No. 18-349

In The Supreme Court of the United States

DARRELL PATTERSON,

Petitioner,

v.

WALGREEN CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE JEWISH COALITION FOR RELIGIOUS LIBERTY; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; MUSLIM PUBLIC AFFAIRS COUNCIL; THE LUTHERAN CHURCH–MISSOURI SYNOD; THE SIKH COALITION; AND CHURCH OF GOD IN CHRIST, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

ALEXANDER DUSHKU
Counsel of Record
R. SHAWN GUNNARSON
KIRTON MCCONKIE
Key Bank Tower
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
adushku@kmclaw.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE[1]

Religious organizations and groups associated with faith traditions comprising approximately 57.5 million adult Americans appear on this brief.[2] Amici are The Church of Jesus Christ of Latter-day Saints; the Jewish Coalition for Religious Liberty; Ethics and Religious Liberty Commission of the Southern Baptist Convention; Muslim Public Affairs Council; The Lutheran Church–Missouri Synod; The Sikh Coalition; and Church Of God In Christ, Inc. Despite disagreements on many points of faith, we are united in supporting robust legal protections for religious freedom—including the right of religious Americans to observe their Sabbath and participate in other religiously significant events, and to observe religious dress and grooming standards, without being forced to sacrifice their employment. The religious freedom we cherish is threatened by the decision below, which relies on a

---

[1] All parties have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of the intention to file an amicus curiae brief at least 10 days before the due date.

[2] This total comes from a U.S. Census publication that compiles the self-reported religious affiliation of adults. See U.S. Census, Statistical Abstract of the United States: 2012, *Self-Described Religious Identification of Adult Population: 1990, 2001, and 2008*, https://www2.census.gov/library/publications/2011/compend-ia/statab/131ed/tables/pop.pdf (Baptists: 36.15 million; Lutherans: 8.67 million; Pentecostal: 5.42 million; Latter-day Saints: 3.16 million; Jewish: 2.68 million; Muslim: 1.35 million; Sikh: 78,000).

failed Title VII jurisprudence that allows an employer to offer religious workers an ersatz accommodation and then defend its refusal to provide a meaningful accommodation by asserting mere inconvenience as an undue hardship. We submit this brief to assist the Court in understanding the harms that religious employees of all faiths will continue to confront unless the Court grants review and restores Title VII to its textual foundations.[3]

SUMMARY OF ARGUMENT

Petitioner is not alone in seeking to live his religion without losing his job. Millions of American workers from diverse faith communities face the same terrible conflict between complying with the inflexible demands of an employer and the imperative requirements of faith. Congress enacted specific protections in Title VII to shield employees from that choice, but the widespread judicial conflict and confusion described in the petition form a nearly insuperable barrier to enjoying that protection in practice. Petitioner Darrell Patterson learned that lesson personally when he lost his job because he would not work on his Sabbath. Without this Court's intervention, devastating losses like his will continue to be suffered by other employees, as an unfortunate pattern of judicial confusion continues to

---

[3] Individual statements of interest for each amicus are contained in the appendix.

deny Patterson and millions of religious workers like him the civil rights that Congress enacted.

The petition ably describes several reasons for granting review. But perhaps the most compelling reason is that judicial confusion over the meaning and applicability of the "undue hardship" exception in 42 U.S.C. § 2000e(j) has reached such a crisis that the exception now routinely swallows the rule. Over time, the "undue hardship" standard has come to mean little more than a pro forma requirement to engage in creative excuse-making. To be clear, we do not urge review so that this Court can impose unrealistic burdens on business. But for religious workers, Title VII's guarantee of freedom from religious discrimination rings hollow because courts summarily reject even reasonable requests that employers accommodate Sabbath worship or other core religious practices.

The central thrust of this brief is a plea for the Court to resolve the entrenched nationwide confusion over the scope and meaning of what it means to "reasonably accommodate" an employee's religious practice and when an accommodation poses an "undue hardship." Review should be granted because on these questions hangs the power of Title VII to safeguard religious freedom.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT AFFECT NEARLY EVERY CLAIM OF RELIGIOUS ACCOMMODATION UNDER TITLE VII.

