No. 19-1461

IN THE

Supreme Court of the United States

MITCHE 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 OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM, INC. IN SUPPORT OF PETITIONER MITCHE DALBERISTE'S PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* FOUNDERS' FIRST FREEDOM, INC.[1]

Founders' First Freedom, Inc. ("Founders' First Freedom") is a 501(c)(3) nonprofit organization incorporated in 2005 that upholds liberty of conscience and to pursue a cooperative approach to resolving disputes between parties in cases affecting religious freedom.

Founders' First Freedom is the successor organization to the Council on Religious Freedom, a non-partisan, nonprofit national advocacy group formed in 1986 that appeared often in court on issues involving the Free Exercise and Establishment Clauses and associated legislation.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 requires employers to "reasonably accommodate" an employee's religious observance or practice unless the accommodation imposes an "undue hardship" on the employer. 42 U.S.C. § 2000e(j) incorporated into the Civil Rights of 1964 in 1972.

In the words of the statute, "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates

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[1] Pursuant to Supreme Court Rule 37, all parties received notice of *amicus curiae* Founders' First Freedom's intent to file this brief 10 days before its due date. All parties to this matter have granted blanket consent to the filing of *amicus curiae* briefs. *Amicus* Founders' First Freedom certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund preparing or submitting this brief. No person or entity, other than its *amicus*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business." *Id.* (emphasis added).

Although Congress intended to bolster the rights of employees to religious accommodation, the words "undue hardship" were so diminished in the dicta of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) as to render the protection useless in several circuits. The *Hardison* Court wrote that Title VII does not require any kind of accommodation of an employee's religious practice if doing so would impose more than a *de minimis* burden. Congress did not intend that religious accommodation be turned into a mere intellectual exercise.

Dalberiste is an ideal vehicle for the Court to consider this issue. It is a straight-forward, focused case in which Mr. Dalberiste was offered a job. When he asked for a religious accommodation, the employer admittedly did not consider any accommodation and simply withdrew the job offer. Mr. Dalberiste's filed a lawsuit that the trial judge dismissed on summary judgment. The Eleventh Circuit upheld the dismissal, relying on this Court's "di minimis" dicta in *Hardison*, a case involving the impact of union seniority on accommodation in which the definition of "undue hardship" was neither briefed nor argued.

We request that this Court reconsider the meaning of the term "undue hardship" in Title VII, and bring its jurisprudence into line with the clear meaning of the language of the statute.

ARGUMENT

Dalberiste v. GLE Associates, Inc. is the latest in a string of cases which have presented inconsistent and incompatible interpretations of an employer's responsibility to reasonably accommodate religious practices under § 2000e(j) of the Civil Rights Act of 1964. We are writing in support of the *Dalberiste*'s petition for certiorari so that the Supreme Court can provide needed clarity on this subject.

I. Inconsistent Interpretations of the Religious Accommodation Requirement of Title VII Between Congress, the EEOC, and the Circuits Have Led to an Imbalanced Application of the Statute

When Congress passed the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, sex, religion, or national origin, Congress did not include specific language requiring *accommodation* of religious beliefs and practices.

After some employers concluded that providing religious accommodation for people of faith amounted to "discrimination" against non-religious employees the EEOC published guidelines in 1966. The guidelines stated that while employers could establish a "normal work week" they should also try to accommodate reasonable religious needs "where such accommodation can be made without serious inconvenience to the conduct of the business." The next year, the EEOC changed the term "serious inconvenience" to "undue hardship" which, "may exist where the employee's required work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath keeper." 29 C.F.R. § 1605.1 (1968) codifying the 1967 Guidelines.

The courts disregarded the EEOC 1967 guidelines. For instance in *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd mem. by an equally divided court*, 402 U.S. 689 (1971)(per curiam), the Supreme Court affirmed a Sixth Circuit decision that failure to accommodate an employee's religious observance did not count as religious discrimination and even questioned whether the EEOC could issue such guidelines. *Id.* at 331 n.1.

