No. 18- _____

In the Supreme Court of the United States

DARRELL PATTERSON, PETITIONER,

v.

WALGREEN CO.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII prohibits an employer from firing an employee for engaging in a religious practice—here, abstaining from work on his Sabbath—"unless [the] employer demonstrates that he is unable to reasonably accommodate to" the employee's "religious … practice without undue hardship …." 42 U.S.C. 2000e(j). This Court has not addressed the proper interpretation of the "reasonable accommodation" part of this test since *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986), or the "undue hardship" defense since *TWA* v. *Hardison*, 432 U.S. 63 (1977). The federal circuits are now split over what constitutes a "reasonable" accommodation and the evidence required to establish an "undue burden" under these decisions. The questions presented are:

1. Is an accommodation that merely lessens or has the *potential* to eliminate the conflict between work and religious practice "reasonable" per se, as the First, Fourth, and Eleventh Circuits hold, does it instead create a jury question, as the Eighth and Tenth Circuits hold, or must an accommodation fully eliminate the conflict in order to be "reasonable," as the Second, Sixth, Seventh, and Ninth Circuits hold?

2. Is speculation about possible future burdens sufficient to meet the employer's burden in establishing "undue hardship," as the Fifth, Sixth and Eleventh Circuits hold, or must the employer demonstrate an actual burden, as the Fourth, Eighth, Ninth, and Tenth Circuits hold?

3. Should the portion of *Hardison* opining that "undue hardship" simply means something more than a "*de minimis* cost" be disavowed or overruled?

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INTRODUCTION

Since its enactment in 1972, Title VII's religious accommodation protection has suffered from repeated judicial efforts to narrow its reach to something less than its text provides. This Court addressed one such effort in *EEOC* v. *Abercrombie & Fitch Stores,* 135 S.Ct. 2028 (2015)—Justice Scalia's last major religious-liberty opinion—which rebuffed an attempt by some circuits to narrow the reach of that provision through (as the Court held) an unduly stringent standard of causation. But that standard is only one of several judge-made barriers that have departed from Title VII's text—and in some cases from this Court's precedents—and have thus prevented the accommodation provision from reaching its intended potential in protecting the religious liberty of working Americans.

This case involves two such doctrinal barriers, each based on a misinterpretation of this Court's precedent, that have been adopted by some federal circuits but rejected by others. The first doctrine—squarely adopted in published decisions of the Eleventh Circuit and two other circuits—is that an employer's effort to "accommodate" an employee's religious practice is *per se* "reasonable" under Title VII if it merely lessens or has the potential to eliminate a work-religion conflict, without eliminating it. As other circuits have explained, this doctrine expands the "reasonableness" defense available to employers under this Court's 1986 decision in *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986), well beyond Title VII's text, thus eroding the protections for religious workers that the statute demands.

The second doctrine is the idea—also squarely adopted in published decisions of the Fifth and Sixth Circuits and the decision below—that an employer can

satisfy its statutory "undue hardship" defense, as a matter of law, by speculating about hardships that *might* occur if an accommodation were granted. This doctrine rests on a misinterpretation of *TWA* v. *Hardison*, 432 U.S. 63 (1977). Although that decision said that "undue hardship" simply means something more than a "de minimis cost," *id.* at 84, it did not state or suggest that this minimal standard can be satisfied by speculation about future costs.

Both doctrines are ripe for this Court's review: Most circuits have now addressed each doctrine—with the Eleventh Circuit in the minority on both. And the EEOC—the federal agency charged with enforcing Title VII—has squarely adopted and pressed the opposite position on both issues.

Hardison's "de minimis" standard—which has been interpreted as binding by all the lower courts—is also ripe for reconsideration. As Justice Thomas pointed out in his separate opinion in *Abercrombie, Hardison*'s discussion of "undue hardship" was dicta because the Court was construing the then-existing but since-revised EEOC guideline, not the statutory language. In any event, the majority's reasoning in that case falls far short of the Court's current standards of statutory interpretation. And if that reasoning is binding precedent, it can and should be overruled, consistent with sound principles of *stare decisis.*

OPINIONS BELOW

The Eleventh Circuit's decision is printed at 727 Fed. Appx. 581 and reprinted at 1a. The order denying rehearing *en banc* is reprinted at 18a. The district court's opinion granting summary judgment is reprinted at 19a.

JURISDICTION

The Eleventh Circuit issued its opinion on March 9, 2018. Rehearing *en banc* was denied on April 26, 2018, making this petition due on July 25, 2018. Justice Thomas granted two extensions, one to August 24, and the second to September 14, 2018. This Court has jurisdiction under 28 U.S.C.1254(1).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. 2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual … because of such individual's … religion.

42 U.S.C. 2000e(j) adds a definition of "religion":

> The 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 to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT

A. Legal Framework

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer ... to discharge any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Under the statute, subject to an "undue hardship" defense, an employer must "reasonably accommodate to" "*all* aspects" of an "employee's … religious observance or practice." 42 U.S.C. 2000e(j) (emphasis added). Otherwise, an employer's decision to discharge an employee for adhering to his or her religious practice constitutes a "discharge … *because of* such individual's … religion," and so violates the statute. *Abercrombie*, 135 S.Ct. at 2032.

As noted in *Abercrombie,* Title VII's religious-accommodation provision was enacted by Congress in 1972 in response to judicial decisions narrowing the 1964 Act's general prohibition on religious discrimination.[1] Those decisions held that Title VII's original prohibition on religion-based discrimination protected only religious *belief*, not religiously motivated conduct.[2] Those decisions thus suggested that Title VII's protection against religious discrimination in the private workplace was narrower than that provided to government workers by the First Amendment, which

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[1] See 118 Cong. Rec. 705–731 (1972); see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362–363, 368 (1997).

[2] *E.g., Riley* v. *Bendix Corp.,* 330 F. Supp. 583 (M.D. Fla. 1971); *Dewey* v. *Reynolds Metal Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd,* 402 U.S. 689 (1971).

had long been held to protect not just belief, but speech and, by extension, religiously motivated conduct. See, *e.g., Pickering* v. *Bd. of Ed. of Twp. High Sch.*, 391 U.S. 563 (1968); (protecting political speech by government employees); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (protecting religiously motivated conduct generally).

