No. 19- _____

In the Supreme Court of the United States

MITCHE A. DALBERISTE, PETITIONER,

v.

GLE ASSOCIATES, INC.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII requires employers to reasonably accommodate their employees' religious practices—such as abstaining from work on the Sabbath—unless the employer can demonstrate that it is "unable" to provide an accommodation "without undue hardship" 42 U.S.C. 2000e(j). This Court has not addressed the proper interpretation of "undue hardship" since *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), which said a hardship is "undue" if it poses anything more than a *de minimis* burden on the employer.

Four decades of hard experience have shown that courts willingly find nearly any burden an employer invokes to be more than *de minimis*—especially in cases involving minority religions. As a result, employees of faith across the country have been left without a vital protection that Congress enacted. It is unsurprising, therefore, that several members of this Court, along with the United States in an invited brief, have expressly recognized the need to "grant review in an appropriate case to consider whether *Hardison*'s interpretation [of undue hardship] should be overruled." *Patterson* v. *Walgreen Co.*, 140 S.Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari). This is such a case. The question presented is:

> Whether the Court should reconsider *Hardison* and set a proper legal standard for determining what constitutes an "undue hardship" under Title VII, 42 U.S.C. 2000e(j)?

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INTRODUCTION

Congress enacted Title VII's religious accommodation protection in 1972 to provide significant workplace protections—indeed, "favored treatment"—to employees of faith, so that "otherwise-neutral" policies would not exclude them from the workplace. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2034 (2015). That protection requires employers to provide reasonable accommodations as long as they do not pose an "undue hardship" on the employer. 42 U.S.C. 2000e(j).

But while the statute was still in its infancy, this Court in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), interpreted a pre-enactment agency guideline that used similar "undue hardship" language. The *Hardison* Court concluded that a hardship was "undue" if it imposed anything more than a "*de minimis*" burden on the employer. *Id.* at 84. Dissenting from that decision, Justice Marshall warned that it violated the statute's ordinary meaning, "effectively nullif[ied]" the protections provided by the statute, and "deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Id.* at 86, 89, 92 n.6 (Marshall, J., dissenting).

Without directly addressing the question, this Court and lower courts have subsequently treated *Hardison*'s interpretation of the preexisting EEOC guideline as a binding interpretation of the statute itself. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986); see also *infra* at 31–32. However, three members of the Court—Justices Thomas, Alito, and Gorsuch—have in recent years recognized that

Hardison's interpretation of "undue hardship" was "dictum" as applied to Title VII. *Abercrombie*, 135 S.Ct. at 2040 n.* (Thomas, J., concurring); *Patterson* v. *Walgreen Co.*, 140 S.Ct. 685, 686 n.* (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the denial of certiorari).

Joined by the United States—the sovereign tasked with enforcing Title VII—those Justices have also recognized that the proper definition of "undue hardship" is an issue that warrants this Court's review. *Patterson*, 140 S.Ct. at 686; see *U.S. Amicus Br.* at 19–22, *Patterson* v. *Walgreen Co.* (No. 18-349). As Justice Alito recognized, "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson*, 140 S.Ct. at 686. Indeed, the interpretation in *Hardison* ignores not only the relevant text but also basic principles of statutory interpretation, drafting history, and Congress's use of that phrase in other laws. And it does so at the expense of religious employees—particularly employees of minority religions, like Dalberiste—who are left largely unprotected under the *Hardison* regime.

Solely because of *Hardison*'s anomalous *de minimis* standard, the courts below affirmed as lawful an employer's refusal to offer—or even to consider—any accommodation that Dalberiste suggested. This case accordingly offers an excellent vehicle to correct *Hardison*'s misinterpretation of "undue hardship," thereby restoring—and fully protecting—the vital protections Congress sought to provide to all employees of faith.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion was filed on May 19, 2020 and is reprinted at Pet.1a. The district court's opinion granting summary judgment was filed on February 18, 2020 and is reprinted at Pet.8a.

JURISDICTION

The Eleventh Circuit entered judgment on May 19, 2020. Pet.1a. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

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

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

42 U.S.C. 2000e(j) defines "religion" broadly to include religious practice, and adds an "undue hardship" defense for employers:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT

A. Legal Framework

Title VII of the Civil Rights Act of 1964 declares that it is "an unlawful employment practice for an employer * * * to discharge any individual * * * because of such individual's * * * religion[.]" 42 U.S.C. 2000e-2(a). Under the statute, an employer must "reasonably accommodate" "*all* aspects" of an employee's "religious observance or practice." 42 U.S.C. §2000e(j) (emphasis added). An employer is excused from that duty only if it demonstrates that it cannot accommodate the practice "without undue hardship." *Ibid.* Otherwise, an employer's decision to discharge (or to refuse to hire) an employee for adhering to his or her religious practice constitutes a "discharge * * * *because of* such individual's * * * religion," and so violates the statute. *Abercrombie*, 135 S.Ct. at 2031 (emphasis added).

1. Title VII's religious-accommodation provision was enacted by Congress in 1972 in response to judicial decisions artificially narrowing the 1964 Act's general prohibition on religious discrimination.[1] Those decisions held that Title VII's original prohibition on religion-based discrimination protected only religious *belief*, not religiously motivated

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[1] See 118 Cong. Rec. 705–731 (1972); see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362–369 (1997).

conduct.[2] The decisions thus suggested that Title VII's protection against religious discrimination in the private sector was narrower than that provided to government workers by the First Amendment, which this Court has long held protects not just belief, but also speech and religiously motivated conduct. See, *e.g., Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (protecting religiously motivated conduct generally); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (same).

According to the chief Senate sponsor of the 1972 amendment, Jennings Randolph, a Seventh Day Baptist, the new accommodation provision was designed to "assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972). The new provision thus clarified that Title VII requires accommodation not only for religious belief but also for religiously motivated conduct—such as declining to work on the Sabbath.[3]

But the rights that Congress intended to protect "for all time" did not even last the decade. In 1977, this Court in *Hardison* was asked to interpret 29 C.F.R.

