No. 18-349

IN THE
Supreme Court of the United States

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

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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The government recommends *denying* certiorari on the first question presented, which seeks review of the Eleventh Circuit's holding that Walgreens offered a religious accommodation. But it recommends *granting* certiorari on the third question presented and overruling the undue-hardship standard of *TWA v. Hardison*, 432 U.S. 63 (1977). Both parties agree that the government's suggestion is legally impossible. The parties agree that the Eleventh Circuit issued two holdings that were independently sufficient to support the judgment: first, that Walgreens' accommodation was reasonable, and second, that Patterson's proposed alternative would pose an undue hardship. The parties agree that Patterson could not obtain relief unless the Court reversed both rulings. Thus, as the parties agree, the Court could not grant certiorari on whether to overrule *Hardison* unless it also granted certiorari on the reasonable-accommodation question. The Court should reject the government's suggestion of issuing an opinion that both parties agree would be purely advisory.

Even setting aside this threshold issue, this case is a profoundly unsuitable vehicle to reconsider *Hardison*. If the Court is inclined to reconsider that 42-year-old statutory-interpretation precedent, it should await a case cleanly presenting the issue. In any event, *Hardison* should not be overruled.

I. The Parties Agree That the Government's Suggestion Is Legally Impossible.

The Eleventh Circuit held that Patterson's Title VII claim failed for two reasons. First, "Walgreens reasonably accommodated Patterson's religious

practice." Pet. App. 11a. Second, "even assuming the accommodations offered by Walgreens were not reasonable," Patterson's proposed accommodation "would have posed an undue hardship." Pet. App. 11a-12a.

At the certiorari stage, the parties agreed that the Court would have to reverse *both* those holdings to afford Patterson relief; the Court could *not* grant review only on the *Hardison* question while denying review on the reasonable-accommodation question. Walgreens argued that this case would be a poor vehicle to reconsider *Hardison* because, among other points:

> [T]he Eleventh Circuit also held, as an independent basis for affirming the grant of summary judgment, that Walgreens offered a reasonable accommodation. Patterson could not obtain relief unless that ruling was also reversed. Thus, if the Court were to use this case as a vehicle to reconsider *Hardison*, it would also have to separately grant certiorari on Patterson's first question presented, which challenges the reasonable accommodation ruling.

BIO 31. Patterson responded:

> Walgreens does no better in denying (at 31-33) that this case is an excellent vehicle. To be sure, reversal on Question 1 *and* either Question 2 or Question 3 is required for Patterson to receive relief. However, as the petition explains (at 35)—and Walgreens ignores—this is a "plus," as it allows the Court to consider both

> accommodation and hardship in the same case, thus examining "the broader context of the statute as a whole." See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Moreover, this Court regularly grants certiorari on multiple questions where the petitioner needs to prevail on at least two in order to obtain relief.

Reply Br. 12 (italics in original).

The parties therefore agree that the government's suggestion of granting certiorari on only the third question presented is not available to the Court.

Although the government's brief is unclear on why it disagrees with the parties' view, it appears to theorize that the Eleventh Circuit's reasonable-accommodation holding depended on its undue-hardship holding, such that a reversal on the undue-hardship standard would also cast doubt on the reasonable-accommodation holding. *E.g.*, U.S. Br. 13. If this is the government's theory, it is both inconsistent with the Eleventh Circuit's opinion and reflects a theory that Patterson has waived.

First, the Eleventh Circuit made clear that its reasonable-accommodation holding did *not* depend on its undue-hardship holding:

> Because Walgreens reasonably accommodated Patterson's religious practice, we need not consider the issue of undue hardship. *Philbrook*, 479 U.S. at 68–69, 107 S. Ct. at 372 ("[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not

> further show that each of the employee's alternative accommodations would result in undue hardship … [T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.") … But even assuming the accommodations offered by Walgreens were not reasonable, allowing him to retain his training instructor position with a guarantee that he would never have to work on Friday nights or Saturdays, which is what he insisted on, would have posed an undue hardship for Walgreens' business operations.