A. Judicial confusion as to the meaning of "reasonable accommodation" denies religious employees genuine protection.

Petitioner well describes how circuits are divided over whether an employer meets its obligation to "reasonably accommodate" an employee's religious practice by offering a solution that does not remove the conflict between religious faith and work requirements. See Pet. 13–22. This Court's review is imperative, not only to achieve national uniformity on an important issue of federal law, but to restore a crucial piece of Title VII's protection of religious freedom in the workplace. Too often, an employer purports to satisfy its statutory duty by proffering an accommodation that will only partially or hypothetically remove the conflict, thereby leaving an employee no less compelled to choose between his job and his faith. Lower courts, lacking clear guidance from this Court, have essentially acquiesced in this rights-defeating stratagem.

The conflicting and erroneous circuit precedents reviewed in the petition misdirect district courts into routinely denying Title VII claims, as the following cases illustrate:

- A dump truck driver sought to honor "his Hebrew Israelite faith's requirement that he cannot work on Saturdays," but the courts rejected his efforts to get an effective accommodation from his employer. *E.E.O.C.* v. *Thompson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d 738, 741 (E.D.N.C. 2011), *aff'd*, 499 Fed. App'x 275 (4th Cir. 2012). Quoting misguided circuit precedent, the district court concluded that the company satisfied Title VII by invoking a company personal leave policy that did not apply to the employee seeking an accommodation. "Although as a 90-day probationary employee, [Plaintiff] was not yet able to take advantage of this policy, this fact 'does not negate the reasonableness of the accommodation.'" *Id.* at 745 (quoting *E.E.O.C.* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315 (4th Cir. 2008)).

- A Home Depot store greeter asked for time off consistent with her Catholic faith, which "precludes her from working on Sundays." *George* v. *Home Depot, Inc.*, No. 00-2616, 2001 WL 1558315, at *5, *8 (E.D. La. Dec. 6, 2001), *aff'd*, 51 Fed. App'x 482 (5th Cir. 2002). Home Depot "offered her flexible working hours on Sundays . . . to allow her to attend church services either in the morning or the evening." *Id.* at *8. Thus the district court reframed the employee's actual religious need to conclude that permitting flexible hours to attend Mass was a reasonable accommodation

for an employee whose religious convictions precluded *any* work on her Sabbath.

- A mechanic for an aluminum can manufacturer requested time off on Saturdays to observe his Sabbath. *Henry* v. *Rexam Beverage Can of N. Am.*, No. CA 3:10-2800-MBS-SVH, 2012 WL 2501994, at *1 (D.S.C. Apr. 18, 2012), *report and recommendation adopted*, No. CA 3:10-2800-MBS, 2012 WL 2502726 (D.S.C. June 27, 2012). At first, his employer let him switch shifts with other employees, whom he paid $100 out of his own pocket for each shift change to give them the equivalent of the "premium overtime pay" they would have received if the company had assigned the switch. *Id.* at *2. Eventually, the employer denied even this self-funded accommodation by informing the mechanic that his personal payments violated company policy, and without additional payment other employees would not agree to switch shifts with him. *Id*. Yet the district court concluded that the employer met its duty under Title VII by letting the mechanic ask other employees to switch shifts—even if that permission did not relieve him of the conflict between his job and his faith. *Id.* at *8.

B. Judicial confusion about how to demonstrate "undue hardship" allows an employer's speculations to justify its refusal to accommodate religious practice.

Another circuit split described by petitioner centers on whether an employer's speculations about possible future harms from accommodating an employee's religious practice adequately "demonstrate . . . undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j). See Pet. 23–27. Granting review on this question will not only restore national uniformity on an important point of federal civil rights law, it will ensure that the sole exception to Title VII's requirement of reasonable accommodation does not keep swallowing the rule. By accepting an employer's bare speculation about future hardship, courts mistakenly excuse the duty to reasonably accommodate an employee's religious observances on no firmer basis than the court's ability to imagine hypothetical harms—an exercise in extreme judicial deference reminiscent of rational basis review. Cf. *F.C.C.* v. *Beach Communications, Inc*., 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

Permitting an employer to circumvent the duty to provide a reasonable accommodation by contriving imaginary burdens has devastating results:

- A Muslim man working as a receptionist in a university residence hall asked not to work the midnight shift because it

interfered with prayer between 2-4 a.m., which his faith required. *Abdelwahab* v. *Jackson State Univ.*, No. CIV.A 309CV41TSLJCS, 2010 WL 384416, at *1 (S.D. Miss. Jan. 27, 2010). Although the university made no attempt to accommodate his request, the district court found that it had demonstrated an undue hardship because of the university's speculative burdens of "possibly incur[ring] overtime expense" and finding other employees willing to work a midnight shift. *Id.* at *2.