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[2] *E.g., Dewey* v. *Reynolds Metal,* 429 F.2d 324 (6th Cir. 1970), *aff'd,* 402 U.S. 689 (1971) (per curiam) (equally divided court affirming decision holding that the 1964 Act did not extend to accommodation of religious practices); see also *Dawson* v. *Mizell*, 325 F.Supp. 511, 514 (E.D. Va. 1971) ("Religious discrimination should not be equated with failure to accommodate."); *Riley* v. *Bendix Corp.,* 330 F.Supp. 583, 591 (M.D. Fla. 1971) (following *Dawson*).

[3] Engle, *supra* note 1, at 380 (citing Congressional Record to note that "concern for Sabbatarians" motivated Title VII's amendment).

1605.1(b) (1968), a regulatory precursor to the amended Title VII, 42 U.S.C. 2000e(j). That regulation, like the statute now, required an employer to make "reasonable accommodations" for the "religious needs of its employees," short of "undue hardship." *Hardison*, 432 U.S. at 66. In *Hardison*, as here, a religious employee asked his employer if he could have Saturdays off "to avoid working on his Sabbath." *Id.* at 84. Concerned about interpreting Title VII to require "*unequal* treatment of employees on the basis of their religion"—and thereby, in the Court's view, potentially violating the Establishment Clause—this Court held that it would be an "undue hardship" to require the employer to "bear more than a *de minimis* cost" to accommodate the request. *Id.* at 69 n.4, 84 (emphasis added).

Later decisions of this Court took an ax to *Hardison*'s doctrinal roots. First, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, this Court held that Title VII's religious protections *do not* violate the Establishment Clause. 483 U.S. 327, 338–339 (1987) (evaluating 42 U.S.C. 2000e-1(a)); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (holding that "appropriately balanced" religious accommodations are appropriate). Decades later, in *Abercrombie*, the Court relied on the 1972 amendment's history and text to hold that Title VII's accommodation provision requires *more* than "mere neutrality" toward religiously motivated conduct. 135 S.Ct. at 2034. Instead, the Court held, Congress affirmatively protected religious exercise by imposing a heightened duty ("favored treatment") on employers to try to resolve conflicts between an

employer's standards and a worker's religious practices. *Ibid.*

B. Factual Background

This dispute stems from respondent's failure to even attempt to find, much less offer, petitioner Mitche Dalberiste a reasonable accommodation when he requested time off to comply with a religious obligation.

1. Dalberiste is a Seventh-day Adventist who observes the Sabbath from sundown Friday evening to sundown Saturday. Doc.35-1:12, 41.[4] Like most Adventists, he is a member of a minority race. See *infra* note 19. Respondent GLE Associates is a Florida firm that provides worksite safety monitoring, including monitoring of substances like asbestos, by industrial hygienists. Doc.31:1; Doc.33-1:7–8.

In 2016, one of GLE's clients, Turkey Point Nuclear Generating Station in Homestead, Florida, planned to shut down part of its facility for annual maintenance that would last anywhere from thirty to eighty days. Doc.33-1:10; Doc.34-1:8, 11, 19, 42. During such shutdowns, GLE employees generally work twelve-hour shifts, seven days a week, to return the station to full operation as quickly as possible. Doc.31:3; Doc.33-1: 10, 15, 24; Doc.34-1:18–19.

Historically, to handle the shutdowns, an experienced employee had worked the day, and a

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[4] Citations to the record are in the form Doc.XX:Y, where XX is the docket number and Y the page number. All cited documents were cited in the same form in the briefing below, following Eleventh Circuit rules.

newer employee the night. Doc.33-1:11, 16; Doc.34-1:11–12. Departing from that established practice, GLE decided to have two *new* employees handle Turkey Point's fall shutdown. Doc.34-1:6–7, 12, 15, 24–25. But for the first few days, GLE planned to send a third, experienced employee at its own expense to assist in training the new employees. Doc.34-1:11–14.

2. In April 2016, GLE interviewed Dalberiste for one of those new positions. Doc.35-1:14–15, 17. After being initially passed over for the position, he reapplied, and on June 21, 2016, GLE extended him an offer. Doc.35-1:23–24, 26–27; Doc.45-1:16–17. The offer letter said he would need to pass a background and drug test as well as possibly work some (unspecified) weekend days and nights. Doc.35-1:21, 27–28, 43. Dalberiste accepted. Doc.35-1:27.

Without relying on the point, the district court highlighted that Dalberiste "specifically represented to GLE during the interview process that he could work nights and weekends" even though he could only work "half the weekend." Pet. 28a. But there was no evidence—and no finding—that Dalberiste ever represented that he could work the *entire* weekend.

Moreover, in waiting until after he had been offered a position before telling GLE of his need for an accommodation, Dalberiste was acting consistently with the EEOC-approved practice typically followed by new employees who need a disability- or a religion-

related accommodation.[5] Specifically, after receiving an offer, he told GLE he would be unable to work sundown Friday until sundown Saturday. Doc.34-1:33; Doc.35-1:20, 30. Dalberiste explained that he was still available to work weekends, namely "after sunset" on Saturday, "before sunset" on Friday, and "any time on Sunday." Doc.35-1:29. Despite this, GLE's president rescinded the offer without either analyzing the harm the accommodation would cause or talking further with Dalberiste about how GLE might accommodate him. Doc.35-1:29, 36; Doc.49-1:8–9.

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[5] See *EEOC Compliance Manual* § 12-4, at 65–66 (2008) (an employee who "tells his employer on his first day of work" that he needs a religious accommodation is entitled to one absent undue hardship); see also EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), https://www.eeoc.gov/policy/docs/accommodation.html#N_23_ ("The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer."); Doc.34-1:28–29; Doc.35-1:28–29, 32. The EEOC's approval of this approach to handling accommodations makes sense: If Dalberiste, for example, had raised his need for an accommodation during the hiring process and was denied on that basis, he would have had a Title VII failure-to-hire claim against GLE under the same statute and subject to the same "undue hardship" defense. See 42 U.S.C. 2000e-2(a); 42 U.S.C. 2000e(j). But forcing employees like Dalberiste who need an accommodation to raise that issue during the hiring process would induce employers to give false reasons for refusing to hire religious employees—thereby making it more difficult to establish liability.

