, J., joined by Thomas and Gorsuch, J.J., concurring in denial of certiorari).

This is that case.

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[2] Justice Thomas has rightly pointed out that "[b]ecause the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an 'undue hardship' defense—not the amended statutory definition." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2040 n.* (2015) (Thomas, J., concurring in part and dissenting in part). Yet courts—including the Eleventh Circuit below—have treated *Hardison* as a controlling interpretation of Title VII. See App. 9a (describing *Hardison* as "binding Supreme Court precedent").

2. Petitioner's plea to reconsider *Hardison* is deeply rooted not only in the language of Title VII, but in the history of Anglo-American religious freedom. For centuries, Sabbath worship was so intrinsic to religious faith that laws commonly barred commerce on Sunday. English statutes guarding Sunday from commercial activity date back to 1237. See *McGowan* v. *Maryland*, 366 U.S. 420, 431–32 (1961) (citing A.H. Lewis, *A Critical History of Sunday Legislation* 81–108 (1888)). This deeply engrained pattern of English law influenced legislation in the American colonies—even those founded on the right of religious dissent. See Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729, 729 n.2 (1960) (citing The Law Concerning Liberty of Conscience, 1700, 2 Pa. Stats. at Large 34 (1700)). Sunday closing laws "persevered after the Revolution and, at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor." *McGowan*, 366 U.S. at 433 (citations omitted). Even after the religious rationale for Sunday closing laws had eroded, most states maintained laws restricting Sunday labor. See *id.* at 435 ("Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system.") (citations omitted).

Considering the importance of Sabbath worship, it should not be surprising that the modern understanding of religious freedom under the First Amendment recognizes that the government may not penalize an employee for taking time off work to observe his or her Sabbath. One of the Court's leading decisions under the Free Exercise Clause holds that a state could not

deny unemployment benefits to a Seventh-day Adventist whose faith prevented her from working on Saturdays—essentially the same conflict petitioner faces here. See *Sherbert* v. *Verner*, 374 U.S. 398, 408–09 (1963). The Court criticized the state for compelling the employee "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

Yet *Hardison*—in spite of Congress's best efforts to safeguard religious freedom—forces employees to make that same "cruel choice." 432 U.S. at 87 (Marshall, J., dissenting).

3. The United States has rejected *Hardison*'s reading of 2000e(j).

In response to this Court's invitation, the Solicitor General wrote last year that *Hardison* was "incorrect" because it did not articulate "a reasonable interpretation of the statutory phrase 'undue hardship,' and subsequent case law has eroded *Hardison*'s doctrinal underpinnings." U.S. Invitation Br. 8. Accordingly, the Solicitor General concluded that "the question whether to revisit *Hardison*'s de minimis standard warrants review." *Id.* at 19 (emphasis removed, capitalization altered).

In another blow against *Hardison*, the U.S. Department of Justice has interpreted 2000e(j) as a duty to accommodate religious observance. By the Department's reckoning, "covered employers are required to adjust employee work schedules for Sabbath observance, religious holidays, and other religious observances, unless doing so would create an undue

hardship, such as materially compromising operations or violating a collective bargaining agreement." Att'y Gen. Jeff Sessions, Mem. for All Executive Dep'ts and Agencies, *Federal Law Protections for Religious Liberty*, at 5 (Oct. 6, 2017).

Welcome as they are, these statements will do little to shore up the rights of religious employees like Dalberiste without this Court's review. Only then can *Hardison* be removed as an obstacle to the protection that Congress enacted for religious employees.