According to the chief Senate sponsor of the 1972 amendment, Jennings Randolph, the new accommodation provision was designed to make clear that Title VII's prohibition on religious discrimination "protect[s] the same rights in *private* employment as the Constitution protects in Federal, State, or local governments." 118 Cong. Rec. at 705. The new accommodation provision thus clarified that Title VII's prohibition on religious discrimination would require accommodation not only to religious belief, but also to religiously motivated conduct—such as declining to work on Sabbath.

Abercrombie relied on that history in holding that Title VII's accommodation provision requires more than mere neutrality toward religiously motivated conduct. The Court concluded that Title VII gives religious objectors "favored treatment," and that employers have an affirmative duty to try to resolve conflicts between an employer's standards and a worker's religious practices. *Abercrombie*, 135 S. Ct. at 2034. The *Abercrombie* Court's "favored treatment" holding, moreover, buttressed the suggestion in *Ansonia*, that an employer provides a "reasonable accommodation" as a matter of law *only* when it "*eliminate[s]* the conflict" between a work requirement or policy and an employee's religious practice. *Id.* at 70 (emphasis added).

B. Factual Background

The heart of this dispute is that Walgreens did not attempt to eliminate the conflict or even find a reasonable compromise when Darrell Patterson requested an ongoing accommodation for his religious practice.

1. Patterson's initial position was a low-level job that paid less than $20,000 per year—a Customer Care Representative (CCR)—in Orlando, Florida. Doc.60:13 (Patterson).[3] He received several promotions, ultimately becoming a trainer. Doc.60:23 (Patterson). Among those he trained were those who now had his original job—CCRs. Doc.60:23 (Patterson). His final annual salary was approximately $52,500. Doc.69-14:1.

As a Seventh-day Adventist, Patterson avoids work from sundown Friday to sundown Saturday, in observance of the biblical command to "Remember the Sabbath Day, to keep it Holy." Exodus 20:8-11; see also Doc.60:15 (Patterson). While an employee of Walgreens, Patterson consistently asserted he needed his Sabbath off. *Ibid.*

Throughout Patterson's employ, however, Walgreens undertrained—or mistrained—its employees on religious accommodation. For example, Patterson's immediate supervisor, Curline Davidson, testified that she believed Walgreens had *no* obligation

[3] Citations to the record are in the form Doc.XX:Y, where XX is the docket number and Y the page number. Unless otherwise indicated, a reference to a person's last name denotes that person's deposition testimony. All cited documents were in the Court of Appeals appendix and were cited in the same form in the briefing there, following Eleventh Circuit rules.

to accommodate Patterson's religious objection because the unit where Patterson worked supposedly operated twenty-four hours a day. Doc.62:1112.[4] And human resource manager Carol White flatly told Patterson that "the company was not required to honor [his] Sabbath observance[.]" Doc.60:28 (Patterson).

In early August 2011, Davidson also told Patterson he needed to be more "flexible" in his availability for work. Doc.60:42. Given that he was *already* available any hour of any day except Friday nights and Saturdays, Patterson understood this as a request to work during his Sabbath. Doc.60:42. He thus objected to Davidson's request, but Davidson did not relent. Doc.60:42.

2. Patterson was terminated just a few days later after a supposed regulatory "emergency." On Wednesday, August 17, 2011, Walgreens received a letter from the Alabama Board of Pharmacy stating that a Walgreens' call center in that state did not comply with state pharmacy laws and regulations. Doc.63:19 (Groft); Doc.63-1:1–2 (letter). So Walgreens set an internal deadline to transfer all calls from the Alabama facility to Patterson's Orlando facility by the next Tuesday, August 23. Doc.63:41 (Groft); Doc.68:37 (Williams). To prepare for that transfer, Walgreens instructed the Orlando center to schedule refresher trainings for CCRs.

The schedule for these trainings was set on Friday afternoon, August 19, just before Patterson's Sabbath.

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[4] Setting aside that *Patterson's* call center was not really open twenty-four hours a day, Doc 63:11 (Groft), Title VII does not automatically excuse employers who operate 24 hours a day from providing religious accommodations. See, *e.g.*, *Tabura* v. *Kellogg* 880 F.3d 544 (10th Cir. 2018).

The schedule informed Patterson he was to conduct training on Saturday at 11:30 a.m.—during his Sabbath. Doc.65:6–7 (Sheppard).

Recent statements by his supervisors also made it extremely difficult to arrange a swap with someone else: After learning of the need for weekend training but before receiving the schedule, Patterson had been told by Davidson that it would not be "fair" to have his co-trainer Alsbaugh work that weekend. Doc.60-1:128 (EEOC Statement); Doc.60:45 (Patterson). Patterson understood this as an instruction that he was *not* to swap with Alsbaugh—an understanding Davidson later verified. See Doc. 62:11 ("Darrell's supposed to be there."). Patterson also understood that, aside from Davidson, Alsbaugh was the only other employee who could substitute for him. Doc. 60:52

Nonetheless, once Patterson received the schedule and recognized his religious conflict, he attempted to resolve it by calling Alsbaugh. But Alsbaugh was unable to find child care. Doc.60:45–46 (Patterson); *accord* Doc.60-1:129–130 (EEOC Statement).

Left without options, Patterson repeatedly called his supervisor Davidson—who was qualified to conduct the training—and left messages explaining that he would not be able to conduct it. Doc.60:45–46 (Patterson). Although Davidson was in Atlanta during those calls, she soon returned to Orlando, arriving in time that she *could* have conducted the Saturday training. Doc.62:11, 26, 32 (Davidson). She also stated to another manager, Elizabeth Rodriguez, that she was willing to come in and conduct the training, which would have solved the problem. Doc.62:11, 26, 32 (Davidson). But Walgreens, through Rodriguez, instructed Davidson *not* to conduct the training, even

though she volunteered. Doc.62:26 (Davidson). Rodriguez said she would direct the class to do self-study instead. Doc.62:26 (Davidson).

3. The undisputed record shows that there was no hardship from Patterson's failure to conduct the training on Saturday, August 19. Indeed, when Patterson came in on Monday, he conducted the training that had originally been scheduled for Saturday. Doc.60:46–47 (Patterson). And by early Tuesday, Walgreens had begun transferring all of the Alabama calls to Orlando—thereby meeting its internal goal. Doc.63:41 (Groft); Doc.68:37 (Williams).