C. Procedural History

In response, Dalberiste filed a Charge of Discrimination with the EEOC, which issued a right-to-sue letter on June 26, 2018. Doc.1:2–3.

1. In his subsequent civil complaint, Dalberiste claimed, among other things, that GLE had an obligation under Title VII to accommodate his religious beliefs. Doc.1:6.

GLE responded in both its answer and its eventual summary-judgment motion that it could not accommodate those beliefs without suffering undue hardship under the *Hardison* standard. Doc.7:7; Doc.29:3; *id.* at 16 ("[A]nything GLE could have theoretically done would have certainly been an undue hardship under the applicable standards."). In support, GLE asserted that it hired its employees to work at specific offices and that Dalberiste was hired specifically to work in its Fort Lauderdale office during the upcoming Turkey Point outage. Doc.29:12. GLE further asserted that all other employees in the Fort Lauderdale office were already working on "preexisting (and more complex) on-going projects at the time." Doc.29:12 (citing Doc.30:3, 5, 8, 10). GLE further asserted that its contract with Turkey Point presented "strict scheduling and badging requirements," meaning that allowing someone else to work for Dalberiste would not have been as simple as merely moving another employee to his position. Doc.29:12–13 (citing Doc.30:4–7). According to GLE, the new employee would also need to have, or obtain, a badge from Turkey Point. Doc.3:6 (citing Doc.31:3; Doc.34-1:34; Doc.33-1:11, 13).

In response, Dalberiste showed that GLE's alleged burdens were not nearly as weighty as it claimed. GLE, for example, had asserted that Dalberiste's requested accommodation would demand it to "rearrange[] its entire staffing approach to accommodate his schedule." Doc.29:11. But in the past, GLE had allowed qualified managers to "work weekends and work nights" to cover another employee's shift if necessary. Doc.34-1:6. Further, GLE's Fort Lauderdale office had six industrial hygienists who were also qualified to work at Turkey Point, and GLE had already brought employees from its other offices to work there. Doc.33-1:5, 7, 10; Doc.34-1:16. Moreover, in another situation in which an employee had quit shortly before a shutdown, GLE had allowed a single employee to handle the outage by himself, during parts of a double shift, for an entire three-week period, whereas Dalberiste was asking only for a single, 24-hour period once a week. Doc.34-1:18.

Dalberiste also showed that the badging requirement posed less of a problem than GLE alleged. Although Turkey Point physically took the badges at the end of each outage, badge access lasted an entire year, and the employee who had worked in the spring 2016 outage was still badged through the fall 2016 outage—and thus could have worked for Dalberiste during that period. Doc.40-1:21 (citing Doc.34:9–10). Alternatively, badge access at another station where GLE employees worked could be used at Turkey Point and therefore could have circumvented the badging problem. Doc.34-1:10. Finally, even though badging another employee sometimes takes several weeks, Dalberiste had informed GLE of his

need for an accommodation in July, months before the fall outage in October—at least raising the possibility that a reasonable jury could conclude that GLE had time to work out a solution with Turkey Point and, if necessary, badge another employee. Doc.35-1:28; Doc.34-1:8.

GLE did not even consider or attempt to implement any of these potential solutions. Instead, GLE admitted that, as to Dalberiste's accommodation request, "[t]here was no analysis done" on "what the economic cost might be * * * with regard to personnel or salary or overtime." Doc.49-1:8.

Even with the evidence disputing GLE's alleged hardships, the district court granted GLE's motion under the current *de minimis* standard. Pet.19a, 30a–31a. The court recognized two possible accommodations. *First*, a second employee could work double shifts "each week to cover [Dalberiste's] unavailability." Pet.20a. However, citing *Hardison* and the Eleventh Circuit's opinion in *Patterson* v. *Walgreen Co.*, 727 F.App'x 582, 588–589 (11th Cir. 2018), *cert. denied* 140 S.Ct. 685 (2020), the district court determined that, whether or not the second employee *wanted* the extra work, this "unequal" or "unfair treatment" of that employee would impose a more than *de minimis* burden *on GLE*. Pet.20a, 21a.

Second, the district court recognized that "a third local or non-local employee" could have covered for Dalberiste on his Sabbath, without the need for a double shift. Pet.21a. Indeed, the district court acknowledged that it was already GLE's established practice to have "employees work outside of their home office" where "another office is busy and needs

assistance," or there was a vacancy or emergency in another office. Pet.23a n.6. But because the court felt this accommodation would to some degree require GLE to "revamp the way it schedules and assigns its employees," the district court held that this accommodation too would impose a more than *de minimis* burden. Pet.21a–22a.

The district court also rejected the evidence that Dalberiste had presented about the time for badging and the ability to return the badges. It determined that "the uncontroverted evidence is that at the relevant time no Fort Lauderdale employee had [badge] access," and that there was "not enough time to have a job-ready employee"—again, without GLE's incurring more than *de minimis* costs. Pet.24a n.7, 25a n.8.

Accordingly, the court held that, under the *Hardison* standard, the hardship was "undue." Pet.25a. And based on that reason alone, the court granted summary judgment to GLE. Pet.25a–26a, 30a. Understandably, the district court did not attempt to determine whether any available accommodation would pose an undue hardship under any standard other than *Hardison's de minimis* standard.

2. On appeal, in an unopposed motion for summary affirmance, Dalberiste conceded that *Hardison* governed—and defeated—his failure-to-accommodate claim. Pet.4a.[6] Although Dalberiste argued that

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[6] This procedure has been used in prior cases to conserve judicial resources where the court of appeals is bound by prior

"*Hardison* was wrongly decided and that the Supreme Court should overturn [that] decision," he acknowledged that the *Hardison "de minimis"* standard was binding precedent in the Eleventh Circuit as to Title VII's undue-hardship defense and that the district court had correctly applied that standard when it granted summary judgment to GLE based on the evidence before it. Pet.4a–5a, 7a.