B. *Hardison*'s incorrectness has been a recurring issue for four decades.

Since *Hardison* was announced, the cost of that decision for millions of religious employees has been anything but de minimis. *Hardison* sets the bar for employers so low that allowing an employee to make a slight departure from a company-wide dress and appearance policy is held to be an undue hardship. Allowing a police officer to wear a small gold cross on his uniform was deemed an undue hardship when department policy allowed pins to be worn only if approved by the police chief. See *Daniels* v. *City of Arlington, Tex.,* 246 F.3d 500, 506 (5th Cir. 2001). Denying other workers their preferred shifts to make a religious accommodation has been ruled an undue hardship. See *Adams* v. *Retail Ventures, Inc.*, 325 Fed. App'x 440, 443 (7th Cir. 2009). And perhaps most absurdly, the possibility that "other employees could have hard feelings" if a religious employee was allowed to have his Sabbath day off was considered a valid factor in court's undue hardship analysis. *Leonce* v. *Callahan*, No. 7:03-CV-110-KA, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008).

These decisions illustrate the sad fact that *Hardison* allows all but the most unimaginative employer to shirk the legal duty to accommodate religious employees. Review is warranted to revisit that decision and realign judicial doctrine with the text of Title VII.

C. The lax regime created by *Hardison* imposes especially severe hardships on economically vulnerable workers.

Tragically, the damage caused by *Hardison* often hurts employees who are least able to weather the loss of a job. Many who assert the right to a religious exemption come from the lower rungs of the economic ladder—store clerks and mechanics, not lawyers and investment bankers:

- Entry-level maintenance worker, see *McCarter* v. *Harris Cty., Tex.*, No. CIV.A. H-04-4159, 2006 WL 1281087 (S.D. Tex. May 5, 2006);
- Hotel kitchen mechanic, see *Jiglov* v. *Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010);
- Part-time grocery store clerk, see *Prach* v. *Hollywood Supermarket, Inc.*, No. 09-13756, 2010 WL 3419461 (E.D. Mich. Aug. 27, 2010);
- Immigrant pet food factory production workers, see *Mohamed* v. *1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017);
- Nursing home activity aide, see *Nobach* v. *Woodland Vill. Nursing Home Ctr., Inc.*, No. 1:11CV346-HSO-RHW, 2012 WL 3811748 (S.D. Miss. Sept. 4, 2012);

- Administrative assistants, see *Shatkin* v. *Univ. of Texas at Arlington*, No. 4:06-CV-882-Y, 2010 WL 2730585 (N.D. Tex. July 9, 2010);
- Juvenile detention center officer, see *Finnie* v. *Lee Cty., Miss.*, 907 F. Supp. 2d 750 (N.D. Miss. 2012);
- Sheriff's office detention officer, see *Leonce* v. *Callahan*, No. 7:03-CV-110-KA, 2008 WL 58892 (N.D. Tex. Jan. 3, 2008).

Employees like these have limited bargaining power and financial resources. They are seldom able to pressure employers for religious accommodations, much less wage a legal battle to vindicate their civil rights. Reported cases represent only the tip of the proverbial iceberg since these claims rarely come before a judge at all, much less before this Court. Yet economically vulnerable workers have the greatest need for protection since few can absorb the devastating blow of losing their jobs as the price of practicing their faith. *Hardison* stands in the way protecting them.

II. Overruling *Hardison* Holds National Importance for Americans from Diverse Faith Communities.

Seventh-day Adventists are hardly the only religious group affected by *Hardison*. Millions of Christians observe Sunday as the Sabbath and other legal holidays like Christmas as days of religious observance. *Hardison* prevents these employees from practicing their religion without risking their jobs. Non-Christian beliefs and practices from diverse religious groups likewise create potential conflicts between conscientious employees and their employers.

Understanding some of those beliefs and practices underscores the importance of accommodating religious practices for people of all faiths.

A. Sabbaths, Holy Days, and the Duty to Worship

Many religions in the United States observe a day set aside each week for religious worship, annual holy days or periods, and other religious observances. Firm religious standards often require that the believer refrain from commercial work on such days.

1. *Christianity*

The Decalogue declares: "Remember the sabbath day, to keep it holy. Six days you shall labor, and do all your work; but the seventh day is a Sabbath to the Lord your God; in it you shall not do any work." Exodus 20:8–10 (King James). Millions of American Christians still understand this scriptural injunction as a divine command not to perform work for pay on the Sabbath.