Nevertheless, that same day, Walgreens placed Patterson on administrative leave. Doc.60:48 (Patterson). Before doing so, his (and Davidson's) supervisor White asked if he wanted to transfer back to his original CCR position. Doc.60:47–48 (Patterson). That position had paid him less than half of what he made as a trainer, and according to White, there was *still* a possibility he would have to work on his Sabbath, Doc.60:47–48 (Patterson). Accordingly, Patterson declined the demotion. Doc.60:47–48 (Patterson).[5]

Two days later, on August 25, Walgreens terminated Patterson, claiming "gross negligence" because of his predictable and pre-disclosed failure to conduct two hours of training on his Sabbath. Doc.60-1:119 (Termination Letter). His firing, moreover, violated Walgreens' four-stage discipline policy, which called for, at most, a verbal warning for missing a scheduled

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[5] The opinion below erroneously rejected Patterson's undisputed explanation that his original pay rate was $9.75. Pet. 10a n.2. The panel ignored that if a material fact is not found in the record—but goes undisputed—the fact is taken as true. See Fed. R. Civ. Proc. 56(e).

shift. See Doc.60-1:36. And Davidson reiterated in Patterson's firing letter that even a transfer to a CCR position wouldn't assure Patterson his Sabbaths off. Doc.60-1:119 (Termination Letter); Doc.60:47–48 (Patterson).

C. Procedural History

Patterson sued Walgreens, claiming (as relevant here) a failure to accommodate him in violation of Title VII. Doc.1:6–8. Walgreens moved for summary judgment on reasonable accommodation and undue hardship. Walgreens claimed that it "accommodated" Patterson by offering him a demotion and pay cut—even though that change would leave him vulnerable to demands that he work on his Sabbath. Walgreens also claimed that allowing him Saturdays off in his job as a trainer would impose an undue burden because there *might* be a greater need for Saturday training in the future. See Pet. 12a, 32a.

1. The district court ruled for Walgreens. Without inquiring whether it had eliminated the conflict, the court held that Walgreens had offered two reasonable accommodations. Pet.31a–32a. First, because Patterson was able to swap on many *earlier* occasions, the court held that Walgreens had acted "reasonably," even though it hadn't eliminated Patterson's *later* work-religion conflict. Pet. 31a. Second, the court asserted that Walgreens' offer to demote Patterson to the lower-paying CCR position was itself a reasonable accommodation. Pet. 32a. The court also held that Patterson's continuing employment would cause undue hardship, based on Walgreens' speculation about the possible future impact of accommodating his religious practice. Pet. 32a.

2. The Eleventh Circuit's opinion largely followed the district court opinion. The panel held that both "accommodations" were reasonable as a matter of law—while conceding that neither would actually have accommodated his religious practice of not working on the Sabbath. Pet. 9a. Indeed, the court held that, "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*." Pet. 9a (emphasis added). The court further acknowledged that the offer of a transfer to a CCR position would merely have "ma[d]e it easier" to get swaps, Pet. 9a, rather than eliminating the conflict.

Turning to undue hardship, the panel (like the district court) also focused on *future* possible issues—such as a planned reduction in staffing—to conclude that, if Walgreens fully accommodated Patterson, it could someday incur undue hardship. Pet. 12a–13a. Rather than requiring a demonstration of actual, concrete hardship, the panel accepted Walgreens' speculative claim that hardship "*would have been* required," Pet. 13a, if it continued to employ Patterson. Pet. 12a–13a.

REASONS FOR GRANTING THE PETITION

Review should be granted to resolve a 4-2-3 circuit split over whether an incomplete or uncertain accommodation that fails to eliminate the conflict between a work requirement and an employee's religious practice is nonetheless a "reasonable" accommodation, allowing the employee to be fired for the unresolved conflict. Review is also warranted to resolve a 4-3 split over whether an employer may prove undue hardship using speculation. And the Court should also revisit *TWA* v. *Hardison*, 432 U.S. 63 (1977), in light of Justice Thomas's concerns in *Abercrombie*, and because of its non-textual approach to interpreting Title VII.

These issues are important not only because they impact millions of religious employees and frequently find their way into court, but also because the Eleventh Circuit and some others are severely diminishing the protection for religious liberty that Congress enacted and intended. Such issues are important in both quantity and quality and, at a minimum, should be addressed uniformly throughout the country.

I. The decision below entrenches a 4-2-3 circuit split on when an employer provides a reasonable accommodation as a matter of law.

This Court's review of the "reasonableness" question is needed because the decision below (and prior published Eleventh Circuit precedent) joins two circuits in conflicting with the positions of *six* other circuits. These other circuits have held that an accommodation that only partially or occasionally resolves the conflict between a work requirement and a religious practice is not *per se* "reasonable." Four of these circuits have correctly held that an accommodation is not reasonable as a matter of law unless it eliminates the conflict fully. Two others have held that it is a factual question whether an accommodation is reasonable when it doesn't fully eliminate the conflict.

1. As noted, Title VII requires that an employer provide a "reasonabl[e] accommodat[ion] to an employee's or prospective employee's religious observance or practice" unless the accommodation would cause undue hardship. 42 U.S.C. 2000e(j). Interpreting this provision in *Ansonia*, this Court explained that an employer can provide such an accommodation by "*eliminat[ing]* the conflict between employment requirements and religious practices" thus "allowing the individual to observe *fully* religious holy days." *Id.* at 70 (emphasis added). Only one accommodation suggested there—unpaid leave—would have eliminated the conflict. *Ibid.* And that is the only one the Court endorsed as "reasonable." *Ibid.* ("We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one.")

Ansonia thus created a safe harbor for employers: If an employer eliminates the conflict between the employee's work requirements and his religious practice, the employer has "reasonably" accommodated the employee and is entitled to summary judgment.

2. Despite *Ansonia's* reference to "eliminating the conflict," a question has arisen that now divides the circuits: When an employer does *not* eliminate the conflict, under what conditions, if any, can the accommodation be "reasonable," either as a matter of law or as determined by a jury? On this point the circuits have scattered in three different directions.

