No. 19-____

In the Supreme Court of the United States

JASON SMALL, PETITIONER

v.

MEMPHIS LIGHT, GAS & WATER, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In Title VII of the Civil Rights Act of 1964, Congress generally prohibited private employers from discriminating against an individual "because of such individual's * * * religion." 42 U.S.C. §§ 2000e–2(a)(1) and (2). In 1972, Congress amended the statute to specify that "'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." *Id*. § 2000e(j).

The question presented is:

Whether *Trans World Airlines, Inc*. v. *Hardison*, 432 U.S. 63, 84 (1977), which stated that employers suffer an "undue hardship" in accommodating an employee's religious exercise whenever doing so would require them "to bear more than a de minimis cost," misinterprets § 2000e(j) and should be overruled.

PARTIES TO THE PROCEEDINGS

Petitioner, Jason Small, was the plaintiff in the district court and the appellant in the court of appeals.

Respondent, Memphis Light, Gas & Water, was the defendant in the district court and the appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

Small v. *Memphis Light Gas & Water*, No. 2:17-cv-02118 (Sept. 11, 2018)

United States Court of Appeals (6th Cir.):

Small v. *Memphis Light, Gas & Water*, No. 19-5710 (Mar. 12, 2020)

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INTRODUCTION

This case presents an exceptionally important and recurring question: whether Title VII of the Civil Rights Act of 1964 requires employers to make more than de minimis efforts to accommodate their employees' religious practices. Taken at its word, Title VII requires accommodation of religious employees whenever doing so would not cause "undue hardship." But in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), this Court, contrary to plain English and the statute's structure, history and purpose, read "undue hardship" to mean anything "more than a de minimis cost." That decision "effectively nullif[ied]" the statute, and "[a]ll Americans" have since been "poorer" —especially the "thousands" forced to choose between their "livelihood" and their "conscience." *Id.* at 89, 96–97 (Marshall, J., dissenting).

Three current Justices, the United States, and commentators across the spectrum have called for the Court to "consider whether *Hardison*'s interpretation should be overruled." *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari). As the three Justices recognized, *Hardison*'s de minimis standard is not "the most likely interpretation" of "'undue hardship.'" *Ibid.* The United States was more blunt: *Hardison* is "incorrect." U.S. Invitation Br. 19, *Patterson* v. *Walgreen Co.*, No. 18–349 (2018) ("U.S. *Patterson* Invitation Br.").

Nor is this error inconsequential: "[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964," and Title VII affects myriad religious liberty claims annually. *Bostock* v. *Clayton County*, No. 17-1618, slip op. at 2 (U.S. June 15, 2020). "The American story is one of religious pluralism,"

and the Founders "wrote that story into our Constitution." App. 14a (Thapar J., concurring). Yet *Hardison* "thwarted" Congress's bipartisan efforts to honor that tradition, and the ruling continues to harm "religious minorities." *Ibid.* This Court should right that wrong, and this case presents an ideal opportunity to do so.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a–14a) is reported at 952 F.3d 821. The district court's opinion (App. 15a–43a) is unreported.

JURISDICTION

The Sixth Circuit issued its judgment on March 12, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e–2(a)(1) provides in relevant 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) defines "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. The religious accommodation requirement of Title VII of the Civil Rights Act

Under Title VII, employers may not "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)(1). As originally enacted, Title VII did not explicitly require employers to accommodate employees' religious practices. Guidelines issued by the Equal Employment Opportunity Commission (EEOC) in 1966, however, read the statute to require reasonable accommodation of religious practices absent "serious inconvenience." 29 C.F.R. § 1605.1 (1967); see 118 Cong. Rec. 705–731 (1972).

A year later, in response to numerous complaints related to Sabbath observance and religious holidays, the EEOC stiffened its Guidelines to require accommodation absent "undue hardship." 29 C.F.R. § 1605.1 (1968); see David M. Ackerman, Cong. Research Serv., No. 77–163A, *Religious Discrimination in Employment: An Analysis of* Trans World Airlines *v.* Hardison 5 (1977). But the courts "question[ed] whether the guidelines were consistent with Title VII." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Most notably, in *Dewey* v. *Reynolds Metal Co.*, the Sixth Circuit rejected a claim based on the denial of an employee's request for accommodation of his objection to working overtime on Sundays. 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971).

In 1972, in response to *Dewey*, Senator Jennings Randolph introduced legislation "tracking" the EEOC regulation and amending Title VII to require religious

accommodation. *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting). Randolph, a Seventh Day Baptist, explained that some employers discriminated against those "whose religious practices rigidly require[d] them to abstain from work * * * on particular days." 118 Cong. Rec. 705. As a result of economic "pressures" on adherents, some Sabbath-observing faiths suffered "dwindling" membership. *Id.* at 706. The amendment was thus designed to protect both "religious freedom" and "the[] opportunity to earn a livelihood." *Ibid*.

As amended, Title VII requires employers to "reasonably accommodate" "all aspects" of an "employee's * * * religious observance or practice" that can be accommodated "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Otherwise, adverse actions taken against an employee for engaging in a religious practice are taken "because of such individual's * * * religion," in violation of the statute. *EEOC* v. *Abercrombie & Fitch Stores Inc.*, 135 S. Ct. 2028, 2032 (2015).

Title VII further states that, absent "an intention to discriminate" based on a protected classification, "it shall not be an unlawful employment practice" for employers to treat employees differently "pursuant to a bona fide seniority or merit system." 42 U.S.C. § 2000e–2(h); see *Hardison*, 432 U.S. at 81–82. As explained below, the accommodations that petitioner seeks do not conflict with respondent's seniority policy.

B. This Court's decisions interpreting Title VII's religious accommodation requirement

Hardison was this Court's first merits decision assessing a religious accommodation claim under Title VII. Hardison, a member of the Worldwide Church of

God, abstained from work on Saturdays. 432 U.S. at 67–68. When he was transferred to a new position at TWA, his seniority was no longer sufficient for him to avoid working on his Sabbath. *Id.* at 68. TWA rejected Hardison's request to work a four-day week, as that would have left the shift shorthanded or required TWA to pay premium wages to his replacement. *Id.* at 68–69. When Hardison did not show up to work on Saturday, he was fired. *Id.* at 69.

The Court ruled against Hardison, concluding that "TWA made reasonable efforts to accommodate" and that further accommodation "would have been an undue hardship" under pre-1972 Title VII, as "construed by the EEOC guidelines." *Id.* at 77. Title VII did not require TWA to violate "an agreed-upon seniority system * * * to accommodate religious observances," the Court stated, or contemplate the "unequal treatment" of "deny[ing] the shift and job preferences of some" to "prefer the religious needs of others." *Id.* at 79–81.