The Catholic Catechism teaches, for instance, that "[o]n Sundays and other holy days of obligation, the faithful are to refrain from engaging in work or activities that hinder the worship owed to God, * * * and the appropriate relaxation of mind and body." *Catechism of the Catholic Church* § 2185 (2d ed. 2000). On Sundays and other holy days, the "faithful are bound * * * to abstain from those labors and business concerns which impede the worship to be rendered to God, * * * or the proper relaxation of mind and body." *Id.* § 2193. And on these days of religious observance "the faithful are bound to participate in Mass." *Id.* § 2180.

Other Christian faiths interpret this commandment of Sabbath-day observance in similar terms. Members of The Church of Jesus Christ of Latter-day Saints believe that the Lord has commanded them to "go to the house of prayer and offer up thy sacraments upon my holy day" as "a day appointed unto you to rest from your labors, and to pay thy devotions unto the Most High." Doctrine and Covenants 59:9–10; see also Russell M. Nelson, *The Sabbath Is a Delight* (April 2015), https://www.lds.org/general-conference/2015/04/the-sabbath-is-a-delight?lang=eng ("God gave us this special day, not for amusement or daily labor but for a rest from duty, with physical and spiritual relief. * * * We are under covenant to [keep the Sabbath].").

Jehovah's Witnesses not only attend a mandatory Sabbath-day worship meeting but also a mid-week mandatory meeting, often in the evening. See JW.org, *What Happens at Our Meetings?*, https://www.jw.org/en/jehovahs-witnesses/meetings/; JW.org, *What Are Our Meetings Like?*, https://www.jw.org/en/library/books/jehovahs-will/meetings-of-jehovahs-witnesses/.

Although not all Christians agree which day of the week should be observed as the Sabbath, many share Dalberiste's belief that it would offend God and violate his commandments to work for an employer on the Sabbath. See Adventist, *Is Saturday the Sabbath?,* July 9, 2013, https://www.adventist.org/en/beliefs/living/the-sabbath/article/go/-/is-saturday-the-sabbath/.

2. *Judaism*

Members of the Orthodox Jewish community interpret the Torah and Oral Law to prohibit working on the Jewish Sabbath (sundown Friday to Saturday night) and designated Jewish holy days. See generally Rabbi Yosef Karo, *Shulchan Aruch Orach Chayim* 242–365 (Sabbath prohibitions); *id.* at 495–529 (holy day prohibitions); Aryeh Kaplan, *Sabbath: Day of Eternity*, *in II The Aryeh Kaplan Anthology* 107, 128 (1998). Sabbath restrictions extend beyond mere employment to encompass thirty-nine categories of prohibited activity. See Orthodox Union, *The 39 Categories of Sabbath Work Prohibited by Law*, July 17, 2006, https://www.ou.org/holidays/shabbat/the_thirty_nine_categories_of_sabbath_work_prohibited_by_law/. Given the importance of these restrictions for Orthodox Judaism, adherents feel that an observant Jew must be willing to lose a job rather than work on the Sabbath. *See* 3 Karo, *Shulchan Aruch Orach Chayim*, at 308.

3. *Islam*

The Muslim equivalent of the Christian or Jewish Sabbath is the Friday noonday prayer at the local Mosque, known as *Jumu'ah*. For observant Muslim men, work is not forbidden on Fridays but missing *Jumu'ah* is a serious violation of Islamic law. See Ceasar E. Farah, *Islam: Beliefs and Observances* 136 (7th ed. 2003). The Qur'an directs Muslims to "leave trade" and proceed to Friday prayer when called. Al-Qur'an 62:9; see also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 345 (1987) (describing "Jumu'ah, a weekly Muslim congregational service" that is "commanded by the Koran and must be held every Friday after the sun

reaches its zenith and before the Asr, or afternoon prayer").