- A Home Depot store greeter who requested time off on Sundays in keeping with her Catholic faith lost her religious discrimination claim even though the store "ha[d] presented no evidence that it actually experienced a business loss from the lack of a greeter on Sundays." *George*, 2001 WL 1558315, at *10. Despite Title VII's requirement that an employer must demonstrate an alleged undue hardship, the district court intoned that "the law requires no such evidence." *Id.* Instead, the court pointed to hypothetical "[a]dverse impacts" that might occur if Home Depot accommodated the greeter and still concluded that accommodation would create an undue hardship. *Id.*

C. *Trans World Airlines, Inc.* v. *Hardison* should be revisited and overruled because it obscures the statutory meaning of "undue hardship," to the detriment of religious employees.

Forty years ago, this Court interpreted the "undue hardship" requirement of 42 U.S.C. § 2000e(j) to mean that, to avoid having to grant a religious accommodation, an employer need only show "a de minimis cost." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977) (footnote omitted). Replacing the statutory standard of "undue hardship" with the judge-made standard of "de minimis cost" invites employers to deny religious accommodations for the flimsiest of reasons. With this change, *Hardison* undermined the idea of an "undue hardship"—a carefully chosen formulation denoting that an employer would not incur an excessive burden from reasonably accommodating an employee's religious observance. In practice, the *Hardison* standard means that employees generally lose claims for religious accommodation, as employers invoke the exception with little to prove beyond mere inconvenience.

Hardison sets the bar for employers so low that allowing an employee to make a slight departure from a company-wide dress and appearance policy was held to be an undue hardship. See, e.g., *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 134–37 (1st Cir. 2004) (allowing an employee to have a facial piercing for religious reasons, in violation of the dress code, was an undue hardship). Denying other workers their preferred shifts to make a religious accommodation also

counts as an undue hardship. See *Adams* v. *Retail Ventures, Inc.*, 325 Fed. App'x 440, 443 (7th Cir. 2009). And allowing a police officer to wear a small gold cross on his uniform was held to be an undue hardship when department policy allowed uniform pins only if approved by the police chief. See *Daniels* v. *City of Arlington, Tex.*, 246 F.3d 500, 501, 506 (5th Cir. 2001). Perhaps most absurdly, the possibility that "other employees could have hard feelings" if a religious employee was allowed time off for his Sabbath day was a factor in the court's undue hardship analysis. *Leonce* v. *Callahan*, No. 7:03-CV-110-KA, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008).

Hardison has reduced the evidentiary burden on employers so severely that only unimaginative employers can fail to satisfy it. Review is warranted to revisit that decision and realign judicial doctrine with statutory text for the protection of religious Americans of all faiths.

D. The departures from statutory text that we describe cause severe hardship for economically vulnerable workers.

Our review of Title VII religious accommodation decisions reveals that the American workers most often raising religious accommodation claims are seldom lawyers, doctors, and bankers. Typically, claimants are blue-collar or unskilled workers.[4] They are grocery

[4] Petitioner exemplifies this trend. After beginning at Walgreen making $9.75 per hour, Patterson eventually became a supervisor

store clerks and store greeters, factory workers and mechanics, administrative assistants and maintenance personnel.[5] With limited financial resources, they are seldom able to wage a legal battle to vindicate their civil rights. Rarely do these claims come before a judge at all, much less before this Court: reported cases represent only the tip of the proverbial iceberg. Yet these workers have the greatest need for protection, as few can absorb the devastating blow of losing their jobs to practice their faith.

---

making $52,500 per year. Walgreen's purportedly "reasonable" accommodation was to let him return to the comparative penury of his previous entry-level position. See Pet. 6, 9 n.5.