The Eleventh Circuit—noting that Dalberiste had not challenged *Hardison* in the district court—granted Dalberiste's motion. Pet.4a, 7a.[7] It found that, because

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precedent and cannot provide the relief the petitioner seeks. See, *e.g., Bowen* v. *Am. Hosp. Ass'n.*, 476 US 610, 620 (1986) (noting that the court below had summarily affirmed because both parties agreed that binding authority "required a judgment against the Government"); *United States* v. *Vanegas-Martinez*, 678 F.App'x 260 (5th Cir. 2017) (summarily affirming), *cert. granted, judgment vacated sub nom. Aguirre-Arellano* v. *United States*, 138 S.Ct. 1978 (2018); *Friedrichs* v. *Cal. Teachers Ass'n*, 2014 WL 10076847 (9th Cir. 2014) (summarily affirming where Ninth Circuit precedent applying Supreme Court precedent foreclosed claim), *cert. granted*, judgment affirmed by equally divided court, 136 S.Ct. 1083 (2016).

[7] Dalberiste was of course not required to challenge *Hardison* in the district court, or even in the court of appeals, where such a challenge would have been futile. See, *e.g., MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) (failing to raise futile claims "does not suggest a waiver," but rather "sound" judgment). Regardless, this Court's practice "permit[s] review of an issue not pressed [below] so long as it has been *passed upon*." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) (alternation in original; citation omitted; emphasis added); Pet. 7a, 19a–22a. Here, both the district court and the court of appeals expressly applied *Hardison* and addressed its binding character.

of *Hardison* and its Eleventh Circuit progeny, there was "no substantial question as to the outcome of the case." Pet.7a. Like the district court before it, the Eleventh Circuit held that Dalberiste's requested accommodation would have caused a more than *de minimis* hardship to GLE. Pet.6a–7a.

Unlike in *Patterson*, however, neither the district court nor the Eleventh Circuit articulated an alternative basis for affirmance, considered whether Dalberiste's suggested accommodations would have posed an undue hardship under any other standard, or decided any other legal issue. Indeed, GLE neither offered an alternative ground for affirmance nor, unlike the employer in *Patterson*, claimed it had tried to accommodate Dalberiste. Compare *Patterson,* 727 F.App'x at 588–590. And there is no question that Dalberiste squarely disputed GLE's argument that an accommodation would impose an "undue hardship" within the meaning of Title VII, correctly interpreted.

REASONS FOR GRANTING THE PETITION

Multiple Justices and the United States have already determined that the question presented here—whether the Court should reconsider *Hardison*'s interpretation of "undue hardship"—is worthy of the Court's review. *Hardison*'s mistaken *de minimis* standard deviates from both the text and history of Title VII and has had devastating effects on workers of faith. Those effects are felt most strongly by members of non-Christian minority religions and Christian religions comprised mostly of racial minority groups like Adventists. Moreover, repudiation of the *Hardison* standard would be consistent with traditional principles of stare decisis. Finally, this case offers the cleanest possible vehicle with which to restore valuable religious liberty protections to the Nation's religious employees that *Hardison* has denied them for more than forty years.

I. The Question Presented is Important and Warrants Review, as Recognized by Several Justices of this Court and by the United States.

The clearest reason to grant this petition is that it raises an extremely important question recognized by several Justices and by the United States as being worthy of this Court's review. The *Patterson* petition, No. 18-349, asked the Court to revisit *Hardison* in 2018. The Court thought the issue sufficiently important that it called for the views of the Solicitor General, and the United States agreed that the question was worthy of the Court's review. The United States also highlighted several reasons why this Court should reconsider *Hardison*: (1) the "*de minimis*"

standard was contrary to the statutory text; (2) neither party briefed that standard in *Hardison*; (3) the Carter Administration itself had "presupposed a higher standard" in an amicus brief; (4) the Court gave no reason for its adoption of the "*de minimis*" standard; and (5) stare decisis did not preclude reconsidering the issue. *U.S. Amicus Br.* at 19–22, *Patterson* v. *Walgreen Co.* (No. 18-349).

Even though the United States argued that *Hardison* should be revisited and overturned in *Patterson*, this Court denied certiorari earlier this year. In an opinion concurring in that denial, Justices Alito, Thomas, and Gorsuch agreed with the "most important point" made by the United States, namely that this Court should "reconsider the proposition, endorsed by the opinion in [*Hardison*], 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. Those Justices were concerned, however, that *Patterson* "d[id] not present a good vehicle for revisiting" *Hardison*—likely because the Eleventh Circuit in that case had articulated an alternative ground for its decision. *Id.* at 686. Accordingly, those Justices concurred in the denial of review. *Ibid.*; see also *Kennedy* v. *Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (statement regarding denial of certiorari) (Alito, J., writing for Thomas, Gorsuch, and Kavanaugh, JJ.) (observing that petitioner's potential "live claims" under Title VII may have been abandoned—at least at that stage of the litigation—due to "certain decisions" of the Court, including *Hardison*).

This petition, like *Patterson* before it, asks whether the Court should revisit *Hardison*'s interpretation of "undue hardship" in failure-to-accommodate cases. And, for reasons more fully developed in Section V, it presents the Court with an excellent vehicle for review—including the absence of any alternative ground or other procedural hurdles.

This Court should grant the petition for the reasons discussed by Justice Alito and the United States in *Patterson* and remedy the harm that *Hardison* has inflicted on Title VII's religious-accommodation scheme and on religious employees—especially those belonging to minority faiths.

II. *Hardison*'s Definition of Undue Hardship Cannot Be Squared with Title VII's Text, Basic Principles of Statutory Construction, or the 1972 Amendment's History.

As Justice Thomas pointed out in his separate opinion in *Abercrombie*, 135 S.Ct. at 2040 n.*—and as Justice Alito reiterated in *Patterson*, 140 S.Ct. at 686 n.*—*Hardison*'s discussion of "undue hardship" did not even interpret the statute itself, which was amended only *after* Trans World Airlines terminated Hardison, and hence did not govern that case. But even if *Hardison's* analysis were understood to interpret Title VII, as this Court did (without analysis) in *Ansonia*, 479 U.S. at 67, and as it has been in the lower courts,[8] that ruling should not stand. That is

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[8] See *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004); *Philbrook* v. *Ansonia Bd. of Educ.*, 757 F.2d 476, 483–485 (2d Cir. 1985), aff'd and remanded, 479 U.S. 60

because the analysis in *Hardison* disregards the plain meaning of "undue hardship," statutory definitions of the same term elsewhere in the United States Code, and Title VII's drafting history. The petition should be granted to reconsider that decision.