B. Religious dress and grooming standards

Besides observance of Sabbaths and holy days, many believing Americans demonstrate their faith in the workplace by complying with religious dress and grooming standards. These may include ways of covering one's head, objects worn on one's body, or not cutting one's hair. For many faiths, compliance with these standards is an outward expression of religious commitment.

1. *Women's head coverings*

Many Muslim women believe that Islamic scripture encourages, if not requires, them to cover their heads in public to be modest. See, *e.g.*, Al-Qur'an 24:31; 33:59. The headscarf or veil Muslim women wear is often called a hijab. See Council on American-Islamic Relations, *An Employer's Guide to Islamic Religious Practices* (2005), https://www.cair.com/images/pdf/employers_guide.pdf. About 60 percent of Muslim women in this country report that they wear a hijab at least sometimes, including 36 percent who wear it whenever they are in public. See Pew Research Ctr., *Muslim Americans: No signs of growth in alienation or support for extremism*, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

Married Orthodox Jewish women also wear various types of head coverings in public as a symbol of modesty and as a visible token of their married status. See Aaron Moss, *Why Do Jewish Women Cover Their*

Hair, https://www.chabad.org/theJewishWoman/article_cdo/aid/336035/jewish/Why-Do-Jewish-Women-Cover-Their-Hair.htm.

Sikhs, both women and men, wear a comb in their hair called a *kanga*. See Kaur Foundation, *FAQS*, https://www.kaurfoundation.org/faqs.html. Wearing the *kanga* is one of five articles of faith Sikhs commit to obey after going through an initiation called the Amrit Ceremony, wherein they promise to live by the Sikh code of conduct. See *id.*; Santokh Singh, *Fundamentals of Sikhism* 67, 91 (1991). Wearing or abiding by these articles of faith is a fundamental tenet of the Sikh faith. See Kapur Singh, *Me Judice* 258–64 (2003). The *kanga* represents religious principles of order and discipline. Surinder Singh Johar, *Handbook on Sikhism* 94 (1977). It also signifies the obligation for Sikhs to remain engaged in improving society rather than withdrawing into the life of an ascetic. See generally Gobind Singh Mansukhani, *Sikh Rahit Maryada and Sikh Symbols, in Sikhism Its Philosophy and History* 312 (Daljeet Singh & Kharak Singh eds., 1997); Ganda Singh, *Gobind Singh, Guru*, *in 2 The Encyclopaedia of Sikhism* 88 (Harbans Singh ed., 1996).

2. *Men's head coverings*

Many Sikh men wear turbans. Covering one's hair with the turban represents religious values such as piety, courage, and dedication. See generally Gobind Singh Mansukhani, *Sikh Rahit Maryada and Sikh Symbols, in Sikhism Its Philosophy and History* at 312. "[T]urbans become a part of a Sikh's body and are usually removed only in the privacy of the house." The Sikh Coalition, *FAQ*, https:/www.sikhcoalition.org/about-sikhs/ faq/.

Other faiths require men to wear head coverings. Orthodox Jewish men wear a yarmulke or *kippah*. See R. Seigel, M. Strassfeld & S. Strassfeld, *The Jewish Catalogue* 49–50 (1973); see also *Talmud Kiddushin* 31(a) & 33(a); *Talmud Shabbat* 118(b), 156(b). By covering one's head, a "Jew symbolically expresses [submission to God] by keeping his head covered, and in this subordination to God he finds his own honor." S. R. Hirsch, *Hirsch Siddur* 14 (1969). Some Muslim men also wear a cap, called a *taqiyah*, to symbolize that "its wearer is in constant prayer," and its removal is forbidden. See *In re Palmer*, 386 A.2d 1112, 1113 (R.I. 1978).