[5] Many cases besides those discussed above illustrate how much the disarray in Title VII jurisprudence routinely falls on unskilled and blue-collar workers. See, e.g., *McCarter* v. *Harris Cty., Tex.*, No. CIV.A. H-04-4159, 2006 WL 1281087 (S.D. Tex. May 5, 2006) (entry-level maintenance worker); *Nobach* v. *Woodland Vill. Nursing Home Ctr., Inc.*, No. 1:11CV346-HSO-RHW, 2012 WL 3811748 (S.D. Miss. Sept. 4, 2012) (nursing home activity aide); *Shatkin* v. *Univ. of Texas at Arlington*, No. 4:06-CV-882-Y, 2010 WL 2730585 (N.D. Tex. July 9, 2010) (administrative assistants); *Prach* v. *Hollywood Supermarket, Inc.*, No. 09-13756, 2010 WL 3419461 (E.D. Mich. Aug. 27, 2010) (part-time grocery store clerk); *Mohamed* v. *1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017) (immigrant pet food factory production workers).

II. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT AFFECT MILLIONS OF AMERICANS FROM DIVERSE FAITH COMMUNITIES.

Seventh-day Adventists are hardly the only religious group affected by the courts' failure to vindicate the religious freedom guaranteed by Title VII. Even in this increasingly secular society, millions of Christians still observe Sunday as the Sabbath and other legal holidays like Christmas as days of religious observance. What's more, the Nation's growing religious diversity means that the number of Americans whose faith requires them to observe a Sabbath not on Sunday and holy days not recognized as legal holidays—and to observe religiously dictated dress and grooming standards—continues to increase. The legal standards governing religious accommodations under Title VII profoundly affect the rights of tens of millions of believing Americans.

A. Sabbaths, holy days, and the duty to worship

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

1. Christianity

One of the Ten Commandments declares: "Remember the sabbath day, to keep it holy. Six days you shall labor, and do all your work; but the seventh day is a Sabbath to the Lord your God; in it you shall not do any work." *Exodus* 20:8-10 (KJV). Millions of American Christians still interpret this command as forbidding gainful employment on the Sabbath.

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

Other Christian faiths interpret this commandment of Sabbath-day observance in similar terms. Members of The Church of Jesus Christ of Latter-day Saints believe that the Lord has commanded them to "go to the house of prayer and offer up thy sacraments upon my holy day" as "a day appointed unto you to rest from your labors, and to pay thy devotions unto the Most High." *Doctrine and Covenants* 59:9-10; see Russell M. Nelson, *The Sabbath Is a Delight* (Apr. 2015),

https://www.lds.org/general-conference/2015/04/the-sabbath-is-a-delight?lang=eng ("God gave us this special day, not for amusement or daily labor but for a rest from duty, with physical and spiritual relief. . . . We are under covenant to [keep the Sabbath].").

Jehovah's Witnesses not only have a mandatory Sabbath-day worship meeting but also a mid-week mandatory meeting too, often in the evening. See *Congregation Meetings of Jehovah's Witnesses*, JW.org (last visited Oct. 18, 2018), https://www.jw.org/en/jehovahs-witnesses/meetings/; *What Are Our Meetings Like?*, JW.org (last visited Oct. 18, 2018), https://www.jw.org/en/publications/books/jehovahs-will/meetings-of-jehovahs-witnesses/.

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

2. Judaism

Members of the Orthodox Jewish community interpret the Torah and Oral Law to prohibit working on the Jewish Sabbath (sundown on Friday to nightfall on Saturday) and designated Jewish holy days. See generally Rabbi Yosef Karo, 1 Shulchan Aruch Orach Chayim 242–365 (1977) (Sabbath prohibitions); *id.* at 495–529 (holy day prohibitions); see also Aryeh

Kaplan, *Sabbath: Day of Eternity*, *in* 2 The Aryeh Kaplan Anthology 107, 128 (1998). Sabbath restrictions extend beyond paid employment to encompass 39 categories of prohibited activity. See *The 39 Categories of Sabbath Work Prohibited by Law*, Orthodox Union (July 17, 2006), https://www.ou.org/holidays/shabbat/the_thirty_nine_categories_of_sabbath_work_prohibited_by_law/. Given the importance of these prohibitions to Orthodox Judaism, adherents feel it is required of an observant Jew to be willing to lose a job rather than work on the Sabbath. See 3 Karo, *supra*, at 308.

3. Islam

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

B. Religious dress and grooming standards

In addition to the observance of Sabbaths and holy days, many believing Americans demonstrate their faith in the workplace by complying with religious dress and grooming standards. These may include

ways of covering one's head, objects worn on one's body, or not cutting one's hair. Compliance reflects an outward manifestation of religious commitment.