Pet. App. 11a-12a (citations omitted). Thus, the Eleventh Circuit's holding that Walgreens had reasonably accommodated Patterson was *not* premised on its view that Patterson's alternative would have posed an undue hardship. Rather, the court concluded that Walgreens' accommodations were reasonable, full stop. Unless that holding is also reversed, Patterson cannot obtain relief.

The government further contends that the two questions are interlinked because a partial accommodation cannot be reasonable *unless* a complete accommodation would pose an undue hardship. U.S. Br. 11. But whether or not that position is correct, it is irrelevant to this case. This is because the Eleventh Circuit held that Walgreens' accommodation was reasonable because it may well have *completely* accommodated Patterson's religious beliefs, but Patterson simply "failed to take advantage" of it. Pet.

App. 8a. Specifically, "Walgreens allowed Patterson to find other employees to cover his shifts." Pet. App. 9a. But "[a]lthough Patterson thought that several other employees could have covered the training session for him, he did not attempt to contact any of them." *Id.* Thus, regardless of whether Patterson's proposed alternative would have posed an undue hardship, Walgreens' accommodation was reasonable: "Walgreens met its obligations under Title VII by allowing Patterson to arrange a schedule swap with other employees when they were willing to do so." *Id.*[1] In other words, Patterson has not shown that the schedule-swap accommodation was an incomplete accommodation because he did not even try to swap schedules with other employees. This holding is completely distinct from the independent holding that Patterson's proposed alternative would have posed an undue hardship. Pet. App. 11a.

Moreover, Patterson has waived any argument that the reasonable-accommodation question and the undue-hardship question collapse into the same inquiry, as the government now apparently contends. As noted above, he made the exact opposite argument in this Court. Similarly, in the Eleventh Circuit, he took the explicit position that the two inquiries are *distinct*, and that the district court *erred* by conflating the two. Pet. App. 12a

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[1] Likewise, the court concluded that Walgreens' offer of "a different position within the company" was a reasonable accommodation: "Patterson did not want to pursue that option," but "he had a duty to make a good faith attempt to accommodate his religious needs through the means offered by Walgreens." Pet. App. 9a-10a.

n.3 (noting "Patterson's claim that the district court conflated the reasonable accommodation standard and the undue hardship standard."). The Eleventh Circuit rejected this argument, *not* on the ground that the two inquiries could be conflated, but on the ground that the district court correctly issued two alternative holdings: "The district court's summary judgment order concluded that Walgreens' efforts to accommodate Patterson's Sabbath observance satisfied its duty to make reasonable accommodations *and*, *alternatively*, *that*" Patterson's proposed accommodation "would be an undue hardship." *Id.* (emphasis added).

Thus, there is no principled way to adopt the government's suggestion of granting certiorari on only the third question presented. Overruling *Hardison* would be a pure advisory opinion in light of the Eleventh Circuit's independent reasonable-accommodation holding.

The Court should not cure the defect in the government's proposal by also granting certiorari on Patterson's first question presented, which challenges the reasonable-accommodation holding. For three reasons, that question does not merit review.

First, the question Patterson raises—whether an incomplete accommodation can be "reasonable"—is not actually presented in this case. As noted above, the Eleventh Circuit held that Patterson did not, in fact, show that the accommodation was incomplete because he did not even try to contact his co-workers.

Second, even if this case did present that question, there is no circuit conflict—as the government

correctly recognizes. U.S. Br. 14-15.