3. Other dress and grooming standards

Some faiths require their adherents to dress according to traditional norms. Pentecostal Christian women do not wear pants, for instance. See, *e.g.*, *McCarter* v. *Harris Cty., Tex.*, No. CIV.A. H-04-4159, 2006 WL 1281087, at *1 (S.D. Tex. May 5, 2006) (entry-level maintenance worker "requested permission to wear a long, tapered skirt" at work because "[o]ne of the tenets of her new [Pentecostal] faith was that women could not wear men's clothing, including pants"); *Finnie* v. *Lee Cty., Miss.*, 907 F. Supp. 2d 750, 756–57 (N.D. Miss. 2012) (officer at juvenile detention center "requested an exemption from the uniform policy" because "wearing pants would violate her [Pentecostal] beliefs").

Also, Vaishnava Hindus, represented on this brief by the International Society for Krishna Consciousness, must wear sacred neck beads at all times. Devoted men must wear a tuft of hair on the back of their heads; faithful women often cover their heads and always prefer modest dress.

C. Religious symbols

Some Catholics and other Christian believers feel a duty or desire born of their faith to wear a cross or Crucifix at all times—including in the office. See, *e.g.*, *Daniels*, 246 F.3d at 500 (police officer fired for refusing to stop wearing a gold cross pin on his uniform). Some Jewish men follow the Biblical command to wear knotted strings, called *tzitzit*, hanging from the corners of a four-cornered garment, and, according to some, these strings must be visible to comply with the divine directive. See Deuteronomy 22:12, Numbers 15:38–40.

Sikhs who have completed the Amrit Ceremony and committed to live by the Sikh code of conduct must wear a dagger called a *kirpan* as one of the five articles of the Sikh faith. Santokh Singh, *Fundamentals of Sikhism* 91–97 (1991). While there is no prescribed length or shape as individuals choose a *kirpan* consistent with their own religious practice, the *kirpan* generally has a curved, blunted edge and obligates Sikhs to maintain their duty to promote justice and protect the weak. See L.M. Joshi, *Ahimsa*, *in 1 The Encyclopaedia of Sikhism* 19 (Harbans Singh ed., 1992).[3] Observant Sikhs also must wear a steel or iron band called a *karaa*, another element of the five articles of faith. See Singh, *Fundamentals of Sikhism* at 91–97. The *karaa* represents the unbreakable bond between Sikhs and their faith. See Johar, *Handbook on Sikhism* at 95.

[3] In reality, the dulled *kirpan* is no more dangerous than a common pencil, pen, or fingernail clipper.

D. Hair and beards

Some faiths require a man to wear a beard or refrain from cutting his hair. Many understand Islam to dictate that men should wear beards. See Muhammed al-Jibaly, *The Beard Between the Salaf & Kalaf*, ch. 1 (1999). For these believers, "[t]his is not a discretionary instruction; it is a commandment," and refusing to grow a beard when one is capable "is a major sin." *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J).

Orthodox and Hasidic Jews let their sideburns grow to a certain length, and some wear beards to follow the Biblical commandment found in Leviticus 19:27: "You shall not round off the edge of your scalp and you shall not destroy the edge of your beard."

The Sikh Code of Conduct commands adherents to keep all body hair "unshorn." Dawinder S. Sidhu & Neha Singh Gohil, *Civil Rights in Wartime: The Post-9/11 Sikh Experience* 1, 23, 43 (2009). For a Sikh man to cut his beard is a grave sin. See 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001). Likewise, Sikh men and women may not cut any other hair as part of the article of faith called *kesh*. See Patwant Singh, *The Sikhs* 56 (1999). Violating this article of faith is considered "direct apostasy." 2 *The Encyclopaedia of Sikhism*.

Hardison's shadow falls on all these groups. Conflicts arise when an orthodox Jew requests Saturdays off, see *Brener* v. *Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982); a Muslim woman wears a scarf with her employee uniform, see *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031; or a Sikh wears a *kirpan* to work, see *Tagore* v. *United States*, 735 F.3d 324

(5th Cir. 2013). Unless this Court intervenes, *Hardison* will continue to deny religious Americans from diverse religious communities their right to accommodation for trivial reasons. As Justice Marshall correctly forecast, *Hardison*'s standard "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Hardison*, 432 U.S. at 86 (Marshall, J., dissenting).