Four circuits have correctly held that when an accommodation does not eliminate the conflict, the accommodation is *per se* unreasonable and therefore the employer does not fall within *Ansonia's* safe harbor. For example, in *Opuku-Boateng* v. *California*, a Seventh-day Adventist took a job in another town on the understanding that he would not have to work on Saturdays. 95 F.3d 1461, 1465 (9th Cir.1996). But once he had relocated his family, his request to not work Saturdays was denied, even though he offered to take undesirable shifts, swap shifts, or work at a different location. *Ibid.* The Ninth Circuit held that, if negotiations "do not produce a proposal by the employer that would *eliminate* the religious conflict," the employer can prevail only if it shows undue hardship. *Id.* at 1467 (emphasis added). The Ninth Circuit thus limited the employer's safe harbor to *Ansonia*'s terms, and held that the employee had established a prima facie case of non-accommodation. *Id.* at 1475.

In so holding, the Ninth Circuit built upon an earlier decision by the Sixth Circuit. In *Cooper* v. *Oak Rubber Company*, an employee wished to have her Sabbath (Friday nights and Saturdays) off. 15 F.3d

1375 (6th Cir.1994). The employer offered two accommodations: scheduling the shifts to avoid church meetings and allowing the employee to use vacation time to avoid Saturday work. *Id.* at 1377. The Sixth Circuit concluded that neither accommodation eliminated the conflict and therefore both were *per se* unreasonable. See *id.* at 1379. Although the Sixth Circuit ultimately ruled in favor of the employer on undue hardship grounds, the court clearly refused to extend *Ansonia*'s safe harbor to accommodations that did not eliminate the conflict.

The Seventh Circuit joined these circuits the following year, in a case involving a Jewish worker at a Chicago beauty salon who requested Yom Kippur off. *EEOC* v. *Ilona of Hungary*, 108 F.3d 1569 (7th Cir.1997). Ruling for the employee, the court held that the employer's proposed accommodation—offering to let the worker take a vacation on days *other* than Yom Kippur—did not fall within *Ansonia's* safe harbor. *Id.* at 1576. Offering employees a different day off, the Court held, "cannot be considered reasonable ... because it does not *eliminate* the conflict between the employment requirement and the religious practice." *Ibid.* (emphasis added).

Most recently, the Second Circuit reached a similar conclusion in *Baker* v. *Home Depot*, 445 F.3d 541 (2d Cir. 2006). There an employee transferring from a Boston store to a New York store made clear to his new managers that, for religious reasons, he would not work on Sundays. While this was acceptable for a time, eventually new management refused to accommodate him. *Id.* at 544–545. Instead, they offered him a Sunday shift that at least did not interfere with his religious service. *Ibid.*

The EEOC filed an amicus brief supporting the employee. Relying on *Ansonia*, *Cooper*, and *Ilona*, the EEOC urged that "an employer's suggestion is not a reasonable accommodation unless it *eliminates* the conflicts between the employee's work requirements and his religious practices." Br. of EEOC at 8-9, 11, *Baker* v. *Home Depot*, No. 05-1069 (2d Cir. 2006).

Ruling for the employee, the Second Circuit agreed: The court held that the employer's shift change proposal "was no accommodation at all because … it would not permit him to observe his religious requirement to *abstain from work totally on Sundays*." *Baker*, 445 F.3d at 547–548 (emphasis added). The Second Circuit further explained that, as a matter of law, "the offered accommodation cannot be considered reasonable … because it does not eliminate the conflict between the employment requirement and the religious practice." *Id.* at 548 (ellipsis in original; citation omitted).

The EEOC continues to agree with these circuits. In its current compliance manual, it explains that "[a]n accommodation is not 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship." EEOC Compliance Manual, Religious Discrimination, Section 12-IV, available at: https://www.eeoc.gov/policy/docs/religion.html.

3. Two other circuits have also rejected attempts by employers to enlarge *Ansonia*'s safe harbor—by authorizing juries to evaluate whether accommodations outside the safe harbor are reasonable.

The first to adopt this approach was the Eighth Circuit in *Sturgill* v. *UPS*, in which a Seventh-day Adventist was asked to deliver packages on a Friday after sundown. 512 F.3d 1024, 1028–1029 (8th Cir. 2008). While normally an employee who couldn't finish a shift for religious or other reasons could ask for another worker to take over, on this occasion no employee was available when the worker's Sabbath started. *Id.* at 1029. He was fired for not completing the shift. *Ibid.* At his trial, the jury instructions followed the Second, Sixth, Seventh, and Ninth Circuits—and the EEOC—in explaining that "an accommodation is reasonable if it eliminates the conflict between Plaintiff's religious beliefs and Defendant's work requirements and reasonably permits Plaintiff to continue to be employed by Defendant." *Id.* at 1030.

The Eighth Circuit rejected this standard and instead made it a jury question whether an accommodation was reasonable, even if it did not eliminate the conflict. The Eight Circuit held that "in close cases, that is a question for the jury" and a reasonable jury may find in many circumstances that the employee could be required to "compromise a religious observance or practice." *Id.* at 1033.[6]

The Tenth Circuit has recently followed the Eighth Circuit's approach. In *Tabura* v. *Kellogg*, the employer allowed two employees to swap shifts or use vacation time to avoid working on their Sabbaths. 880 F.3d 544, 555 (2018). Both employees struggled to find swaps and were eventually fired. The employer argued for a safe harbor—that is, "a per se rule that the

[6] The Eight Circuit upheld the jury verdict as harmless error with regard to liability and back pay but reversed on other grounds as to injunctive relief and punitive damages. *Id.* at 1036.

accommodations it offered Plaintiffs are reasonable as a matter of law," whether or not the conflict was eliminated. *Id.* at 555 n.11. The EEOC filed an amicus brief urging the Tenth Circuit to follow the majority rule limiting the employer's safe harbor as in *Ansonia*. See Br. of EEOC, *Tabura* v. *Kellogg*, No. 16-4135 (10th Cir. Oct. 21, 2016).

The Tenth Circuit rejected the employer's attempt to enlarge the *Ansonia* safe harbor, noting that "whether an accommodation is reasonable in a given circumstance is ordinarily a question of fact to be decided by the fact finder." *Tabura*, 880 F.3d at 555 & 555 n.11. The court therefore reversed the summary judgment in favor of the employer and remanded for a trial.