As to the possibility of a four-day week, the Court reasoned that such an accommodation would "involve costs to TWA, either in the form of lost efficiency" or "higher wages," and that "requir[ing] TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84. Notably, however, "the parties' briefs in *Hardison* did not focus on the meaning of ['undue hardship']"; neither the parties nor the United States "advanced the *de minimis* position"; and "the Court did not explain the basis for this interpretation." *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring in the denial of certiorari).

Justice Thurgood Marshall, joined by Justice William Brennan, dissented. It "makes a mockery of the statute," Justice Marshall noted, to reject a religious

accommodation "simply because it involves preferential treatment." *Hardison*, 432 U.S. at 87–88. Observing that such treatment was required absent "'undue hardship,'" he "question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost.'" *Id.* at 88, 92 n.6.

This Court has never since applied *Hardison*'s de minimis standard. In *Ansonia Board of Education* v. *Philbrook*, for example, the Court repeated *Hardison*'s standard without applying it. 479 U.S. 60, 67 (1986). But the lower federal courts—all eleven circuits to address the issue—treat *Hardison* as binding.[1]

C. Jason Small's employment with Memphis Light, Gas & Water

Jason Small is an Elder in the Collierville Congregation of Jehovah's Witnesses in Collierville, Tennessee, a Memphis suburb. App. 33a, 57a–58a. As a congregational leader, he must attend service on Wednesday evenings and Sundays. He is also required to witness to the community sometime on Saturdays and to

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[1] *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004); *Baker* v. *Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006); *EEOC* v. *Geo Grp., Inc.*, 616 F.3d 265, 273 (3d Cir. 2010); *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Davis* v. *Fort Bend Cty.,* 765 F.3d 480, 488–489 (5th Cir. 2014); *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *EEOC* v. *Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997); *Harrell* v. *Donahue*, 638 F.3d 975, 980 (8th Cir. 2011); *Balint* v. *Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999); *Tabura* v. *Kellogg USA*, 880 F.3d 544, 557 (10th Cir. 2018); *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995).

participate in special services a few times a year. App. 2a, 17a.

For more than a decade, Small worked as an electrician at Memphis Light, Gas and Water (MLGW), "the largest three-service public utility in the nation."[2] Throughout this period, his work schedule allowed him to satisfy his religious obligations without incident. App. 17a. In early 2013, however, Small injured his wrist on the job. When an MLGW-approved doctor determined that he could no longer safely work as an electrician, he sought reassignment to a job that he could perform without violating his religious obligations. While awaiting reassignment, he was placed on reduced salary. *Ibid*.

What followed was a frustrating series of events in which MLGW repeatedly offered Small jobs that did not allow him to attend his worship services, while refusing to make accommodations that would have solved that problem without any undue hardship. Although some details are disputed, the case arises on MLGW's motion for summary judgment, so the Court must resolve those disputes and draw all reasonable inferences in Small's favor. *Tolan* v. *Cotton*, 572 U.S. 650, 656–657 (2014).

The bone of contention at every point was mandatory overtime: Unless Small's need to attend religious services were accommodated, any job with mandatory overtime duties would conflict with his right to practice his religion. Exemptions from the mandatory overtime at issue are not governed by seniority, and thus raise no issue under 42 U.S.C. § 2000e–2(h),

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[2] http://www.mlgw.com/about/governed.

which protects bona fide "seniority" systems.[3] Rather, the "Work Rules" in the department that Small eventually joined provide: "Service Dispatching personnel may be required to work overtime *when the employee has the least number of cumulative overtime hours and all other available employees have passed the overtime*." App. 44a, 47a (emphasis added). Any mandatory overtime accommodation is thus judged under Title VII's general "undue hardship" standard.

Small first sought reassignment as an inspector in the revenue protection department—a position that, like his earlier post, would not have conflicted with his religious services. App. 18a. Small was qualified for the job, and an MLGW-approved doctor opined that he could perform the essential functions listed in the job description. App. 18a–19a. In response, however, MLGW's medical coordinator provided the doctor with a list of additional duties, some of which the doctor doubted Small could do (with the reservation that the duties seemed peripheral to the job). App. 20a–21a. Small was not offered the job. App. 2a.

MLGW then suggested that Small take a position as a service advisor. This position, however, required mandatory overtime, so Small declined it. App. 21a. MLGW then offered Small a similar position, service dispatcher, with the same mandatory-overtime requirement. This time, however, MLGW told Small he

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[3] The district court said otherwise (App. 34a), apparently based on MLGW's unsupported assertion (D.I. 70 at 3). MLGW has never cited any evidence showing that mandatory overtime is assigned based on seniority. But even if MLGW's policy could be disputed, Small's evidence must be credited for summary judgment purposes.

could be fired if he declined the job, only four months into his twelve-month reassignment window. App. 2a.

Faced with being an out-of-work electrician with a chronic wrist injury, Small accepted the job, hoping he might somehow avoid the seemingly inevitable scheduling conflicts with his religious obligations. *Ibid.* Because dispatchers on vacation are not "available" for mandatory overtime under MLGW's rules, Small tried to avoid those conflicts by using vacation time to avoid overtime assignments during worship services. App. 23a; D.I. 54–1 at 46 ("If staffing is needed, dispatchers NOT approved for vacation or PTO & are *eligible* to work will be REQUIRED to work."). Unfortunately, however, this was not always possible. Small thus requested one of two accommodations: to be placed back into the reassignment pool to find another position, or to be exempted from shifts and mandatory overtime that conflicted with his services. App. 22a–23a.

MLGW denied Small's request to be placed back in the reassignment pool, explaining that, although reassignment was available to employees with "unsatisfactory job performance," he "had not received any unsatisfactory reviews." App. 22a & n.7 ("[A]n employee may be returned to their prior position during the trial period on the basis of performance deficiencies. There have been no performance deficiencies during your trial period[.]"); *ibid.* (finding "no evidence of an unsatisfactory performance"). If Small had been a worse employee, he would have been accommodated.

MLGW also denied Small's request to be exempted from conflicting shifts or mandatory overtime. But while MLGW cited its use of seniority to "assign[] shifts" (App. 22a & n.7, 23a; D.I. 54–1 at 38), it offered

no reason why accommodating Small's *mandatory overtime* conflict would either violate its seniority system or cause undue hardship.