Third, this is a poor vehicle because the parties' dispute boils down to a disagreement over the Eleventh Circuit's interpretation of the summary judgment record. Patterson argued in his petition that he was *not* offered the chance to switch with multiple co-workers. Instead, he argued that it would have been "extremely difficult to arrange a swap with someone else," and when the one co-worker contacted by Patterson stated she could not swap shifts, Patterson was "[l]eft without options." Pet. 8. But the Eleventh Circuit held that this argument conflicted with the deposition record. Pet. App. 4a n.1. Likewise, Patterson argued in the petition that Walgreens' proposed transfer would have been to a "lower-paying" position, Pet. 10, but the Eleventh Circuit found that "he has not presented any evidence to support that assertion." Pet. App. 10a. Granting certiorari on the Eleventh Circuit's reasonable-accommodation holding would require delving into those fact-bound disputes.

II. This Case Would Be a Poor Vehicle to Reconsider *Hardison*.

If the Court is inclined to reconsider *Hardison*, it is difficult to imagine a less suitable vehicle than this case.

One vehicle problem is the Eleventh Circuit's independent reasonable-accommodation holding. Walgreens would have the absolute right to argue for affirmance of the Eleventh Circuit's decision on this basis. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("Without cross-petitioning for certiorari, a prevailing party may, of course, defend its judgment on

any ground properly raised below" (quotation marks omitted)). The Court cannot avoid this issue merely by deciding the *Hardison* question and then, if *Hardison* is overruled, remanding for further consideration. The Court could not vacate the Eleventh Circuit's decision unless it found that *Hardison* may have influenced the reasonable-accommodation holding—which, as explained above, it did not.

Another vehicle problem is the idiosyncratic nature of the factual record. The government asks this Court to replace *Hardison*'s standard with a different standard which would "weigh the cost of a given accommodation against what the particular employer may properly be made to bear," based on a nebulous test. U.S. Br. 20. But the government urges the Court to deny certiorari on the second question presented, which seeks review of the application of the undue-hardship standard to this case. U.S. Br. 17-19. The government evidently wants the Court to announce that *Hardison*'s standard is replaced with a vague new heightened standard, and leave lower courts to work out the details.

If the Court accepts this invitation, two things would happen. First, the law would be dramatically unsettled. *All* appellate decisions on the undue-hardship standard from the last 42 years would be rendered meaningless, because plaintiffs would argue that those decisions were based on *Hardison*'s erroneous standard. And *all* appellate decisions on the reasonable-accommodation standard from the last 42 years would also be rendered meaningless, because the Court would have to hold that *Hardison* also influences

the reasonable-accommodation standard in order to reverse the Eleventh Circuit. There would be literally *no* extant case law to guide employers seeking to follow the law.

Second, no one would know how the new standard works. To take one question that would be left open: would the result in *Hardison* itself be overturned? In *Hardison*, the employee's proposed accommodations would have either "require[d] TWA to finance an additional Saturday off," or would have yielded "abandonment of the seniority system," and were therefore deemed undue hardships. 432 U.S. at 84. Would that still be true? No one would know.

If the Court is going to unsettle the law, it should do so in the context of a frequently-arising fact pattern so that it could provide guidance to lower courts. For instance, the Court could apply the new standard in a case in which the employee's proposed accommodation required an expenditure of funds by the employer. Those were the facts of *Hardison*: the employee sought an accommodation under which the employer would have to pay premium wages to other employees in order to give the religious employee Saturdays off, and the Court concluded that "[t]o require [the employer] to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84. Applying a new rule to a similar fact pattern would give courts and employers guidance as to what the Court's new rule means.

In this case, however, the fact pattern is not only idiosyncratic, but Patterson disagrees with the Eleventh Circuit as to what the facts even *are*. The

Eleventh Circuit concluded that accommodating Patterson on the Saturday at issue would have imposed an undue hardship on Walgreens because Walgreens faced "a true emergency." Pet. App. 12a. It further held that guaranteeing Patterson Saturdays off going forward would have imposed an undue hardship because Walgreens faced a risk of future, similar emergencies. Pet. App. 13a. As the government accurately recognizes, the Eleventh Circuit properly "relied on findings about whether Walgreens foreseeably could face a factual scenario similar to the one that gave rise to this case." U.S. Br. 19.