Because the Eighth and Tenth Circuits hold that the reasonableness of an incomplete accommodation is a factual question for the jury, employees who would prevail on this element in the Second, Sixth, Seventh, and Ninth Circuits only receive a trial on reasonableness in the Eighth and Tenth Circuits. Those circuits thus reject the majority rule that employees cannot be forced to accept an "accommodation" that requires them to violate their religious beliefs. In the Eighth and Tenth Circuits there is no such certainty: Both employee and employer must await a jury's determination as to what is reasonable.

As explained above, this latter approach is also contrary to the EEOC's guidance, which holds that an accommodation *cannot* "be 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work …" EEOC Compliance Manual, *supra* at 16.

4. In this case, by contrast, the Eleventh Circuit concluded as a matter of law that "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." Pet. 9a. But that incomplete and contingent accommodation gives employers a safe harbor well beyond that recognized in *Ansonia*: Whether such an arrangement avoids the conflict depends on the actions of third parties and may not work at all. Moreover, the panel opinion here conflicts even more squarely with the Tenth Circuit, which rejected a safe harbor when the employer authorized *both* shift swaps and vacation time as accommodations. *Tabura*, 880 F.3d at 555 & n.11.

Similarly, the decision below conflicts with the Eight Circuit in *Sturgill* because the Eleventh Circuit upheld summary judgment for the employer even though Patterson was fired based on a "specific, one-time failure to accommodate." By contrast, in *Sturgill,* the court upheld the jury verdict in the employee's favor based on a one-time failure to accommodate. *Sturgill*, 512 F.3d at 1033.

The split is even starker when the Eleventh Circuit's decision is compared with the Second, Sixth, Seventh and Ninth Circuits. As explained above, these four circuits have held that the *employee* is entitled to prevail on reasonable accommodation when the conflict is not eliminated. *Cooper*, 15 F.3d. at 1378 ("If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring undue hardship"); *Opuku-Boateng*, 95 F.3d at 1467 (same) ; *Ilona*, 108 F.3d at 1576 (accommodation "*cannot* be considered reasonable ... because it does not *eliminate*

the conflict between the employment requirement and the religious practice.") (emphases added); *Baker*, 445 F.3d at 547–548 ("[T]he shift change … was no accommodation at all because … it would not permit [the employee] to observe his religious requirement to abstain from work totally on Sundays.")

Here, while the Eleventh Circuit acknowledged *Ansonia*'s "elimination" language (as most circuits have done), it also recognized that the accommodations Walgreen's offered did *not* eliminate the conflict. The court noted that Walgreen's proposed accommodation of transferring to a different position would merely have "ma[d]e it easier" to get swaps, Pet. 9a. Likewise, the Eleventh Circuit's suggestion that "allowing Patterson to arrange a schedule swap" was sufficient as a matter of law, Pet. 9a, does not ensure that Patterson will—in the Second Circuit's words—be able to "abstain from work totally" every Saturday. The opinion below thus rejected the elimination standard that the Second, Sixth, Seventh, and Ninth Circuits have embraced, and gave a safe harbor to Walgreens that those Circuits and the Eighth and Tenth Circuits have rejected.

This is not the first time the Eleventh Circuit has enlarged *Ansonia's* safe harbor beyond its terms. In *Walden*, a counselor refused to provide relationship counseling for religious reasons. See 669 F.3d at 1280–1283. She was removed but was told she could "*retain her tenure* with [the employer] *if* she found" another position with the employer within a year. *Id.* at 1282 (emphasis added). The Eleventh Circuit held that, as a matter of law, the employer had reasonably accommodated the conflict between the employee's work and her religious beliefs. *Id.* at 1294. But the conflict wasn't eliminated: another job was not found, and the

employee was fired. In short, like the decision below, *Walden* enlarged *Ansonia*'s safe harbor to include unsuccessful *attempts* to eliminate the conflict.

4. Two other circuits—the First and Fourth—have likewise expanded *Ansonia*'s safe harbor beyond its terms, and the terms of Title VII. In *EEOC* v. *Firestone Fibers*, the employer offered an employee who objected to working on Saturdays several partial accommodations to reduce the number of required Saturday shifts. 515 F.3d 307, 316 (4th Cir.2008). The employee used these accommodations but was nonetheless fired when they proved insufficient to eliminate the work-religion conflict. *Id.* at 311. The Fourth Circuit ruled that "no reasonable juror could conclude that Firestone did not provide reasonable accommodation for Wise's religious observances," and affirmed summary judgment for the employer. *Id.* at 316. The court thus expanded *Ansonia*'s safe harbor, ruling for the employer without bothering to examine whether a complete accommodation would create undue hardship.

Similarly, in *Sánchez-Rodríguez* v. *AT&T Mobility,* when the employee declined to work on Saturday for religious reasons, the employer offered a series of partial accommodations that again proved insufficient to eliminate the conflict. 673 F.3d 1, 12 (1st Cir. 2012). Nonetheless, the First Circuit held that, as a matter of law, "the [combination of] efforts made by AT&T constituted a reasonable accommodation of Sánchez's religious beliefs," and thus affirmed a grant of summary judgment to the employer. *Id.* at 13. Thus, like the Eleventh and Fourth Circuits, the First Circuit has expanded *Ansonia*'s safe harbor to include "accommodations" that do not actually accommodate to the

religious practice at issue, and thus do not eliminate the conflict.

In sum, the circuits are overtly, widely and irreconcilably split on whether *Ansonia*'s safe harbor extends to "accommodations" that do not eliminate the conflict between an employee's work requirements and the employee's religious practice. While religious workers in six circuits either prevail on this prong or have the chance to make their argument to a jury, workers in three circuits, including the Eleventh Circuit below, face the prospect of losing on summary judgment even when the "accommodations" offered do not resolve the conflict between their religious practice and work requirements. It is important to resolve this conflict sooner rather than later, given that this recurring problem will only multiply with the increasing religious diversity in America. See *infra* Section III

II. The decision below joins the wrong side of a 4-3 split on the use of speculation to establish undue hardship.

The decision below also enlarges a pre-existing split on whether an employer can demonstrate undue hardship based on speculation about future events.

1. Although the district court and Eleventh Circuit briefly discussed (at Pet. 11a) the possible hardship from Patterson's August 20 absence, they *never* held that this specific absence created any hardship for Walgreens. See Pet. 11a. To the contrary, the record indicates that Walgreens was able to transfer all of its calls on the only schedule it ever established—by Tuesday, August 23. *E.g.* Doc. 63:41 (Groft). And any claim of urgency or hardship on August 20 would be disingenuous given that Patterson's supervisor volunteered to take the Saturday training shift but was told not to bother. Doc.62:26 (Davidson).