That fall, Small filed an EEOC charge alleging disability and religious discrimination. D.I. 49–9 at 1. Meanwhile, he kept reiterating his request for exemptions from working shifts and mandatory overtime during his religious services. Each time, he was denied—until 2014, when MLGW *partially* relented, as to shift assignments. Small was allowed to "blanket swap" regular shifts once a quarter, but he was not accommodated for mandatory overtime—the nub of the problem. App. 23a.

These scheduling conflicts came to a head in 2015. Small had requested vacation to attend services on Good Friday for the Memorial of Christ's Death, the "most sacred event" in the Jehovah's Witness faith. D.I. 54–1 at 37; D.I. 49–9 at 3; JW.org, *Memorial of Jesus' Death* (2020).[4] More than a month in advance, he requested and received vacation for this holy day. But when the time came, MLGW cancelled his vacation, fully aware of the implications. D.I. 49–9 at 3. Small complained, but management told him nothing could be done. D.I. 54–1 at 37. As required by his faith, he missed work to attend the service. *Id.* at 40.

Small was again required to report for mandatory overtime the following Wednesday, during his weekly service. App. 59a–60a. Here too, Small had requested vacation, which MLGW had approved weeks earlier. *Ibid.*; D.I. 62–15. But this time Small's vacation fell

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[4] Available at: https://www.jw.org/en/jehovahs-witnesses/memorial/.

prey to a Kafkaesque bureaucratic twist. At the quarterly shift change, Small had successfully obtained a schedule excluding Wednesdays, which should have eliminated the conflict between his work schedule and Wednesday worship. Because he was not regularly scheduled on Wednesdays, however, company policy prohibited him from taking Wednesdays off—which meant he could no longer use vacation to avoid conflicts with Wednesday services. D.I. 54–1 at 37. Small complained, again without success, and again missed work to attend the service. *Id.* at 37, 40.

For attending his services rather than working on Good Friday and the following Wednesday, Small was suspended for two days without pay. App. 24a.

D. The district court's decision

Small sued, alleging religious discrimination under Title VII, disability discrimination under the ADA, and retaliation. D.I. 1.

MLGW moved for summary judgment on all claims. The district court granted the motion. App. 43a, 27a. As to the religious discrimination claim, the court assumed that Small had made out a prima facie case, but held that MLGW "offered accommodations [from conflicting shifts] by allowing a 'blanket swap,'" and that further "accommodations would result in an undue hardship." App. 33a. The court recognized, however, that blanket swaps did not address the conflicts with mandatory overtime: Small missed work "not because he was assigned to a regular shift that conflicted with his obligations but because he was being asked to work mandatory overtime." App. 34a. "[A]ttempts were not made" to accommodate the mandatory overtime conflicts. App. 35a.

The court held that Small's requested accommodations—being returned to the reassignment pool or exempted from mandatory overtime during religious worship—"would result in an undue hardship." App. 33a. Returning to the reassignment pool, which would entail paying Small a reduced wage not to work, "would, as a matter of law, place more than a de minimis burden on MLGW." App. 35a.

As to exempting Small from mandatory overtime, the court held that MLGW was not required to accommodate Small for two reasons. First, the court asserted (incorrectly, see App. 47a–48a) that mandatory overtime was "assigned based on seniority," and thus that accommodating Small would be an undue hardship because "MLGW's obligation to upset seniority status" is "limited." App. 34a. Second, "shifting all of the relevant mandatory overtime obligations to other employees * * * would, as a matter of law, place more than a de minimis burden on MLGW." App. 35a.

E. The court of appeals' decision

Small appealed. In his opening brief, he contended "that MLGW discriminated against him based on his religion when [it] knowingly placed him into a job with regular shift changes along with sporadic mandatory overtime that would inevitably interfere with Small's religious obligations." App. 56a–57a. Small maintained that the requested accommodations—exemption from mandatory overtime during his worship services or return to the reassignment pool—"would have at most caused MLGW a *de minimis* burden."

App. 57a.[5] He also argued that the district court's rejection of the accommodations on "undue hardship" grounds was "erroneous." App. 59a.

The Sixth Circuit affirmed, holding that MLGW "did not have to offer any accommodation that would have imposed an 'undue hardship' on its business—meaning (apparently) anything more than a 'de minimis cost.'" App. 5a (quoting *Hardison*, 432 U.S. at 84). Accepting MLGW's assertion that "additional accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system," the court stated: "Our court has found similar costs to be more than de minimis." App. 5a–6a (citations omitted).

Despite having addressed the undue hardship issue, the court stated that "Small has not challenged whether the accommodations would have imposed an undue hardship on the company—beyond a passing assertion in his brief. Instead, he argues only about whether the company *did* accommodate his religious beliefs." App. 6a. As recounted above, however, Small had argued that his requested accommodations would impose no undue hardship, and MLGW responded at length without suggesting forfeiture. C.A. Appellee's Br. 42 ("2. Further accommodation of Plaintiff's religious needs presented an undue hardship to MLGW.").

In a concurrence joined by Judge Kethledge, Judge Thapar criticized the "de minimis" standard at length, explaining that it conflicts with the ordinary meaning of "undue hardship." App. 9a–11a. As Judge Thapar

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[5] Small also appealed disability discrimination, hostile work environment, and settlement-related issues, but this petition raises no question concerning those issues.

noted, "the word 'hardship'" alone "would imply some pretty substantial costs," and Congress "specified that the 'hardship' must be 'undue.'" App. 9a. Judicial interpretations of "undue hardship" elsewhere in the U.S. Code confirm that it typically means "significant difficulty or expense," or more than "garden-variety hardship." *Ibid.* Judge Thapar thus concluded that *Hardison*'s reading lacks textual support, and that any Establishment Clause concerns that may have influenced *Hardison* are foreclosed by later precedents. App. 12a–13a. Finally, he noted that *Hardison* primarily "harm[s] religious minorities," in conflict with the value of "religious pluralism." App. 14a.

REASONS FOR GRANTING THE PETITION

This case raises an important and recurring question that urgently warrants review: Is any religious accommodation that imposes more than a "de minimis" cost an "undue hardship" under Title VII? In *Hardison*, where the de minimis standard first appeared (432 U.S. at 84), the Court did not say how it arrived at that reading of the statute, which neither party nor the United States advocated. As the dissent there recognized, the de minimis rule "makes a mockery" of Title VII: It flouts "simple English usage" and compels "thousands of Americans" to choose between staying true to their faith and staying employed. *Id.* at 96–97, 92 n.6 (Marshall, J., dissenting). *Hardison* also all but guarantees employers a win; and whatever doctrinal concerns animated the decision, none "remain[] valid." App. 13a (Thapar, J., concurring).