1. Whether viewed as an interpretation of the pre-statute regulation, Title VII itself, or both, *Hardison* went off the rails when it defined "undue hardship" as merely something more than a "*de minimis* cost," 432 U.S. at 84. That interpretation simply cannot be squared with "the ordinary public meaning of Title VII's command." *Bostock* v. *Clayton Cty.*, 590 U.S. __, __ (2020) (slip op. at 4); accord *id.* at __ (Kavanaugh, J., dissenting) (slip op. at 10) (emphasizing the "extraordinary importance of hewing to the ordinary meaning of a phrase"); *id.* at __ (Alito, J., dissenting) (slip op. at 33) (italics in original) ("Without strong evidence to the contrary * * *, our job is to ascertain and apply the '*ordinary* meaning' of the statute."). No pre-*Hardison* dictionaries that Dalberiste has found had ever defined "undue" as merely "more than *de minimis*." Nor could they—"[b]y definition, de minimis costs are *not* hardships (much less 'undue'

(1986); *Protos* v. *Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986); *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Howard* v. *Haverty Furniture Cos., Inc.*, 615 F.2d 203, 204–206 (5th Cir. 1980); *Cooper* v. *Oak Rubber Co.*, 15 F.3d 1375, 1378 (6th Cir. 1994); *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 451 (7th Cir. 1981); *Wren* v. *T.I.M.E.-D.C., Inc.*, 595 F.2d 441, 445 (8th Cir. 1979); *Burns* v. *S. Pac. Transp. Co.*, 589 F.2d 403, 406–407 (9th Cir. 1978); *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989); *Beadle* v. *Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994).

hardships)."[9] *Any* hardship at all thus is more than *de minimis*, but that approach would fail to give any weight or meaning to the qualifier "undue." Rather, dictionaries at the time of the amendment's enactment defined "undue" primarily as "unwarranted" or "excessive." *E.g.* The Random House Dictionary of the English Language, College Edition 1433 (1968).

By contrast, a *de minimis* burden was and is defined as one that is "trifling" or "so insignificant that a court may overlook [it] in deciding an issue or case"—something akin to a peppercorn. De minimis, *Black's Law Dictionary* (5th ed. 1977); De minimis, *Black's Law Dictionary* (11th ed. 2019); Peppercorn, *Black's Law Dictionary* (11th ed. 2019) (used to represent a "small or insignificant thing or amount").[10] *Hardison's* interpretation of "undue" thus renders that word essentially meaningless, in violation of the principle of statutory interpretation that a word in a statute "*cannot* be meaningless, else [it] would not

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[9] Mark Storslee, *Religious Accommodation, The Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871, 936 (2019) (emphasis added).

[10] *Hardison*'s interpretation is no more defensible when considered against contemporary corpus linguistics data. A search of the word "undue" in its syntactic context, i.e, as an adjective modifying a noun, from the years 1967 to 1977, shows that contemporaneous dictionaries were right: The word was virtually always synonymous with "excessive." Brigham Young University, Corpus of Historical American English, https://www.english-corpora.org/coha/ (last visited June 22, 2020); see generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788 (2018) (explaining corpus linguistics approach to obtaining and evaluating evidence on a statute's original public meaning).

have been used." *United States* v. *Butler*, 297 U.S. 1, 65 (1936) (emphasis added).

Hardison fares no better if one assumes "undue hardship" was a term of art when the 1972 statutory Amendments were adopted. The EEOC provided the most relevant pre-1972 interpretation when it defined "undue hardship" as including (1) situations causing an employer "serious inconvenience," 29 C.F.R. 1605.1 (1967), or (2) situations "where the employee's needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 29 C.F.R. 1605.1 (1968) (codifying 1967 Guidelines) (emphasis added). Under that standard, the evidence Dalberiste presented below would have at least created an issue of material fact precluding summary judgment.

EEOC practice in the years before *Hardison* similarly shows that "undue hardship" meant a significant burden. The agency, for example, required employers to demonstrate their "*inability* to find a substitute employee" as well as the "economic effect of [the employee's] absence on its business." EEOC Dec. No. 72-1578, 1973 CCH EEOC Dec. 4652, 4653 (Apr. 21, 1972) (emphasis added). Here too, on the present record, GLE would not be able to obtain summary judgment under this more demanding standard.[11]

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[11] The result in *Hardison* also would have been different if the Court had applied the prevailing EEOC guidelines or the ordinary meaning of "undue hardship": TWA was "one of the largest air carriers in the Nation" and Hardison's requested accommodation would have cost it a paltry "$150 for three

With this history, it is unsurprising that *Hardison*'s crabbed understanding of undue hardship has been roundly criticized by prior and current members of this Court. For example, Justice Marshall dissented in *Hardison* because "[a]s a matter of law," he "seriously question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost[.]'" *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting); *Patterson*, 140 S.Ct. at 686 (Alito, J., concurring in the denial of certiorari) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship[.]'"). Other courts and judges have likewise disagreed with the *Hardison* majority on that ground. *E.g.*, *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring) ("The *Hardison* majority never purported to justify its test as a matter of ordinary meaning. And how could it?").

2. *Hardison*'s interpretation of "undue hardship" also contravenes the common-sense definition of "undue hardship" that Congress has employed in other statutes, such as the Americans With Disabilities Act, the Uniformed Services Employment and Reemployment Act of 1994, and the Fair Labor Standards Act. Each of those statutes defines "undue hardship" to mean hardship causing "*significant* difficulty or expense," not just a smidgen more than *de minimis* harm. 42 U.S.C. 12111(10)(A); 38 U.S.C. 4303(15); 29 U.S.C. 207(r)(3) (emphasis added in

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months." *Hardison*, 432 U.S. at 91, 92 n.6 (Marshall, J., dissenting).

each).[12] Thus, whenever Congress has expressly defined "undue hardship," its definition has *always* required more than *Hardison* demands.