Instead, the Eleventh Circuit addressed a different question—whether Patterson's continued employment *could* create future hardship. And the court relied upon Patterson's single absence to conclude that "what Patterson insisted on would produce undue hardship for Walgreens *in the future*." Pet. 12a (emphasis added). Specifically, the panel credited Walgreen's speculation about what might "have been required" if and when Alsbaugh departed—the possibility of having to avoid Saturday trainings. Pet. 13a.

2. But this analysis contradicts the holdings of the Fourth, Eighth, Ninth and Tenth Circuits that an employer may not establish hardship through speculative evidence. *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Tooley* v. *Martin-Marietta Corp.,* 648 F.2d 1239, 1243 (9th Cir. 1981); *Brown* v.

Gen. Motors, 601 F.2d 956, 961 (8th Cir. 1979); *Benton* v. *Carded Graphics*, 1994 WL 249221 (4th Cir. June 9, 1994) (unpublished). Specifically, these circuits have held that an employer may *not* rely on:

- "speculation" about possible hardships, *Toledo*, 802 F.2d at 1492; *Brown*, 601 F.2d at 961;
- merely "conceivable" or "hypothetical" hardships, *Toledo*, 892 F.2d at 1492; *Tooley*, 648 F.2d at 1243; *Benton*, 1994 WL 249221, or even
- "anticipated hardship," *Brown*, 601 F.2d at 961.

The EEOC has also condemned this sort of speculation. Its compliance handbook explains that "[a]n employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information." EEOC Compliance Manual, *supra* at 16. The EEOC thus agrees with the majority rule that rejects reliance on speculation.

3. In allowing speculative claims of hardship, the court of appeals below parroted the reasoning of a Fifth Circuit decision, *Weber* v. *Roadway Express, Inc.*, 199 F.3d 270 (2000). There, a trucker with a religious objection to being alone with a woman suggested that his boss skip over him when making assignments, pairing the next trucker on the rotation with the female trucker. *Id.* at 272. Given that the next worker's preferences as to the length of the shift and time between shifts were unknown, whether this schedule alteration would benefit or hurt the next worker was necessarily a matter of speculation. But the Fifth Circuit relied on this speculation to hold that not just an *actual* adverse impact on this next em-

ployee, but "[t]he *mere possibility* of an adverse impact," was enough to constitute undue hardship, not just for fellow employees, but by extension the employer as well. *Id.* at 274 (emphasis added).

The Sixth Circuit likewise followed *Weber* in a similar factual scenario. In *Virts* v. *Consolidated Freightways,* a male employee was fired for refusing on religious grounds to do overnight runs with a woman. 285 F.3d 508, 512–514 (6th Cir. 2002). *Virts* approvingly quoted and applied *Weber*'s holding that "[t]he *mere possibility* of an adverse impact" created undue hardship. *Id.* at 521 (quoting *Weber*, 199 F.3d at 572) (emphasis added).[7] But such reliance on "possible" impacts is likewise inconsistent with the majority rule, which forbids reliance upon any speculation.

4. Moreover, the approach of the Fifth, Sixth and Eleventh Circuits violates Title VII's text. By its terms Title VII requires an employer to "demonstrate[]" undue hardship. But it is well settled that, especially on a motion for summary judgment, speculation and hypotheticals simply do *not* demonstrate hardship. For example, in *Edenfield* v. *Fane*, this Court held that, to carry its burden on a Free Speech claim, a government must "*demonstrate* that the harms it recites are real." 507 U.S. 761, 770–771 (1993) (emphasis added). Accordingly, in the speech context, mere speculation is not sufficient for the government to carry its burden of establishing hardship.

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[7] The Third Circuit has embraced in *dicta* the rule adopted in the Fifth, Sixth, and Eleventh Circuits: It has interpreted *Hardison* to require the examination of the "*projected* number of instances of accommodation" to determine undue hardship. *Ward* v. *Allegheny Ludlum Steel Corp.*, 560 F.2d 579, 583 n.22 (3d Cir. 1977).

The same analysis applies, with even greater force, to Title VII: The statute's *text* places the burden on the employer to "demonstrate" undue hardship. And to carry its burden, the employer must establish what the Ninth Circuit has called "the *fact* of hardship." *Tooley*, 648 F.2d at 1243–1244.

This approach is also consistent with *Hardison*'s focus on hardships the employer "bears," 432 U.S. at 84, not "might bear," "may someday bear," or "speculates it might bear." By ruling otherwise, the Eleventh Circuit and its allies have made the employer's required burden on a hardship defense trivial.

5. The approach followed by the Fifth, Sixth and Eleventh Circuits also practically eviscerates the statute. As one commentator has noted, if undue hardships include hypothetical hardships, Title VII would "virtually never require accommodation."[8] The Fifth Circuit powerfully illustrates this danger: District courts in that circuit frequently grant summary judgment for the employer based on those courts' erroneous view that a speculative hardship is sufficient to be "undue."[9]

The rule also weights the dice further against the employee: Some circuits have held that no cause of action is available for a religious employee who resigns

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[8] Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 622 (2000).

[9] E.g., *Jones* v. *UPS*, 2008 WL 2627675 (N.D. Tex. June 30, 2008) (citing *Weber*'s mere possibility standard); *EEOC* v. *Dalfort Aerospace, L.P.*, 2002 WL 255486 (N.D. Tex. Feb. 19, 2002) (same); *George* v. *Home Depot*, 2001 WL 1558315 (E.D. La. Dec. 6, 2001) (same).

because he anticipates conflict between his religious beliefs and his job requirements.[10] To preserve his claim, he therefore must cooperate in an employer's effort to find an acceptable accommodation. Yet, in circuits that allow hardship to be shown by speculation, an employer may fire an employee based on an anticipated hardship—*without* making any effort to find an accommodation that will resolve the employer's concern. This combination creates an unfair asymmetry between the obligations of employees and employers, and further weakens Title VII's protections for religious workers.