Several Justices of this Court, the EEOC, the concurrence below, and a host of academic commentators have recognized that the Court "should reconsider the

proposition * * * that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a de minimis burden." *Patterson*, 140 S. Ct. at 685 (Alito, J., concurring in denial of certiorari); see also *Abercrombie*, 135 S. Ct. at 2040 n.* (Thomas, J., concurring and dissenting in part); App. 14a (Thapar, J.); *infra* at 23–25. This case, moreover, provides an excellent vehicle for doing so. It involves a dedicated employee of longstanding service, a major employer capable of accommodating his scheduling needs without undue hardship (properly understood), and a scheduling conflict typical of myriad cases.

Small made more than a "passing assertion" supporting his "undue hardship" claim below (App. 6a)—enough to alert MGLW to provide a full response without suggesting forfeiture. Even if he somehow failed to raise the issue as fully as the court below might have wished, however, the court addressed the issue on the merits (App. 5a–6a), which itself enables this Court to decide it. And it makes little sense to require an extended argument on a point clearly foreclosed by binding Supreme Court precedent.

In sum, *Hardison* unfairly stacks the deck against employees, particularly religious minorities, without warrant in Title VII, and the decision continues to impose negative consequences on thousands of employees. The Court should grant certiorari and "consider whether *Hardison*'s interpretation should be overruled." *Patterson*, 140 S. Ct. at 686 (Alito, J.).

I. This Court should revisit *Hardison*'s conclusion that employers suffer "undue hardship" whenever accommodating employees' faith imposes "more than a de minimis cost."

It is for good reason that several Justices, two circuit judges below, the United States, and numerous commentators have called for *Hardison* to be revisited: The decision lacks support in Title VII's text, structure, history, or purpose, governs thousands of claims, imposes severe consequences on religious minorities, has been undercut by later decisions, and can workably be replaced by a standard faithful to the statute.

A. As the United States has recognized, *Hardison*'s atextual reasoning cannot be reconciled with the text, structure, history, or purpose of Title VII.

We begin with a simple but vital point: *Hardison*'s conclusion that employers suffer "undue hardship" whenever accommodating religious employees entails "more than a de minimis cost" (432 U.S. at 84) makes a mockery of Title VII. As the EEOC—the agency charged with enforcing the statute—has explained: *Hardison* is "incorrect" and should be revisited. U.S. *Patterson* Invitation Br. 19.

1. As to text, *Hardison*'s standard conflicts with "the ordinary public meaning of Title VII's command." *Bostock*, slip op. at 7. "[S]imple English usage" does not "permit[] 'undue hardship' to be interpreted to mean 'more than de minimis cost.'" *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). Dictionaries from the relevant period define "hardship" as "a thing hard to bear." App. 9a (Thapar, J., concurring) (quoting *Webster's New Twentieth Century Dictionary of the*

English Language 826 (2d ed. 1975)).[6] For its part, "undue" means "excessive." *Ibid.* (quoting *The American Heritage Dictionary of the English Language* 1398 (1969)).[7] Taken together, then, suffering "undue hardship" involves experiencing not just *some* difficulty, but *excessive* difficulty. For accommodation to be denied to an employee, therefore, it must impose at least "significant costs" on the employer. *Ibid.*

"'De minimis,'" by contrast, "means a 'very small or trifling matter'"—"the opposite of an 'undue hardship.'" App. 11a (quoting *Black's Law Dictionary* 388). To state the obvious, a burden can be more than trifling without being excessive. As the United States has observed, interpreting "undue hardship" to "mean any cost that is 'more than a trifle'" is an "ill fit to the word 'undue,'" which ordinarily means "'excessive.'" U.S. *Patterson* Invitation Br. 19 (quoting *American Heritage Dictionary* 1398). Without any textual analysis, however, *Hardison* declared that anything more than the slightest burden is "undue." 432 U.S. at 84; see Arthur Larson, *Discrimination as a Field of Law*, 18 Washburn L.J. 413, 419–420 (1979) (criticizing the "remarkable sentence" in which the Court announced the de minimis standard).

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[6] Accord *Random House Dictionary of the English Language* (1968) ("a condition that is difficult to endure; suffering; deprivation; oppression"); *Webster's New Collegiate Dictionary* (1971) ("suffering, privation").

[7] Accord *Random House Dictionary of the English Language* (1968) ("unwarranted; excessive" "inappropriate; unjustifiable; improper."); *Webster's New Collegiate Dictionary* (1971) ("inappropriate, unsuitable," or "exceeding or violating propriety or fitness").

"Congress has typically defined 'undue hardship'" as involving significant difficulty or costs. App. 9a. (Thapar, J.). Most tellingly, in adopting a reasonable accommodation requirement in the Americans with Disabilities Act (ADA), Congress explicitly rejected *Hardison*'s interpretation of "undue hardship" in favor of a "significant difficulty or expense" standard. See S. Rep. No. 101–116, at 36 (1989) (rejecting "the principles enunciated by the Supreme Court in [*Hardison*]"); 42 U.S.C. §§ 12112(b)(5)(A), 12111(10). As one would expect, what is "undue" for ADA purposes varies with factors such as the accommodation's "cost" and "impact" on "operation[s]," together with the employer's "size," "type," and "financial resources." *Id.* § 12111(10)(B)(i)–(iii). Many other laws likewise define "undue hardship" to mean "significant difficulty or expense." App. 10a (Thapar, J.) (citing 28 U.S.C. § 1869(j) (jury service); 29 U.S.C. § 207(r)(3) (Fair Labor Standards Act); 38 U.S.C. § 4303(15) (veteran employment)).

Even where, as here, Congress has used the term "undue hardship" without defining it, court decisions interpreting that term make *Hardison* look all the more anomalous. The Bankruptcy Code, for example, allows debtors to discharge student loans that work an "undue hardship." 11 U.S.C. § 523(a)(8). But as Judge Thapar noted, the courts have held that "'[t]he plain meaning' of that term * * * requires the debtor to show that the debt imposes 'intolerable difficulties * * * greater than the ordinary circumstances that might force one to seek bankruptcy relief'" (App. 10a (quoting *In re Thomas*, 931 F.3d 449, 454 (5th Cir. 2019))), and that "the adjective 'undue' indicates that Congress viewed garden-variety hardship as [an] insufficient excuse." *Ibid.* (quoting *In re Frushour*, 433

F.3d 393, 399 (4th Cir. 2005) (quoting *In re Rifino*, 245 F.3d 1083, 1087 (9th Cir. 2001))). One searches *Hardison* in vain for any explanation, let alone a convincing one, of why the ordinary meaning of Title VII's use of "undue hardship" should be different.