In 1972, the Fifth Circuit reasoned that religious accommodation is an impossibility, and applied this rationale against a Seventh-day Adventist who had been terminated for insubordination when he refused to work on his Sabbath. See *Riley v. Bendix Corp.* 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972). The *Riley* court wrote, "If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment." *Id.* at 590.

Because the courts were acting contrary to the 1967 EEOC Guidelines, Congress amended the Civil Rights Act of 1964 in 1972 to incorporate an affirmative duty of religious accommodation. Under § 2000e(j), originally designated § 701(j) of the Civil Rights Act of 1964, Congress added language stating, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

In 1972, when he introduced the legislation, Senator Jennings Randolf explained its purpose, "Unfortunately, the courts have, in a sense, come down on both sides

of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question. This amendment is intended, in good purpose, to resolve by legislation – and in a way I think was originally intended by the Civil Rights Act – that which the courts have apparently not resolved." 118 Cong. Rec. 705-06 (1972).

In 1977, the case of *TWA v. Hardison*, 432 U.S. 63 (1977) reached the United States Supreme Court. It involved a member of the Worldwide Church of God who was terminated for insubordination after he refused to violate his religious beliefs and work on the Sabbath. Although the employer had been willing for him to swap shifts, the labor union did not approve the accommodation because it would ostensibly violate a seniority provision of the collective bargaining agreement.

The Supreme Court held against Mr. Hardison, stating that without clear Congressional intent, "we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances," *id.* at 79.

Then the *Hardison* Court addressed the meaning of the term "undue hardship" under Title VII. The Court ruled that if the employer needed to bear any inconvenience greater than a *de minimis* cost, it would constitute an undue hardship, *id.* at 84.

After this sweeping 7-2 decision, many employers believed they no longer had any affirmative duty to accommodate religious beliefs under §2000e(j), a situation that the EEOC addressed in a series of meetings held across the United States in 1978.

Hearings before the United States Equal Employment Opportunity Commission (EEOC) on Religious Accommodation: Hearings Held in New York, NY, Los Angeles, CA, and Milwaukee, WI, April-May 1978. Washington, D.C.: United States Equal Employment Opportunity Commission, 1978.

The narrowing of accommodation requirements under § 2000e(j) in *Hardison* was reflected in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) in which the Court ruled that a collective bargaining agreement that provided three religious holidays and three personal holidays, but prohibited a high school teacher from using personal holidays for religious purposes and instead required him to use unpaid days off was a "reasonable accommodation." The Court did provide a basis for an interactive process for determining whether an accommodation that resolves the conflict between religious and job requirements is possible.

But as evidenced in *Dalberiste*, many employers still fail to engage in any kind of interactive process to attempt to resolve the conflicts, and simply dismiss an employee or potential employee based on a perceived inability to accommodate.

The Court has the opportunity in *Dalberiste* to restore the pre-*Hardison* balance to religious accommodation efforts.

II. The Court Needs to Clarify the Meaning of "Undue Hardship" in the Context of Religious Accommodation

Dalberiste presents the ideal vehicle for this Court to provide clarity as to what "reasonable accommodation" and "undue hardship" mean under § 2000e(j).

When Congress did define "undue hardship", it was in the context of the Americans With Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 1201 *et seq.*) which requires employers to make "reasonable accommodations" for disabled employees. In that context, the Court recognized that the term accommodation "conveys the need for effectiveness." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002).

So while the term "undue hardship" appears within the statute, the term *"de minimis"* on which over 40 years of litigation has turned, emerged from a proposition raised in the Court's dicta in *Hardison*. See 432 U.S. 63, 84. This Court has a chance to revisit this definition and bring it into compliance with the Court's terms.

In *Cooper v. Oak Rubber Co.* 15 F.3d 1375 (6th Cir. 1994), Sixth Circuit held that two accommodations offered by the employer did not meet the "reasonable accommodation" standard because it did not eliminate the conflict, even though the plaintiff's case failed because the accommodation would have still posed an "undue hardship" on the employer.