Judges also typically employ plain-meaning interpretations of "undue hardship" in other contexts. As Judge Thapar recently highlighted, even where Congress has not specifically defined the term "undue hardship," such as in the Bankruptcy Code, the courts have rejected any attempt to constrain it with the "*de minimis*" test. *Small*, 952 F.3d at 827 (Thapar, J., concurring) (collecting cases). Judge Thapar's concurrence pointed to interpretations spanning the federal circuits. *Ibid.* And the language they have used underscores what an outlier *Hardison* is: In all other contexts, a hardship is "undue" when it is "intolerable," "significant," or "unusual." *Ibid.* (citations omitted). "[G]arden-variety hardships" are "insufficient." *Ibid.* (citing *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005)).

3. The legislative history of Title VII confirms that the religious-accommodation provision was not meant to be the empty promise *Hardison* has made it. The congressional record shows instead that Congress passed the 1972 accommodation amendments based on concern "for the individuals of all minority religions

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[12] In each of these statutes, Congress also provided a list of factors for courts to consider in determining whether there is undue hardship, including the cost, the company's financial resources, and the scope of the employer's operations. 42 U.S.C. 12111(10)(B); 38 U.S.C. 4303(15); 29 U.S.C. 207(r)(3). Applying these—or similar—textual considerations, Dalberiste would almost certainly prevail—at least at the summary judgment stage—on remand under a proper standard.

who are forced to choose between their religion and their livelihood." *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 454 n.11 (7th Cir. 1981) (citing 118 Cong. Rec. 705–706 (1972)). In addition, the principal proponent of 42 U.S.C. 2000e(j), Senator Randolph, stated that his amendment was intended to "assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972) (emphasis added). After *Hardison*, the amendment does neither of these things.

Hardison thus turns Title VII's history on its head. Rather than accepting the value Congress and the EEOC placed on protecting religious workers, *Hardison* concluded that anything more than a *de minimis* burden on an employer outweighs the freedom to practice one's faith.[13] Thus, far from correcting the erroneous decisions interpreting Title VII before the 1972 Amendment, *Hardison* has perpetuated—and in some cases even increased—those harms. That too is a compelling reason to revisit its analysis.

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

III. *Hardison* Has Had Devastating Practical Effects on Employees of Faith—Especially Members of Minority Religions.

The harms wrought by *Hardison* are significant and hardly surprising. At the time *Hardison* issued, Justice Marshall warned that the decision would "deal[] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86 (Marshall, J., dissenting). *Hardison*'s adverse real-world consequences, especially for members of minority faiths, may not be directly relevant to the statute's proper interpretation. But those harms make this Court's review even more important—and urgent.

1. Armed with near-blanket permission to enforce employment rules that conflict with religious practices—especially practices characteristic of minority faiths—lower courts applying *Hardison* have permitted employers to burden minority religions in a wide variety of ways.

For example, without requiring a showing of significant employer harm, the Third Circuit rejected a request by a Muslim teacher to wear a headscarf on a theory that *state* law *potentially* forbade wearing it and that allowing such action might subject school board officials to legal action. See *United States* v. *Bd. of Educ. for Sch. Dist.*, 911 F.2d 882, 890–891 (3d Cir. 1990). The mere speculative risk of such action was deemed to be more than *de minimis* harm, and hence sufficient. *Id.* at 891.

Similarly, in *Tagore* v. *United States*, 735 F.3d 324 (5th Cir. 2013), the Fifth Circuit upheld a federal

employer's refusal to allow a Sikh employee to wear a dulled ceremonial knife, called a kirpan, at work. *Id.* at 325. The court's theory was that it would be too "time-consuming" for officers to confirm that her kirpan was harmless each time she entered her building, and hence that such an accommodation would create more than *de minimis* harm. *Id.* at 330.

Other courts applying *Hardison* have likewise excused employers from demonstrating any actual burden, instead allowing them to avoid accommodations by merely speculating that they *might* face a hardship at some point in the future. See, *e.g.*, *Weber* v. *Roadway Express*, *Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact"—such as the possibility that an employee rotation system might have to be reworked—created undue hardship.); *Virts* v. *Consol. Freightways Corp.*, 285 F.3d 508, 521 (6th Cir. 2002) (same); *Patterson*, 727 F.App'x at 588 (a requested accommodation might "produce undue hardship for Walgreens in the future"); *Yott* v. *N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979) ("exempting [a religious employee] *could* lead to further exemptions for religious or other reasons") (emphasis added).

In short, *Hardison* virtually eliminates Congress's accommodation requirement for the majority of employees of faith—especially members of minority faiths. Rather than encouraging employers to compromise, *Hardison* tells them an employee has no claim for accommodation if there is more than *de minimis* cost—including even a risk of harm. And if the employer has no potential legal obligation, there is little incentive to engage in the "bilateral cooperation"

this Court urged in *Ansonia*, 479 U.S. at 69 (citation omitted).

That is what happened to Dalberiste. He asked for an accommodation, and GLE immediately rescinded his offer of employment—before any accommodation was even considered. Pet.3a, 14a–15a. Moreover, at no point did GLE even attempt to analyze the *actual* costs that an accommodation might impose. Doc.49-1:8. And, as the district court recognized, GLE had "employees work outside of their home office" in several other circumstances, and in other instances had asked employees to work double shifts for a longer period of time than would have been required here. Pet.23a n.6. Yet GLE and the district court rejected those alternatives, simply because they might have imposed a more than *de minimis* cost. Pet.19a–22a. Such dismissiveness toward religious freedom is exactly what *Hardison* invites.

2. As Justice Marshall predicted, *Hardison*'s impact is reflected in the statistical record. On average, the EEOC receives nearly 3000 charges of religious discrimination each year, including over 550 that address requests for religious accommodations.[14] Those that reach the courts paint a telling picture.