2. While failing to analyze the term "undue hardship," the majority in *Hardison* declared that Title VII did not "contemplate" the "prefer[ential]" treatment of "religious needs" over "nonreligious[] reasons for not working on weekends." 432 U.S. at 81, 84–85; see *id.* at 71–72 ("similarly situated employees are not to be treated differently solely because they differ with respect to [religion]"). As Justice Marshall recognized, however, that view "effectively nullif[ies]" the statute. *Id.* at 87. And this Court has since held that "Title VII does not demand mere neutrality" toward "religious practices"—"it gives them favored treatment." *Abercrombie*, 135 S. Ct. at 2034.

Title VII is structured not only to prohibit discrimination based on religious "belief," but to require accommodation of "religious observance and practice" where doing so would not work an "undue hardship." 42 U.S.C. § 2000e(j); see *Abercrombie*, 135 S. Ct. at 2036 (Alito, J., concurring in the judgment) ("If neutral work rules * * * precluded liability, there would be no need to provide [an undue hardship] defense."). The idea that the statute does not "contemplate" any "prefer[ential]" treatment of employees' "religious needs" (*Hardison*, 432 U.S. at 81) thus effectively limits the statute to a bar on belief-based discrimination, in violation of "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."

Corley v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and citations omitted). It also defies the presumption that Congress "intends its amendment[s] to have real and substantial effect[s]." *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

3. The statute's history powerfully confirms that the undue hardship standard should be reasonably stringent. As originally enacted, Title VII did not explicitly require religious accommodation. The EEOC read the unamended statute as obligating employers to accommodate religious employees absent "serious inconvenience." 29 C.F.R. § 1605.1 (1967). In response to complaints about failures to accommodate Sabbath observance and religious holidays, however, the EEOC strengthened the standard to require accommodation absent "undue hardship." *Ibid*. (1968). When Congress made the accommodation requirement explicit, it selected this "stiffened" standard. Ackerman, *supra*, at 5. Yet *Hardison*'s "de minimis" standard is even weaker than the "serious inconvenience" standard that Congress rejected.

Further, as Justice Marshall noted, the "instructive" legislative history shows that the "primary purpose of the [1972] amendment" was "to make clear that Title VII requires religious accommodation, even though unequal treatment would result," and "to protect Saturday Sabbatarians"—"'whose religious practices rigidly require them to abstain from work * * * on particular days.'" *Hardison*, 432 U.S. at 89 (quoting 118 Cong. Rec. 705 (1972) (statement of Sen. Jennings Randolph)). And the notion that religious accommodation is out of keeping with an antidiscrimination statute is even harder to square with today's U.S. Code, which requires employers to accommodate

disabled employees absent "undue hardship," defined as "significant difficulty or expense." *Supra* at 18.

4. It seems likely that *Hardison*'s strained reading was based on concerns that reading the statute to require "prefer[ential]" treatment of "religious needs" over "nonreligious[] reasons for not working on weekends" would violate the Establishment Clause. *Id*. at 81, 84–85. Even in 1977, that concern was far-fetched —as explained by Justice Marshall, a strict separationist, who dissented. *Id*. at 89–90. Regardless, any "doctrinal merit that [this] concern once may have had" no longer "remains valid." App. 13a (Thapar, J.).

This Court has repudiated the view that statutes that "single[] out" religious individuals or entities for "special consideration" necessarily violate the Establishment Clause. *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch*. v. *EEOC*, 565 U.S. 171, 189 (2012). Moreover, in *Cutter* v. *Wilkinson*, the Court unanimously rejected the view that it is unconstitutional to require accommodation of religious needs at the expense of "other significant interests." 544 U.S. 709, 722 (2005). Although an "'absolute and unqualified right'" to accommodation raises Establishment Clause concerns, "appropriately balanced" accommodation requirements are entirely permissible. *Ibid*. A requirement of "reasonable accommodation," short of "undue hardship," is a quintessential example of an appropriate balance. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

In sum, "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson*, 140 S. Ct. at 686 (Alito, J.).

In fact, that reading "is not a reasonable interpretation of th[at] statutory phrase" (U.S. *Patterson* Invitation Br. 8), as all "the traditional tools of statutory interpretation" foreclose it. App. 8a (Thapar, J.). This Court should thus revisit *Hardison*.

B. *Hardison*'s de minimis standard thwarts thousands of claims, and precludes many others from being filed.

If *Hardison* had involved a law that applied only rarely, perhaps it could be allowed to stand. But the Court was interpreting a core provision of the nation's signature civil rights law: Title VII's religious nondiscrimination requirement. That requirement applies to employers with more than fifteen employees (42 U.S.C. § 2000e(b)), and to thousands of claims—not to mention those never filed because *Hardison* creates an insurmountable barrier to relief.

1. In a typical year, the EEOC receives more than 2900 charges of religious discrimination, over 560 of which involve accommodation requests. EEOC, *Religion-Based Charges (Charges filed with EEOC) FY 1997–FY 2019* (2019) ("Religion-Based Charges");[8] EEOC, *Bases by Issue (Charges filed with EEOC) FY 2010–FY 2019* (2019) ("Bases by Issue").[9] Moreover, the number of religion-based charges "more than doubled from 1992 to 2007." EEOC Guidance, *Section 12:*

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[8] Available at: https://www.eeoc.gov/enforcement/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2019.

[9] Available at: https://www.eeoc.gov/enforcement/bases-issue-charges-filed-eeoc-fy-2010-fy-2019

Religious Discrimination (2008).[10] Even these troubling figures likely understate religious discrimination in the workplace. As a recent Justice Department report found, "religious discrimination in employment settings" has long been underreported. U.S. Department of Justice, *Combating Religious Discrimination Today: Final Report* 17–18 (July 2016).[11]

2. Many employees never file religious accommodation claims, knowing the claims are dead on arrival. Under the de minimis standard, employers routinely win as a matter of law simply by saying they would have to do more than lift a finger. As Justice Marshall noted, Hardison could have been accommodated for $150—a "far from staggering" cost (432 U.S. at 92 n.6)—but even that sum was deemed too burdensome to impose on "one of the largest airlines in the world." App. 11a (Thapar, J.). Thus, commentators immediately recognized that *Hardison* "impose[d] only a very minimal affirmative duty of accommodation, if any, on the employer." Ackerman, *supra*, at 14. As the Ninth Circuit remarked shortly after *Hardison*, "a standard less difficult to satisfy * * * is difficult to imagine." *Yott* v. *N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979).