In *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996), a Seventh-day Adventist employee offered to take alternative shifts, and even move with his family to another town to be accommodated. In that case, the Ninth Circuit ruled that if the employer could not eliminate the conflict through accommodation, it could only prevail if it demonstrated undue hardship.

The Seventh Circuit found that a proposed accommodation that would have provided a Jewish employee with a day off other than Yom Kippur was not a reasonable accommodation because "it does not

eliminate the conflict between the employment requirement and the religious practice." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997).

The Second Circuit similarly found that an employer did not reasonably accommodate a religious employee's Sunday rest requirement when it offered him a transfer to a different position, with fewer benefits and possibly lower pay, and when it offered him a Sunday shift that did not interfere with his Sunday worship services. *Baker v. Home Depot*, 445 F.3d 541 (2d Cir. 2006).

Unlike the result in the Eleventh Circuit in which his case was dismissed on summary judgment, Mr. Dalberiste's case would have likely survived summary judgment and gone to a jury for a determination of the reasonableness of religious accommodation if heard in the Eighth, Tenth, or Fourth Circuits. See *Sturgill v. UPS*, 512 F.3d 1024 (8th Cir. 2008), *Opuku-Boateng v. California*, 95 F.3d 1461, 1465 (9th Cir. 1996), *Tabura v. Kellogg*, 880 F.3d 544 (10th Cir. 2018), and *Benton v. Carded Graphics, Inc.*, No. 93-1675, 1994 WL 249221 (4th Cir. June 9, 1994)(Unpublished Decision).

In *Sturgill*, a Seventh-day Adventist employee was terminated for failing to complete a single shift, and the Eighth Circuit upheld the jury finding that Sturgill was not reasonably accommodated when his employer terminated him.

In *Opuku-Boateng*, a Seventh-day Adventist's request for religious accommodation was denied even though he relocated his family, and offered to take undesirable shifts, swap shifts, or work at a different location. 95 F.3d 1461, 1465 (9th Cir. 1996). The Ninth Circuit held that only if proposed accommodations "do not produce a proposal by the employer that would

eliminate the religious conflict" the employer can only prevail if it shows undue hardship. *Id.* at 1467.

In *Tabura*, the Tenth Circuit similarly rejected an employer's attempt at summary judgment, ruling that "whether an accommodation is reasonable in a given circumstance is ordinarily a question of fact to be decided by a fact finder." *Tabura*, *id.* at 555, n.1.

Had Mr. Dalberiste's case been heard in the Fourth, Eighth, Ninth, or Tenth Circuits, and the case passed the "reasonable accommodation" threshold to address "undue hardship," the result would have likely been very different as these circuits have held that speculative hardship differs from actual hardship. These circuits have held that an employer may not rely on "speculation," or "conceivable" or "hypothetical" hardships. See *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989).

In *Benton v. Carded Graphics, Inc.*, No. 93-1675, 1994 WL 249221 (4th Cir. June 9, 1994)(Unpublished Decision), the Fourth Circuit ruled that the law required an employer to respond to a request for reasonable accommodation by making "a thorough exploration of all the alternatives that would meet the employee's religious needs, and [a] fact-based determination of whether any of those programs could be implemented without a predictably certain undue hardship." The *Benton* decision explained the employer's burden and also held that the Fourth Circuit required an accommodation to eliminate the conflict by mandating that the employer consider measures which "meet the employee's religious needs."

That litigants in different Federal Circuits cannot know whether the facts of a case will take them to a jury or a dismissal through summary judgment has

created an unclear and confusing environment which leads to increased litigation. It is thus, appropriate for the Supreme Court to resolve the circuit split and clarify the meaning of an "undue hardship".

CONCLUSION

Justice Alito in *Patterson v. Walgreen*, 140 S. Ct. 685, 686, stated a ". . . review of the *Hardison* issue [undue hardship] should be undertaken when a petition in an appropriate case comes before us." *Dalberiste* is such a case. It provides an excellent vehicle for this Court to provide much needed clarity for the meaning of "undue hardship" in the context of religious accommodation.

We join in Petitioner's request that the Court agree to hear this matter.

Respectfully submitted,

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