III. The Petition Presents an Excellent Vehicle to Revisit *Hardison*.

Earlier this year, the Court denied certiorari in *Patterson* v. *Walgreen Co.*—a closely watched case presenting the same question posed here. See 140 S. Ct. at 685. This despite the Solicitor General's support for review on the question of *Hardison*'s interpretation of 42 U.S.C. § 2000e(j). See U.S. Invitation Br. 19. Justice Alito authored an opinion concurring in that result, which Justices Thomas and Gorsuch joined. All of them conceded that *Patterson* "does not present a good vehicle for revisiting *Hardison*." *Id.* at 686. Probably, concerns arose from the fact that the court of appeals rested its decision on alternative grounds. See Pet. 15. But the concurrence stressed that the Court "should grant review in an appropriate case to consider whether *Hardison*'s interpretation should be overruled." 140 S. Ct. at 686.

This case presents the vehicle the Court has been waiting for.

First, the petition presents a single question of law—the meaning of "undue hardship" under 2000e(j)—an issue that both lower courts squarely addressed. See App. 6a–7a (summarily affirming the

district court on the basis that it properly applied *Hardison*); *id.* at 19a, 27a (applying *Hardison* to conclude that accommodating Dalberiste would impose an unjust hardship on GLE). Unlike the court in *Patterson*, the Eleventh Circuit here did not articulate any other ground of decision. See *id.* at 7a.

Second, the petition presents a legal question of national significance—not a fact-bound determination. Granting review and vacating the decision below would give Dalberiste a clear opportunity to seek relief under a more robust standard of undue hardship. His claim has broad implications since it falls in "the largest class of cases"—those arising from conflicts over "work schedules." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Overturning *Hardison* would end a decades-old regime of forcing religious employees to choose between their faith and their livelihood. It follows that the petition steers well clear of Rule 10's injunction against seeking review based on "erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Third, this case comes to the Court free of material factual disputes. It is uncontested that Dalberiste was qualified for his position as an industrial hygiene technician. It is uncontested that he holds a sincere belief in observing sundown Friday to sundown Saturday as his Sabbath and that he cannot, in good conscience, do any paid work during that period. It is likewise uncontested that Dalberiste asked GLE to accommodate his religious practice by excusing him from work on his Sabbath. And it is uncontested that GLE refused even

to consider Dalberiste's request, discharging him instead.[4] The record leaves no doubt, therefore, that Dalberiste produced a prima facie case of religious discrimination under 2000e(j). See App. 18a.

Other factual disputes are beside the point. It does not matter whether Dalberiste disclosed his religious objection to working on Saturdays before he accepted a position with GLE. Nor does it matter whether some or all of Dalberiste's suggested accommodations would satisfy a different standard than *Hardison*. Even if these disputes were relevant, the record must be construed in Dalberiste's favor since he appeals from a summary judgment against him. See *Tolan* v. *Cotton*, 572 U.S. 650, 657 (2014). But these disputes are so many red herrings. What genuinely matters is that Dalberiste has satisfied every element under Title VII for a claim of religious discrimination, see Pet. 18a, and that his ability to obtain relief depends on this Court's answer to the question presented.

Few Title VII cases offer such a "straightforward" vehicle for this Court's review. Pet. 36. Granting review here offers a procedurally and factually clean opportunity to revisit *Hardison*'s interpretation of Title VII and, we hope, to restore the civil rights for religious employees that Congress enacted.

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[4] Dalberiste properly brought separate claims for religious discrimination and retaliation based on GLE's denial of an accommodation and its rescission of Dalberiste's job offer. See Pet. 15a (describing petitioner's claims of religious discrimination and unlawful retaliation).

CONCLUSION

The petition should be granted.

Respectfully submitted,

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
EMILY R. HAWS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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