1. Women's head coverings

Many Muslim women believe that Islamic scripture encourages, if not requires, them to cover their heads in public to be modest. See, e.g., *Al-Qur'an* 24:31; 33:59. The headscarf or veil Muslim women wear is often called a *hijab*. See Council on American-Islamic Relations, An Employer's Guide to Islamic Religious Practices (2017), https://www.cairma.org/wp-content/uploads/2017/05/Employer-Handbook-12-page-CAIR-MA.pdf. About 60% of Muslim women in this country report that they wear a *hijab* at least sometimes, including 36% who wear it whenever they are in public. See Pew Research Ctr., Muslim Americans: No Signs of Growth in Alienation or Support for Extremism § 2 (Aug. 30, 2011), http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

Married Orthodox Jewish women also wear various types of head coverings in public as a symbol of modesty and as a visible token of their married status. See Aaron Moss, *Why Do Jewish Women Cover Their Hair*, Chabbad.org (last visited Oct. 15, 2018), https://www.chabad.org/theJewishWoman/article_cdo/aid/336035/jewish/Why-Do-Jewish-Women-Cover-Their-Hair.htm.

Sikhs, both women and men, wear a comb in their hair called a *kanga*. See *FAQs*, Kaur Foundation (last visited Oct. 15, 2018), https://www.kaur-foundation.

org/faqs.html. It represents religious principles of mental order and discipline. Surinder Singh Johar, Handbook on Sikhism 94 (1977). Wearing the *kanga* is one of five articles of faith Sikhs commit to obey after undergoing an initiation called the Amrit Ceremony, where they promise to live by the Sikh code of conduct. See *id.*; W. Owen Cole, Understanding Sikhism 122 (2004). Living by this code is a fundamental tenet of the Sikh faith. See Kapur Singh, Me Judice 258–64 (2003). It also acts as a reminder that a Sikh must remain engaged in improving society rather than withdrawing into the life of an ascetic. See generally Gobind Singh Mansukhani, *Sikh Rahit Maryada and Sikh Symbols, in* Sikhism Its Philosophy and History 312 (Daljeet Singh & Kharak Singh eds., 1997).

2. Men's head coverings

Many Sikh men wear turbans.[6] These "turbans become a part of a Sikh's body and are usually removed only in the privacy of the house." *FAQ*, The Sikh Coalition (last visited Oct. 15, 2018), https:/www.sikhcoalition.org/about-sikhs/faq/. The color of the turban can also signify that the wearer supports or belongs to a particular party or movement within the Sikh faith. See Hew McLeod, *The Five Ks of the Khalsa Sikhs*, 128

[6] Sikh women do not generally wear a turban, though some sects require it. See Hew McLeod, *The Five Ks of the Khalsa Sikhs*, 128 J. Am. Oriental Soc'y 325 (2008). Also, some Sikh women will wear a head scarf called a *chunni*. See *Her Chunni, Her Brand*, Kaur Life (Sept. 16, 2014), https://kaurlife.org/2014/09/16/chunni-brand/.

J. Am. Oriental Soc'y 325 (2008). Covering one's hair with the turban represents religious values such as piety, courage, and dedication. See generally Sikhism Its Philosophy.

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

3. Other dress

Some faiths require their adherents to dress according to traditional gendered norms. For instance, Pentecostal Christian women do not wear pants. See, e.g., *McCarter*, 2006 WL 1281087, at *1 (Pentecostal convert "requested permission to wear a long, tapered skirt" at work because "[o]ne of the tenets of her new faith was that women could not wear men's clothing, including pants"); *Finnie* v. *Lee Cty.*, 907 F. Supp. 2d 750, 757 (N.D. Miss. 2012) (Pentecostal employee at juvenile detention center "requested an exemption from

the uniform policy" because "wearing pants would violate her religious beliefs").

4. Religious symbols

Many Catholics and other Christian believers feel a duty or desire born of their faith to wear a cross or Crucifix at all times—including in the office. See, e.g., *Daniels*, 246 F.3d at 501–02 (police officer fired for refusing to stop wearing a gold cross pin on his uniform). Some Jewish men follow the biblical command to wear knotted strings, called *tzitzit*, hanging from the corners of a four-cornered garment, and, for some, these strings must be visible to comply with the divine directive. See *Deuteronomy* 22:12 (KJV); *Numbers* 15:38-40 (KJV).