Indeed, "lower courts almost never require an employer to occur any economic or efficiency costs." Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp.

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[10] Available at: https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[11] Available at: https://www.justice.gov/crt/file/877936/download.

& Lab. L. 575, 610–611 (2000). Numerous scholars have recognized as much.[12] Virtually the only plaintiffs who prevail on the undue hardship question have "employer[s] [that] made no attempt at accommodation." Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 397 (1997).

Employers have gotten the message. As leading academics have observed, *Hardison* has fostered a culture of "[e]mployer apathy toward religious accommodation." William P. Marshall et al., *Religion in the Workplace*, 4 Emp. Rts. & Emp. Pol'y J. 87, 92 (2000). The decision signaled to employers "that requirements of religious conscience are less important than even arbitrary decisions related solely to personal convenience." *Ibid*. And for their part, many religious employees, aware that suing is typically futile, either never file claims or "accept any offered accommodation—even when it does not adequately accommodate their religious observance—because courts are unwilling to require more." Matthew P. Mooney, *Between a Stone and a Hard Place: How the Hajj Can*

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[12] *E.g.*, Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Religious Practices under Title VII after Ansonia Board of Education v.* Philbrook, 50 U. Pitt. L. Rev. 513, 547 (1989) (*Hardison* has "evolved into a per se approach; virtually all cost alternatives have been declared unduly harsh simply because a loss [to the employer] is involved"); Rachel M. Birnbach, *Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer under Title VII*, 78 Fordham L. Rev. 1331, 1347 (2009) ("[C]ourts tend to find that virtually any economic cost to an employer is an undue hardship.").

Restore the Reasonable Accommodation to Title VII, 62 Duke L.J. 1029, 1050 (2013). This Court should intervene.

C. *Hardison* has especially pernicious effects on those, including religious minorities, whom Title VII was designed to protect.

For four decades, *Hardison* has put "thousands of Americans" to "the cruel choice of surrendering their religion or their job." 432 U.S. at 96, 87 (Marshall, J., dissenting). Even in 1977, that problem was "[p]articularly troublesome" for "adherents to minority faiths who do not observe the holy days on which most businesses are closed," but nonetheless "need time off for their own days of religious observance." *Id*. at 85. With the nation's growth in religious diversity, the problem is still more acute today.

As Judge Thapar put it, the "tragedy" of *Hardison* is that it "most often harm[s] religious minorities—people who seek to worship their own God, in their own way, and on their own time." App. 14a. According to a study undertaken by an amicus in *Patterson*, 62 percent of cases that turned on the "undue hardship" issue since 2000 involved members of non-Christian faiths or Christians who observe Saturday Sabbaths. Christian Legal Society et al. *Amicus* Br. 24 (No. 18–349).

Nor is this surprising. Purely by virtue of the numbers, work schedules have long been more likely to accommodate the scheduling needs of members of larger faiths. It is no coincidence, for example, that few offices are open on Sunday, or that in much of the country few employers are open on Christmas or Easter, while many offices are open on Friday, Saturday, and non-Christian religious holidays. Yet many

minority faiths have calendars that are out-of-sync with mainstream religious practice. For example, "common religious accommodations" sought by religious minorities include Muslims seeking "a break schedule that will permit daily prayers at prescribed times," Native Americans seeking "leave to attend a ritual ceremony," or other employees seeking to abstain from "working on [their] Sabbath." EEOC, *What You Should Know: Workplace Religious Accommodation* (2014).[13]

Litigated religious discrimination cases—a minority of claims—confirm that the de minimis standard has imposed extra hardships on religious minorities. As this case and many others show, religious minorities often "need time off for their own days of religious observance," and under *Hardison* they almost always lose. 432 U.S. at 85 (Marshall, J., dissenting); *supra* at 25. Indeed, one court held that, even where neither time off nor out-of-pocket costs were required, allowing a Muslim employee to pray in any of several office locations would be an "undue hardship" because his praying would "be disruptive to [others'] work" and "impede[] the flow of personnel." *Farah* v. *A–1 Careers*, 2013 WL 6095118, *8–9 (D. Kan. Nov. 20, 2013).

Only by granting review and overruling *Hardison* can this Court restore to the workplace the "hospitality to religious diversity" that has been "one of this Nation's pillars of strength." 432 U.S. at 97 (Marshall, J., dissenting).

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[13] Available at: https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation.

D. The "undue hardship" standard is applied elsewhere without difficulty.

Unlike *Hardison*'s de minimis test, a stronger "undue hardship" standard not only would be more faithful to Title VII, but would workably balance religious employees' right to accommodation with the demands of the workplace. Even in *Hardison*, the employer and the government "presupposed a higher standard" than the Court's de minimis standard—one requiring a showing of "significant[]" or "substantial" costs. U.S. *Patterson* Invitation Br. 21. Other laws confirm that such a standard is sensible.

For example, employers have long complied with meaningful "undue hardship" requirements under the ADA and state antidiscrimination law. As noted (at 18), the ADA defines "undue hardship" as "an action requiring significant difficulty or expense" in light of factors such as the employer's size and resources. 42 U.S.C. § 12111(10). California's religious accommodation law defines "undue hardship" similarly. Cal. Gov. Code §§ 12926(u), 12940(l). Courts have been able to apply these laws "in a practical way" to "case-specific" circumstances. *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401–402 (2002); *Dykzeul* v. *Charter Commc'ns Inc.*, 2019 WL 8198218, *6–7 (C.D. Cal. Nov. 18, 2019).

Under a meaningful undue hardship standard, employees are much more likely to receive accommodation for conflicts between their faith and their work —especially conflicts involving work schedules. Faced with a tougher standard, many employers may simply grant accommodation or not dispute "undue hardship." *Schlitt* v. *Abercrombie & Fitch Stores, Inc.*,

2016 WL 2902233, *10 (N.D. Cal. May 13, 2016) (employer not disputing that "observance of the Sabbath" could be accommodated without "undue hardship"). As discussed below, a strengthened undue hardship standard would have made all the difference for Small, who could have been reassigned to another job or exempted from mandatory overtime on worship service days without significant expense to MLGW. Review should be granted so this Court can restore Congress's undue hardship requirement to its original design.