For example, an amicus brief filed in *Patterson* reviewed 102 religious-accommodation cases decided

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[14] EEOC, *Religion-Based Charges (Charges filed with EEOC) FY 1997–FY 2019* (2019), https://www.eeoc.gov/statistics/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2019; EEOC, *Bases by Issue (Charges filed with EEOC) FY 2010–FY 2019* (2019), https://www.eeoc.gov/statistics/bases-issue-charges-filed-eeoc-fy-2010-fy-2019.

between 2000 and 2018 and found that Muslims "constitute 18.6 percent" of accommodation decisions even though they make up "only 0.9 percent of the population." *Christian Legal Society Br.* at 24, *Patterson* v. *Walgreen Co.* (No. 18-349). And Muslims were not the only minorities harmed—"non-Christian faiths (Muslims, idiosyncratic faiths, Jews, Hebrew Israelites, Rastafarians, Sikhs, and African religions) * * * made up only 5.9 percent of the population," but brought an astonishing "34.3 percent of the accommodation cases." *Ibid.*[15]

Appendix C reflects a similar pattern in religious-accommodation appeals decided since 2000. Pet.32a. In cases where a circuit court has addressed the undue-hardship defense, the employer prevailed an incredible 83.7% of the time.[16] Moreover, some 43% of the religious-accommodation appeals in the last twenty years[17] have involved employees who are

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[15] The reason for the disparity between these numbers and the numbers above is that the CLS brief addressed the results of the undue-hardship inquiry at summary-judgment in both the district court and the court of appeals, whereas Appendix C deals exclusively with appeals. Compare CLS Br. at 23–24 with Pet.32a.

[16] The employer win percentage on appeal is similar to the employer win percentage in all Title VII employment-discrimination cases, in which plaintiffs win only 15% of the time in the district court. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127 (2009).

[17] The appendix figures cited in this section refer to the cases in which an employee's exact religious affiliation could be determined from the text of the opinion or filings in the district court or court of appeals.

either members of (1) a non-Christian faith, which make up less than 6% of the U.S. population;[18] or (2) a Christian faith practiced primarily by racial minorities, such as Seventh-day Adventists and Jehovah's Witnesses,[19] which collectively make up roughly 8.5% of the U.S. population.[20] Thus, members of minority religions accounting for less than 15% of the population bring nearly half of Title VII accommodation appeals—suggesting that such claims are especially important to members of such faiths.

Moreover, in appeals involving members of minority religions, the employer prevails a staggering 85.7% of the time—which means that members of minority faiths prevail on appeal only about 14.3% of the time. Pet.32a. These percentages stand in stark contrast to the success rates for members of other

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[18] *Religious Landscape Study*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/. Muslims and Jews, which make up only .9% and 1.9% of the religious population, *ibid.*, respectively, bring a disproportionately high number of claims under Title VII.

[19] In the United States, only 36% of Jehovah's Witnesses and 37% of Seventh-day Adventists are white. *Racial and ethnic composition*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/racial-and-ethnic-composition/; Michael Lipka, *A closer look at Seventh-day Adventists in America*, Pew Research Center (Nov. 3, 2015), https://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/.

[20] Jehovah's Witnesses (.8%), Seventh-day Adventists (.5%), Historically Black Protestants (6.5%), Orthodox (.5%), and "Other" Christians (.4%) are included in this group. *Religious Landscape Study*, *supra* note 18; Lipka, *A closer look at Seventh-day Adventists in America*, *supra* note 19.

faiths: Appendix C shows that the appellate success rate for members of non-minority faiths is about 30.7%—more than twice the success rate for members of minority faiths.

In short, members of minority faiths—who are involved in nearly 50% of all religious-accommodation appeals—are substantially less likely than members of non-minority faiths to have their rights vindicated.

3. *Hardison* facilitates this disparity because it allows judges to brush aside accommodation claims for religious practices that are not already ingrained to some degree in U.S. culture. See, *e.g.*, *Ansonia*, 479 U.S. at 63–64 (addressing how standard employment contract had "annual leave for observance of mandatory religious holidays"). And that is one reason why *Hardison* hits minority religious communities especially hard: Employers like GLE know they can make almost any request for an accommodation sound like it will impose more than *de minimis* hardship, and therefore, as in this case, they do not even *try* to accommodate religious employees—especially members of minority faiths.

As a result, Dalberiste and each of the other employees in the studied cases were presented with what then-Judge Alito and Justice Marshall called the "'cruel choice' between religion and employment"—a choice Congress sought to prevent with Title VII. See *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring); *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). But Title VII as written forbids this Hobson's choice unless the hardship is excessive. And *Hardison*'s *de minimis* test—whether viewed as dictum or as a holding—

should be overruled to ensure fairness to employees and to facilitate religious diversity in the workforce.

IV. Repudiating *Hardison* Would Be Fully Consistent with Traditional Principles of Stare Decisis.

Repudiating *Hardison* would also be consistent with traditional stare decisis principles.

1. Indeed, stare decisis principles do not even apply where the prior holding was not an interpretation of the pertinent legal text. See *Cohens* v. *Virginia*, 19 U.S. 264, 399 (1821) (explaining how judicial issues that "go beyond the case" "may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision"); *Humphrey's Ex'r* v. *United* States, 295 U.S. 602, 627 (1935) (same); *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012) ("We resist reading a single sentence unnecessary to the decision as having done so much work."). Such is the case here: *Hardison* was interpreting an EEOC regulation, not Title VII. Its treatment of Title VII thus went "beyond the case," and lacks precedential value.

As Justice Thomas first emphasized in his separate opinion in *Abercrombie*—and Justice Alito reemphasized in his *Patterson* concurrence—Hardison himself was terminated "before the 1972 amendment to Title VII's definition of religion." *Abercrombie*, 135 S.Ct. at 2040 n.* (Thomas, J., concurring in part and dissenting in part); *Patterson*, 140 S.Ct. at 686 n.* (Alito, J., concurring in the denial of certiorari). As those Justices made clear, the *Hardison* court thus applied "not the amended statutory definition" at

issue here, but rather a "then-existing EEOC guideline." *Abercrombie*, 135 S.Ct. at 2040 n.*. Thus, Justice Thomas was no doubt correct when he said that "*Hardison*'s comment about the effect of the 1972 amendment was * * * entirely beside the point." *Ibid.*[21] The "undue hardship" portion of *Hardison*'s analysis was thus at best dicta as applied to the statute.

To be sure, this Court in *Ansonia* subsequently *assumed* that *Hardison*'s undue hardship interpretation applied to the statute as well. See 479 U.S. at 67. But the Court did not offer any analysis of that point, and accordingly its assumption likewise did not constitute a holding as to how Title VII should be interpreted. This Court has long recognized that where an earlier Court has assumed an answer to an "antecedent proposition[]" not squarely addressed—as *Ansonia* did by citing *Hardison*'s treatment of Title VII—such an assumption is "not binding in future cases that directly raise the question[]." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (rejecting "drive-by" rulings).