Sikhs who have committed to live by the Sikh code of conduct are required to wear a short dagger called a *kirpan* as one of the five articles of the Sikh faith. Johar, *supra*, at 95–96. The *kirpan* has a curved, blunted edge, and reminds Sikhs of their duty to promote justice and protect weaker members of society. See L.M. Joshi, *Ahimsa*, *in* 1 The Encyclopaedia of Sikhism, *supra*, at 19. Committed Sikhs also must wear a steel or iron band called a *karaa*, another element of the five articles of faith. See Johar, *supra*, at 95. The *karaa* represents the unbreakable bond between Sikhs and their faith. See *id*.

5. Hair and beards

For some, religious standards require a man to wear a beard or not to cut his hair.[7] Many understand Islam to dictate that men should wear beards. See Muhammed al-Jibaly, The Beard Between the Salaf & Kalaf ch. 1 (1999). So understood, "[t]his is not a discretionary instruction; it is a commandment," and refusing to grow a beard when one is capable "is a major sin." *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.).

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

The Sikh Code of Conduct commands adherents to keep all body hair "unshorn." Dawinder S. Sidhu & Neha Singh Gohil, Civil Rights in Wartime: The Post-9/11 Sikh Experience 1, 23, 43 (2009). For a Sikh man to cut his beard is a grave sin. See 2 The Encyclopaedia of Sikhism, *supra*, at 466 ("[T]he use of razor or shaving

---

[7] Beards or long hair for men may be a more common sight in workplaces today, but the long-standing grooming policy of the New York Yankees illustrates that some employers still require male employees to be clean-shaven and to wear their hair closely trimmed. See Daniel Barbarisi, *No Beards—And That's Final: The Yankees Have No Intention of Ever Dropping the Boss's Rules on Facial Hair*, WALL ST. J. (Feb. 23, 2013), https://www.wsj.com/articles/SB10001424127887324048904578320741510151474.

the chin shall be as sinful as incest."). Likewise, Sikh men and women may not cut any other hair as part of the article of faith called *kesh*. See Patwant Singh, The Sikhs 56 (1999). Violating this article of faith is considered "direct apostasy." 2 The Encyclopaedia of Sikhism, *supra*, at 466.

In short, by asking the Court to clarify extensive lower-court conflict and confusion and to correct the parlous state of Title VII jurisprudence on religious accommodation, the questions presented touch the lives of millions of Americans from diverse religious traditions.

III. RELIGIOUS FREEDOM IN EMPLOYMENT IS A CIVIL RIGHT.

Petitioner's demand for a religious accommodation asks this Court to vindicate his civil rights. Religious freedom in employment is a federal civil right—no less than any of our other civil rights.[8] Yet religious Americans often suffer discrimination in the workplace despite the law. The EEOC reports that since 1997 the number of religion-based employment discrimination

[8] It is ironic that religious accommodation claims get rough treatment in the courts when the text of Title VII treats religion more favorably than other protected classes. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation to Redeem Title VII*, 76 Tex. L. Rev. 317, 359, 406 (1997) ("[R]ace, national origin, and sex cases are the precise opposite of the religion cases. Where the former demand neutrality . . . , the latter require accommodation. And where the former separate status from conduct, protecting only status, the latter conflate them, protecting both.").

claims has skyrocketed by 101%, compared with a modest 4% increase in sex discrimination claims and a 2% decrease in race discrimination claims. See *Charge Statistics (Charges filed with the EEOC) FY 1997 Through FY 2017*, E.E.O.C. (last visited Oct. 15, 2018), https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

This worrisome trend suggests that the uncertain state of the law described by petitioner is thwarting congressional efforts to protect the religious freedom of American workers. Enshrined in the Civil Rights Act of 1964, the Nation's premier civil rights legislation, is the principle that an employer may not discharge a person because of his or her religion. Title VII of the Act provides, "It shall be an unlawful practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a). Under Title VII, the word religion "includes all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j). It follows that an employer engages in "an unlawful practice" by "discharg[ing] any individual" because of the employee's "religious observance and practice." *Id.* §§ 2000e-2(a), 2000e(j). The sole exception is when "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." *Id.* § 2000e(j).