In sum, as with the first question presented, the split on the second question regarding proof of undue hardship is broad and well-established, affects many cases, and presents an important question that will ultimately determine whether Title VII's workplace protections are rendered empty and ineffectual. For all these reasons, this Court should grant certiorari to resolve this split.

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[10] *E.g. Lawson* v. *Washington*, 296 F.3d 799, 805 (9th Cir. 2002); *Goldmeier* v. *Allstate Ins. Co.*, 337 F.3d 629, 636–637 (6th Cir. 2003).

III. *Hardison*'s definition of undue hardship should be revisited.

The Court should also use this dispute to revisit an important flaw in *Hardison* that is arguably a logical precursor to the second question presented. As Justice Thomas pointed out in his separate opinion in *Abercrombie* (135 S.Ct. at 2040 n.*) , *Hardison*'s discussion of "undue hardship" was technically dicta because the Court was construing the existing EEOC guideline, not the statute. But even if *Hardison's* analysis is treated as a holding as to Title VII, as it is by all lower courts, it is badly reasoned. Further, it is contrary to Congress's language and intent because it severely burdens the efforts of religiously diverse employees to negotiate reasonable accommodations.

1. Assuming the Court was construing the statute itself, *Hardison* defied Title VII's text and history when it defined undue hardship as merely something more than a "*de minimis* cost." 432 U.S. at 84. No pre-*Hardison* dictionary of which we are aware had ever defined "undue" as merely "more than *de minimis*." Rather, dictionaries at the time of the amendment's enactment defined undue primarily as "unwarranted," or "excessive." *E.g.* The Random House Dictionary of the English Language, College Edition 1433 (1968). By contrast, a *de minimis* burden was and is defined as one that is "trifling," "minimal," or "so insignificant that a court may overlook [it] in deciding an issue or case." *Black's Law Dictionary* 388 (5th ed. 1977).

As a textual matter, some burdens are surely more than "trifling" but less than "excessive." If that were not so, the importance of the very behavior protected by Title VII would be, by definition, "trifling" or insignificant—such that it can be outweighed by *any* employer burden greater than that. Thus, as a textual

matter, "undue" simply does not and cannot mean "more than de minimis," either now or in 1972.

Hardison is also incorrect if one assumes "undue hardship" was a term of art when the 1972 Amendments were adopted. The most relevant use of that term before 1972 was by the EEOC, which defined "undue hardship" as including situations "where the employee's needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer"—a standard obviously more than de minimis, and one Walgreens could not possibly meet here. 29 C.F.R. 1605.1 (1968) (codifying 1967 Guidelines) (emphasis added)

Not surprisingly, then, *Hardison*'s crabbed understanding of undue hardship has been roundly criticized. For example, Justice Marshall dissented in part on the ground that "[a]s a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost[.]'" 432 U.S. at 92 n.6 (Marshall, J., dissenting). Other courts have likewise disagreed with the *Hardison* majority on that ground. *E.g.*, *Nakashima* v. *Bd. of Educ.*, 131 P.3d 749, 758 (Ore. App. 2006); *Anderson* v. *Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship means something *greater than* hardship.") (emphasis added). And *Hardison*'s definition contradicts the definition of "undue hardship" that Congress has employed in other contexts, such as the Americans With Disabilities Act.[11]

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[11] That statute, 42 U.S.C. 12101 et seq., defines "undue hardship" as an action requiring "significant" difficulty or expense. 42

2. Likewise, the history of Title VII shows that the undue hardship standard was not meant to be toothless. The record shows instead that Congress passed the 1972 accommodation amendments based on concern "for the individuals of all minority religions who are forced to choose between their religion and their livelihood.'" *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 454 n.11 (7th Cir. 1981) (quoting 118 Cong. Rec. at 705–706). A toothless standard of undue hardship—such as the "de minimis cost" test adopted in *Hardison*—leaves employees of faith in just that unacceptable predicament.

Hardison thus turns Title VII's history on its head. Rather than accepting the value Congress and the EEOC saw in a religiously diverse workforce, *Hardison* concluded that any more than *de minimis* harm to the employer outweighs the benefits of religious diversity.[12] Thus, far from correcting the erroneous decisions interpreting Title VII before the 1972 Amendment, *Hardison* has perpetuated and in some cases even increased those harms. That too is sufficient reason to revisit its analysis.

U.S.C. 12111(10)(A). The statute offers a list of factors to be considered in appraising whether there is undue hardship, including the cost of the accommodation, the overall financial resources of the company and the scope of the employer's operations. 42 U.S.C. 12111(10)(B).

[12] See Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 Ark. L. Rev. 515, 537 (2010) (noting that if *Hardison* were reversed, "employers would bear an extra cost in accommodating these employees, [but] that cost would be balanced by the benefit of having a workplace that respects religious pluralism.") (internal citation omitted).

3. *Hardison* has also proven unworkable. As the Appendix shows, in cases where a district or circuit court has addressed an undue hardship defense, the employer has prevailed in obtaining summary judgment on that issue far more frequently than the employee—more than twice as often in the district courts and infinitely more often on appeal, where employees have *never* won summary judgment on that defense. See Pet. 35a. That disparity is almost certainly attributable to *Hardison*'s employer-friendly "de minimis" standard. And especially in circuits where even speculative burdens are deemed sufficient, many cases undoubtedly never reach a formal judgment on the issue, as religious employees would have even less chance of success.

These statistics—and the stark disparity between outcomes for defendants and plaintiffs—make clear that *Hardison* eliminates the value of the accommodation requirement for many employees of faith. Rather than encouraging employers to compromise, *Hardison* tells them that the employee has no claim for accommodation if there is more than *de minimis* cost to the employer. And if the employer has no potential legal obligation, there is little incentive to engage in the "bilateral cooperation" contemplated in *Ansonia.* See 479 U.S. at 69 (citation omitted).

Indeed, as one commentator has put it, under *Hardison,* "little more than virtual identical treatment of religious employees [is] required."[13] Such equal treatment offers little protection to employees, since it allows the employer to deny an accommodation to

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[13] Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. Law & Pol. 107, 122 (2015).

everyone if it can show a more than *de minimis* hardship. For the same reason, an employer can often extract large burdens from employees as the price of living their religion—or simply fire them.