E. Stare decisis does not warrant adhering to *Hardison*.

Of course, stare decisis counsels against overruling decisions that have long been on the books. But stare decisis is not "'an inexorable command.'" *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (citation omitted); *Gamble* v. *United States*, 139 S. Ct. 1960, 1993 (2019) (Ginsburg, J., dissenting). Especially when a patently erroneous interpretation has "effectively nullif[ied]" an important civil rights law (*Hardison*, 432 U.S. at 89 (Marshall, J., dissenting)), this Court has not hesitated to correct its mistakes rather than "place on the shoulders of Congress the burden of the Court's own error." *Monell* v. *Dept. of Soc. Servs.*, 436 U.S. 658, 695 (1978) (citation omitted). *Hardison*'s error is so clear and consequential that the United States, which enforces Title VII, has asked this Court to reconsider it. U.S. *Patterson* Invitation Br. 21–22.

Further, the meaning of "undue hardship" did not receive the careful attention it deserved in *Hardison*. No party or amicus there advocated the "de minimis" interpretation. Indeed, both the government and the employer presumed that any "undue hardship" would

"'significantly and demonstrably affect[] the employer's business,'" or involve at least "'substantial'" costs. U.S. *Patterson* Invitation Br. 21 (quoting U.S. Amicus Br. 20 and Pet. Br. 41, *Hardison*, No. 75–1126 (emphasis omitted)). In a very real sense, then, granting certiorari would provide the Court with its "*first* meaningful opportunity to interpret 'undue hardship' in Title VII with the benefit of full briefing." *Ibid.* (emphasis added); see also *Abercrombie*, 135 S. Ct. at 2040 n.* (Thomas, J., concurring) ("the relevant language in *Hardison* is dictum").

In addition, the Court in *Hardison* "did not explain the basis for [its] interpretation" (*Patterson*, 140 S. Ct. at 686 (Alito, J.)), and its conclusion contravenes this Court's repeated teaching that, "unless otherwise defined," words should be given "their ordinary, contemporary, common meaning." *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). Thus, "the quality of the decision's reasoning" (*Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019)) does not support adhering to *Hardison*.

Finally, "legal developments since the decision" have undermined *Hardison*'s rationale. *Ibid.* *Abercrombie* repudiated *Hardison*'s statement that Title VII requires no accommodations that result in "unequal treatment" of religious and nonreligious employees. Compare *Hardison*, 432 U.S. at 84, with *Abercrombie*, 135 S. Ct. at 2034. And any Establishment Clause concerns that may have influenced *Hardison* no longer "remain[] valid" after *Amos*, *Hosanna-Tabor*, and *Cutter*. App. 13a (Thapar, J., concurring) (citing *Cutter*, 544 U.S. at 722–724); *supra* at 21; accord U.S. *Patterson* Invitation Br. 21–22.

In sum, "[a]ll Americans will be a little poorer until [*Hardison*] is erased." *Hardison*, 432 U.S. at 97 (Marshall, J., dissenting).

II. This case is an excellent vehicle to address the question presented.

This is an "appropriate case to consider whether *Hardison*'s interpretation should be overruled." *Patterson*, 140 S. Ct. at 686 (Alito, J.). Small is an employee of longstanding service, and one for whom a correct reading of "undue hardship" would almost certainly change the outcome. Although the court below stated that he did not develop his "undue hardship" position at length, the record shows that he pressed the issue, that MLGW responded without suggesting forfeiture, and that "the court below passed on the issue," which itself "suffices" for the Court to address it. *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U.S. 1083, 1099 n.8 (1991); see App. 5a–6a (addressing the issue). Indeed, two judges below joined a separate concurrence addressing the need to revisit *Hardison*.

A. These facts squarely present the question whether *Hardison* should be overruled, and reversal would likely change the outcome on remand.

This case presents an excellent vehicle for revisiting *Hardison*. Small's need for accommodation arose when, after years of exemplary service, he was injured on the job and transferred to a post where his shift and overtime schedules conflicted with his worship obligations. App. 2a. After endeavoring to avoid these conflicts by using vacation or trading shifts, Small requested either reassignment or an exemption from mandatory overtime during his services. Yet MLGW, a public utility with thousands of employees, denied

his requests on the nebulous ground that they would impair operations. App. 2a, 5a–6a.

The scheduling accommodations that Small seeks do not conflict with any seniority policy. See 42 U.S.C. § 2000e–2(h) (absent intentional discrimination, employers may treat employees differently "pursuant to a bona fide seniority or merit system"); *Hardison*, 432 U.S. at 81–82. For example, MLGW could either exempt Small from mandatory overtime during his worship services or allow him to avoid mandatory overtime by taking vacation on days off. Under its "Work Rules," MLGW assigns such overtime to the available dispatcher with the "least number of cumulative overtime hours," so neither accommodation would violate any seniority policy. App. 44a, 47a–48a ("Service Dispatching personnel may be required to work overtime when the employee has the least number of cumulative overtime hours and all other available employees have passed the overtime.").[14] And it is undisputed that no seniority system applied to Small's request to be returned to the reassignment pool. Indeed, the only reason that MLGW gave for refusing this accommodation is that the reassignment pool is reserved for employees with "performance deficiencies"—which Small lacked. App. 22a n.7. In other words, Small was too good of an employee to be eligible.

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[14] As noted (at 8 n.3), the district court stated—citing no evidence—that mandatory overtime is assigned based on seniority. App. 34a. MLGW asserted the same, likewise without record support. D.I. 70 at 3, 7; C.A. Appellee's Br. 43. Even if unsupported claims could create factual disputes, such disputes must be resolved against MLGW on summary judgment.

Under any "undue hardship" test that is faithful to the statute, summary judgment should not have been granted to MLGW. Allowing Small not to work mandatory overtime during his services—or at the very least, not cancelling his vacation when it would enable him to avoid such overtime—would require only modest adjustments to the dispatchers' schedules. Likewise, MLGW allows poorly performing trainees to return to the reassignment pool; the only reason that MLGW gave for denying Small that option was that he had exhibited "no performance deficiencies." *Ibid*. Thus, returning Small to that pool would at most constitute a "garden-variety hardship" for MLGW. App. 10a. At a minimum, a jury could reasonably so find. Thus, reversal and remand for application of a proper undue hardship standard would likely alter the outcome of this dispute.