Legislative history confirms the plain meaning of the text, that in adopting a generous meaning of "religion," Title VII "encompasses . . . the same concepts as are included in the [F]irst [A]mendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act." 118 Cong. Rec. S705 (daily ed. Jan. 21, 1972) (statement of Sen. Randolph). As the chief sponsor of the 1972 Amendments explained, "I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments." *Id.* Codified in Section 2000e(j), those Amendments were intended to solidify an employee's right to a reasonable accommodation in response to court decisions that "clouded the matter with some uncertainty." *Id.* at S706 (statement of Sen. Randolph); see also *Dewey* v. *Reynolds Metals Co*., 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689 (1971) (an employer satisfied Title VII by treating workers equally, without regard to religion).

Protecting in statute the right of employees to observe their Sabbath obligations is consistent with the history of Anglo-American religious freedom. For centuries, Sabbath worship was so intrinsic to religious faith that laws were enacted prohibiting commerce on Sunday. English statutes guarding Sunday from commercial activity date back to 1237. See *McGowan* v. *Maryland*, 366 U.S. 420, 431–32 (1961) (citing A.H. Lewis, A Critical History of Sunday Legislation 81–108 (1888)). This deeply engrained pattern of English law influenced legislation in the American colonies—even

those founded on the right of religious dissent. See Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729, 729 n.2 (1960) (citing Law Concerning Liberty of Conscience, 2 Pa. Stats. at Large 34 (1700)). Sunday closing laws "persevered after the Revolution and, at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor." *McGowan*, 366 U.S. at 433. Even when these laws shed their strictly religious rationale, and became a uniform day of rest, most states maintained laws restricting Sunday labor. See *id.* at 435 ("Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system.").

Considering the historical pattern of Sunday worship, it should not be surprising that the modern understanding of religious freedom under the First Amendment recognizes that the government may not penalize an employee for taking time off work to keep his Sabbath day. One of the Court's leading decisions under the Free Exercise Clause held that state unemployment benefits could not be denied to a Seventh-day Adventist who refused to work on Saturdays—virtually the same conflict petitioner faces here. See *Sherbert* v. *Verner*, 374 U.S. 398, 408–09 (1963). The Court criticized the state for putting the employee to an impossible choice:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning

> one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

Sherbert's constitutional insight—forcing an employee to choose between his job and his faith violates his religious freedom—finds its statutory parallel in the EEOC's interpretation of Title VII. The Commission reads Section 2000e(j) to mean that "[a]n accommodation is not 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work." EEOC Compliance Manual, Religious Discrimination, at 50–51 (2008), https://www.eeoc.gov/policy/docs/relig-ion.pdf; see *id*. at 54 (Example 32). Likewise, the EEOC requires an employer to produce actual evidence of undue hardship, rather than relying on speculation. See *id.* at 57–58 ("An 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. . . . The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.").

EEOC's robust understanding of religious accommodation is echoed in the official interpretation of Title VII by the U.S. Department of Justice. Pursuant to Executive Order No. 13798 § 4, 82 Fed. Reg. 21,675 (May 4, 2017), the Department has issued a memorandum

describing its understanding of federal law protecting religious liberty. Under Title VII, the Department explained, "covered employers are required to adjust employee work schedules for Sabbath observance, religious holidays, and other religious observances, unless doing so would create an undue hardship, such as materially compromising operations or violating a collective bargaining agreement." Memorandum from Attorney Gen. Jeff Sessions for All Executive Departments and Agencies, Federal Law Protections for Religious Liberty 5 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/ 1001891/download. Nor is this idle musing. The Attorney General has directed all components of the Department and every executive agency to "incorporate the interpretative guidance in litigation strategy and arguments." See Memorandum from Attorney Gen. Jeff Sessions for All Executive Departments and Agencies, Implementation of Memorandum on Federal Law Protections for Religious Liberty 1 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001886/download.

These official interpretations of Title VII stand in stark contrast with the decision below. Both the EEOC and the Justice Department interpret Title VII as requiring an employer to offer an employee like the petitioner a genuine accommodation to observe his Sabbath. Given the disparity between that conception of Title VII and the decision below, we join the petitioner in urging the Court to call for the views of the Solicitor General.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

ALEXANDER DUSHKU
Counsel of Record
R. SHAWN GUNNARSON
KIRTON MCCONKIE
Key Bank Tower
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
adushku@kmclaw.com

Counsel for Amici Curiae

October 17, 2018