This is what happened to Patterson. The panel held that an incomplete accommodation involving a demotion and a large pay cut was *per se* "reasonable," and thus not even a question for a jury. Pet. 10a & n. 2. Patterson thus *lost* based on the panel's argument that it was a reasonable accommodation and a reasonable burden on him to take a demotion and pay cut that still would not fully eliminate the conflict with his religious practices. Yet Walgreens *won* on the ground that mere speculation regarding potential costs to the employer could establish an undue burden. The absurdity and hypocrisy of those countervailing standards, and their inconsistency with the statute, calls out for this Court's correction

Moreover, *Hardison*'s unworkability has increased as our nation has become more religiously diverse. While many past conflicts have involved Seventh-day Adventists and Orthodox Jews seeking to practice their beliefs about the Sabbath, the growing Muslim,[14] Sikh and other minority religious populations have distinctive worship, grooming and dress requirements that often conflict with job requirements. Indeed, an empirical study by Gregory C. Sisk and Michael Heise concluded that "American Muslims appear to be at a

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[14] *E.g.*, Besheer Mohamed, *New estimates show U.S. Muslim population continues to grow*, Pew Research (Jan. 3, 2018), http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/

pronounced disadvantage in obtaining accommodations for religious practices in federal court because they are Muslims[.]"[15] *Hardison* facilitates that disparity because it allows judges to dismiss accommodation claims for religious practices that are not ingrained in U.S. culture far too easily.

4. *Hardison* has also created needless conflicts between employers and employees. Armed with near-blanket permission to enforce rules that conflict with religious practices so long as they can assert a *de minimis* cost, employers have been allowed to burden minority religions through actions such as the following:

- rejecting a request by a Muslim teacher to wear a headscarf, on the theory that *state* law potentially forbade wearing the head scarf. *United States* v. *Bd. of Educ.*, 911 F.2d 882, 890–891 (3d Cir. 1990), and
- firing an Orthodox Jew for refusing to work on his Sabbath in part because other employees felt he was receiving "special treatment." *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 143 (5th Cir. 1982).

And, of course, in this case the *de minimis* standard allowed an employer to fire a member of another minority religion—a Seventh-day Adventist—based on a bare assertion that retaining him would *someday* result in increased costs.

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[15] Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 262 (2011); see also, *e.g.*, *Basheeruddin* v. *Advocate Health & Hosps. Corp.*, 2016 WL 3520160 (N.D. Ill. June 27, 2016) (a leave of absence was a reasonable accommodation for a Muslim woman, even though a "return to her position was not guaranteed" after Ramadan).

Patterson and each of these other employees was thus faced with what then-Judge Alito called the "'cruel choice' between religion and employment" that Title VII sought to prevent. See *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) (quoting *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting)). Foreshadowing Judge Alito, Justice Marshall's dissent in *Hardison* explained that "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting); *accord Jamil* v. *Sessions*, 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017). And, as then-Chief Judge Boochever of the Alaska Supreme Court has explained, a loose application of Title VII results in the "drastic result of depriving [employees] of [their] employment" when they seek to live their religion. *Wondzell* v. *Alaska Wood Prods.*, 583 P.2d 860, 867 (Alaska 1978) (Boochever, C. J., dissenting).

In short, *Hardison*'s de minimis test—whether viewed as dicta or holding—must be corrected to ensure fairness to individual employees, and to facilitate religious diversity in the workforce.

IV. This case is an excellent vehicle.

Not only are all three questions presented worthy of certiorari, but this case is an excellent vehicle for resolving them.

First, this petition squarely presents questions regarding both of the key statutory terms—"reasonable" and "undue hardship" that have divided the lower courts. The presence of *both* recurring issues allows this Court to more squarely consider "the broader context of the statute as a whole." See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). By addressing the accommodation and hardship issues in unison, the Court will be able to provide clearer and more comprehensive guidance to lower courts, employers, and employees. By contrast, if the Court waits for some future vehicle, it may present only one of the questions presented here, and thus will not provide an opportunity to clarify the meaning of both terms.

Second, the facts of this case provide an especially good context in which to clarify the meaning of those provisions. For example, as explained above, Patterson's supervisors believed they weren't required to accommodate Patterson *at all*. The most generous reading of these statements is that the supervisors had (erroneously) been advised that any accommodation they offered would be *per se* reasonable. The other possible reading is simple ignorance, born of a company's indifference toward religious employees. See 7–9, *supra*. Either way, those statements—by senior employees of a major, well-counseled domestic company—illustrate the need for this Court to clarify employers' obligations toward employees' religious practices.

Moreover, in holding that an offer to transfer to an entry-level position that *still* wouldn't solve Patterson's work-religion conflict was "reasonable" as a matter of law, the Eleventh Circuit has all but vindicated the view of Patterson's supervisors that they had no obligation to accommodate him. But a reversal based on Questions 1 and 2, or 1 and 3, will correct both the widespread legal errors and the specific injustice to Patterson.

The facts also make this an excellent vehicle to clarify whether an employer may establish hardship through speculation. Here, Walgreens was unable to establish that it was harmed by Patterson's absence on August 20. So instead, it built its case around far-fetched speculation about possible future hardships. See *supra* 22. Both opinions below similarly relied on this speculation rather than any actual hardship, on August 20 or otherwise. Pet. 12a–13a, 32a–34a. So a favorable decision on the speculation issue will require, at a minimum, vacatur of the decision below.

Likewise, the facts make this an excellent vehicle to reevaluate *Hardison*. The indifference of Patterson's supervisors is part of a broader culture in which supervisors are often undertrained about their obligations to provide religious accommodations. And that further illustrates *Hardison*'s unworkability: It narrows the statute to the point that supervisors mistakenly believe Title VII doesn't protect religious workers.

Finally, there are no preliminary disputed issues that would prevent a resolution of these questions. And both the accommodation and speculation questions were squarely decided by both courts below, with virtually identical reasoning.

In short, this case comes in an ideal posture to address the three questions concerning Title VII's critical protections for religious workers.

CONCLUSION

This petition presents, in a clean and compelling vehicle, questions of great importance to all employees of faith—questions at the core of how to define "reasonable accommodation" and "undue hardship" in Title VII. Moreover, two of these questions divide the circuits—with every numbered circuit opining on at least one question.

The petition should therefore be granted. At a minimum, the Court should call for the views of the Solicitor General so that the EEOC and other interested federal agencies can express their views.

Respectfully submitted,

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