B. Small's claim involves the most common conflict between employees' religious practices and work-related obligations.

This case is also typical of "the largest class of [accommodation] cases"—those involving conflicts with "work schedules." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). As Justice Marshall observed in *Hardison*, "the plight of adherents to minority faiths * * * who need time off for their own days of religious observance" is "[o]ne of the most intractable problems" under Title VII. *Id*. at 85.

The EEOC has since found that conflicts between work schedules and religious obligations are the "most frequent[]" reason that employees cite for requesting religious accommodation. 29 C.F.R. § 1605.2(d)(1); see U.S. *Patterson* Invitation Br. 13 ("conflict[s] between work schedules and religious

practices" arise "frequently"). A review of "undue hardship" cases that have reached the courts bears out that finding.[15] Thus, a decision here will have broad impact.

C. Small raised the undue hardship issue below and both lower courts addressed it.

Small contested MLGW's claim that accommodating him would work an undue hardship in both courts below. The circuit judges asserted that he disputed undue hardship only in "passing" (App. 6a) and not "in a meaningful way." App. 14a (Thapar, J.). But that is incorrect: The issue was pressed by Small, disputed by MLGW, addressed by both the district court (App. 33a–35a) and the court of appeals (App. 5a–6a), and analyzed in a two-judge concurring opinion (App. 8a–14a). Indeed, "even if [undue hardship] were a claim not raised" below, the Court "would ordinarily feel free to address it, since it was addressed." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (emphasis omitted).

1. Throughout the proceedings below, Small contended that, although MLGW did not reasonably accommodate his need to attend worship, it could have done so without undue hardship. His summary judgment brief detailed the conflict between the overtime rules and his religious services. D.I. 63 at 15–18. On the undue hardship issue, he argued that he could be "easily placed" back into the reassignment pool, as

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[15] *E.g.*, *Patterson* v. *Walgreen Co.*, 727 Fed. App'x. 581 (11th Cir. 2018); *Tabura*, 880 F.3d 544; *Davis*, 765 F.3d 480; *Harrell* v. *Donahue*, 638 F.3d 975 (8th Cir. 2011); *George* v. *Home Depot*, 51 Fed. App'x. 482 (5th Cir. 2002); *Ilona*, 108 F.3d at 1576.

MLGW had done with "similarly situated employees." *Id.* at 18. And as to mandatory overtime, he stressed that other employees were on "approved vacation" when his vacation was cancelled for mandatory overtime, demonstrating that "overtime was not 'mandatory'" or necessary to avoid short staffing. *Id.* at 17.

The district court addressed Small's undue hardship arguments on the merits, holding that "where [MLGW] has not offered accommodations, it is because accommodations would result in an undue hardship." App. 33a. Specifically, "shifting all of the relevant mandatory overtime obligations to other employees or placing Mr. Small back in the reassignment pool on reduced pay to wait for a job with hours more in line with Mr. Small's religious obligations would, as a matter of law, place more than a de minimis burden on MLGW." App. 35a.

On appeal, Small again advanced his "undue hardship" arguments, expressly contending that it was "erroneous" for the district court to conclude that "accommodations would result in an undue hardship." C.A. Appellant's Br. 40 (App. 59a). As to overtime, he again argued that "the overtime was not 'mandatory,'" that "similarly-situated employees" were "allowed to take their vacation," and that allowing him to use vacation requested "months in advance" and "approved in writing" would have avoided his "suspension without pay." *Id.* at 41 (App. 59a–60a) (citing D.I. 62–16).

Small also maintained that he was "wrongfully denied a reassignment" under company policy. C.A. Appellant's Br. 37; accord *id.* at 40 (App. 59a). In support, he cited an MLGW interdepartmental memorandum stating that trainees who "have discovered that this is

not the right job for them" "have the right to discontinue training and be assigned somewhere else." *Id*. at 40 (App. 59a).

Small's arguments were more than sufficient to preserve the undue hardship issue. See Fed. R. App. P. 28(a)(8)(A). Indeed, far from suggesting that Small forfeited "undue hardship," MLGW devoted an entire section of its brief to the issue. C.A. Appellee's Br. 42 ("2. Further accommodation of Plaintiff's religious needs presented an undue hardship to MLGW."). Thus, the purpose of the forfeiture rule—ensuring an opportunity to respond to potentially dispositive arguments—was served. Indeed, since MLGW did not grant either requested accommodation, Small's arguments can only be read as a challenge to the district court's undue-hardship holding, not its reasonable-accommodation holding.

2. In any event, the court below was not deterred from resolving the undue hardship issue on the merits. It stated:

> Small next argues that Memphis Light discriminated against him when it failed to accommodate his religion. But the company did not have to offer any accommodation that would have imposed an "undue hardship" on its business—meaning (apparently) anything more than a "de minimis cost." *Trans World Airlines, Inc*. v. *Hardison*, 432 U.S. 63, 84 (1977); *Tepper* v. *Potter*, 505 F.3d 508, 514 (6th Cir. 2007). Memphis Light says that additional accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system. Our court has found similar costs to be more than de minimis. See *Virts* v. *Consol. Freightways Corp. of Del.*, 285

F.3d 508, 517–21 (6th Cir. 2002); *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994).

App. 5a–6a. Even if there had been a forfeiture, therefore, the Court would nonetheless be free to reach the question presented. *Virginia Bankshares*, 501 U.S. at 1099 n.8; *Lebron*, 513 U.S. at 379.

3. Insofar as the judges below believed Small was required to mount a frontal "challenge to the 'de minimis' test" (App. 14a (Thapar, J.)), "'a litigant [need not] engage in futile gestures merely to avoid a claim of waiver.'" *Chassen* v. *Fid. Nat'l Fin., Inc.,* 836 F.3d 291, 293 (3d Cir. 2016) (noting that "[e]very circuit to have answered this question has [so] held"). Here, *Hardison* controlled—a point not lost on MLGW, which argued that *Hardison* and this case were "substantially similar." C.A. Appellee's Br. 43. Thus, there was little point in developing an extended undue hardship argument, let alone challenging binding Supreme Court and Sixth Circuit precedent.

4. If the undue hardship issue were somehow deemed forfeited, the Court should proceed anyway, as there is no prejudice to any party or court. See *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980) (deciding a question not presented or decided "in either the District Court or the Court of Appeals"). After all, the record is fully developed, the issue was argued by both sides, and the courts and concurrence below addressed it. Thus, this Court has the benefit of adversarial presentation and three opinions, and the interests supporting forfeiture are not implicated.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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