Patterson does not dispute that it would be an "undue hardship" to force a company to face a significant risk of emergencies arising without work coverage. Rather, he argues, as a factual matter, that Walgreens was not harmed by his absence from work, and that the Eleventh Circuit's assessment of the factual record was overly "speculative." Pet. 23. The Court should not grant certiorari to decide whether Patterson's interpretation of the summary judgment record is correct. Such a fact-bound analysis would provide no guidance for future litigants.

If the government wants *Hardison* to be overruled, the EEOC is free to bring a case making that argument and litigate it up to this Court. There is no need to consider that question in the context of such a poor vehicle, where the government files a late-breaking amicus brief directly contradicting the uniform positions of both parties throughout the litigation.

III. *Hardison* Should Not Be Overruled.

The Court should not overrule *Hardison*. It is correct, and even if it is wrong, *stare decisis* requires adhering to it.

Hardison is correct. In *Hardison*, this Court held that requiring an employer to bear "more than a *de minimis* cost" is an undue hardship. 432 U.S. at 84. Thus, employers are required to accommodate their employees' religious practices by making exceptions to generally applicable rules, such as scheduling policies and dress codes. But they need not incur more than *de minimis* out-of-pocket costs, such as the cost of hiring new employees, in order to facilitate their employees' religious practices. That holding is consistent with Title VII's historic purpose of requiring employers to give religious employees fair access to the workplace—not to finance religious practice.

The government argues that the phrase "undue hardship" requires an assessment of whether the hardship exceeds what is "appropriate or normal." U.S. Br. 19-20. But the government simply presumes the conclusion that it is "appropriate or normal" to require employers to make out-of-pocket expenditures to facilitate religious exercise. Contrary to the government's contention (U.S. Br. 20-21), Title VII is not analogous to the ADA, under which employers are expected to incur out-of-pocket costs for wheelchair ramps and the like. As the government acknowledges (*id.*), the ADA contains explicit language contemplating such expenditures; Title VII does not. And it is far from clear whether disability is an apt analogy to religion.

Even if *Hardison* is wrong, it should not be overruled. The arguments for *stare decisis* in this case are at their zenith. Employers have relied on *Hardison*'s settled standard for 42 years, and should not face retroactive liability for conduct that was legal when it occurred. Moreover, bills to overturn *Hardison prospectively* have repeatedly failed; the Court should not go beyond what those bills have sought and overturn *Hardison retroactively*. BIO 28-29 & n.3.

The government's arguments against *stare decisis* are not persuasive. The government suggests that *stare decisis* should not apply to Title VII because it is a "civil-rights" statute. U.S. Br. 21. But as this Court has already held in the specific context of Title VII, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Employers have the right to rely on this Court's settled case law in all areas, including employment discrimination law. It would be grossly unfair to subject Walgreens to monetary damages, and cast Walgreens as a civil rights violator, when Walgreens' action was completely legal at the time it occurred.

The government contends that this case does not involve "property." U.S. Br. 22. This is simply wrong; Patterson seeks to impose retroactive money liability on Walgreens. Thus, contrary to the government's claim, this case is fundamentally different from *Monell v. Department of Social Services*, 436 U.S. 658 (1978),

where the Court held that "municipalities can assert no reliance claim" because its decision did not change any substantive law but instead lifted a rule of absolute immunity. *Id.* at 699-700.

The government errs in suggesting (U.S. Br. 22) that *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), "eroded" *Hardison*'s "doctrinal underpinnings." *Abercrombie* recited the unremarkable proposition that Title VII requires employers to affirmatively accommodate religious practices. *Id.* at 2034. It therefore held that Abercrombie & Fitch's generally-applicable dress code did not justify refusing to hire a Muslim job applicant who wore a headscarf for religious purposes. *Id.* at 2031, 2034. That is perfectly consistent with *Hardison*'s holding that more than *de minimis* out-of-pocket costs constitute an undue hardship.

Any change to Title VII should be prospective and should come from Congress. The Court should not overrule *Hardison*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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