2. Moreover, even assuming *Hardison* (or *Ansonia*) actually constitutes a holding for stare decisis purposes, "several factors" that this Court "consider[s]

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[21] *Hardison's* lack of reasoning is another reason for this court to reconsider it. *Cent. Green Co.* v. *United States*, 531 U.S. 425, 431 (2001) ("dicta [based on isolated comments] * * * are not binding") (internal citations and punctuation omitted); Bryan A. Garner, Neil M. Gorsuch, Brett M. Kavanaugh et al., *The Law of Judicial Precedent* 62 (2016) ("[P]eripheral, off-the-cuff judicial remark[s]" are not "binding under the doctrine of stare decisis.").

in deciding whether to overrule a past decision" weigh heavily in favor of overruling *Hardison*. *Knick* v. *Twp. of Scott*, 139 S.Ct. 2162, 2178 (2019).

First, this Court itself has eroded any justification for the rule *Hardison* adopted in the more than 40 years since it was decided. See *id.* at 2178 (overruling decision with "shaky foundations," "the justification for [which] continues to evolve"); see also *Ramos* v. *Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (recognizing that changes in the law have justified overturning precedent).

Hardison grounded its erroneous interpretation of "undue hardship" in the belief that Title VII required no more than neutrality toward religious practices, and thus did *not* require "unequal treatment" of employees because of their religious beliefs. *Hardison*, 432 U.S. at 84. But *Abercrombie* rejected that premise, recognizing that Title VII "does not demand mere neutrality with regard to religious practices," but instead gives such practices "favored treatment." *Abercrombie*, 135 S.Ct. at 2034. That is because Congress specifically sought to protect religious employees from workplace discrimination. *Ibid.*

The Court's recent interpretation of Title VII in *Bostock* likewise confirms that *Hardison*'s emphasis on the potentially different treatment of employees was mistaken in the first place. *Bostock*, 590 U.S. at __ (Slip. Op. at 2) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); accord *id.* at __ (Kavanaugh, J., dissenting) (slip op. at 10) (emphasizing the

"extraordinary importance of hewing to the ordinary meaning of a phrase"). The Court's recent focus on the primacy of Title VII's text—in both *Abercrombie* and *Bostock*—is yet another way that the Court has shaken *Hardison*'s doctrinal underpinnings.

Second, other than the belief (repudiated by *Abercrombie*) that Title VII required equal treatment of religious and non-protected practices, the *Hardison* court provided *no* reasoning. *Patterson*, 140 S.Ct. at 686 (Alito, J., concurring in the denial of certiorari). And for reasons discussed in section II, the Court would have been hard-pressed to provide such analysis: *Hardison*'s interpretation of "undue hardship" violates both the text and history of Title VII in a way that significantly harms workers of faith—and especially members of minority religions.

Third, as discussed previously, *Hardison*'s interpretation of "undue hardship" is inconsistent with other interpretations of the same term throughout the United States Code. This Court has long recognized that stare decisis should yield when one of this Court's opinions is an "anomaly," *Janus* v. *Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2483 (2018), or an "outlier." *Alleyne* v. *United States*, 133 S.Ct. 2151, 2165 (2013) (Sotomayor, J., concurring). Because of *Hardison*, the prevailing interpretation of Title VII's "undue hardship" provision is as anomalous as they come.[22]

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[22] Other factors such as the lack of reliance interests also weigh in favor of overruling *Hardison*. See *U.S. Amicus Br.* at 21–22, *Patterson* v. *Walgreen Co.* (No. 18-349) (citing *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)).

For all these reasons, *Hardison* is ripe for reconsideration.

V. This Case Is an Excellent Vehicle.

For several reasons, this case also offers an excellent vehicle with which the Court can determine whether *Hardison* should be repudiated or overruled.

First, this case involves a single legal issue—undue hardship—that Dalberiste pressed below and that both the district court and the Eleventh Circuit squarely addressed. Faced with *Hardison* and binding Eleventh Circuit precedent applying it to Title VII, the district court granted GLE summary judgment and held that requiring GLE to accommodate Dalberiste on his Sabbath would pose a more than *de minimis* harm to the company. Pet.7a, 19a–22a. On appeal, Dalberiste argued that *Hardison* was wrongly decided but conceded that the district court did not err under *Hardison* and its Eleventh Circuit progeny. Pet.4a. The Eleventh Circuit summarily affirmed, noting that it did "not have the authority to overrule Supreme Court precedent." Pet.7a. This case, therefore, squarely presents the question of whether *Hardison* should be overruled.

In addition, this case comes to the Court unencumbered by any material factual disputes (under the *Hardison* standard) or alternative holdings. The district court concluded that, taking all of the facts in the light most favorable to Dalberiste, there was no issue of material fact regarding whether the hardship was *de minimis* under *Hardison.* Dalberiste conceded this point on appeal, and the Eleventh Circuit agreed with him and affirmed.

Pet.4a. Any residual factual disputes between the parties are irrelevant to the resolution of the *legal* question presented here—and can be resolved on remand if this Court repudiates *Hardison* and adopts a stricter standard.

Such straightforward vehicles are uncommon in the Title VII context, where legally relevant facts are likely to be heavily contested. *E.g.*, *Patterson*, 727 F.App'x at 587–589 (listing Patterson's arguments—which Walgreens contested—for possible accommodations that would not cause an undue hardship). As *Patterson* illustrates, other cases raising the question presented will often involve additional (and sometimes alternative) issues that complicate review, including reliance on alternative defenses or even waiver. In *Patterson*, Justices Alito, Thomas, and Gorsuch understandably determined that the undue-hardship question there—though certworthy—should be resolved in a future, cleaner vehicle. *Patterson*, 140 S.Ct. at 685–686 (Alito, J., concurring in the denial of certiorari).

This is that vehicle: The procedural barriers to the Court's review in *Patterson* are absent here, and there are no other issues preventing or complicating this Court's review. On the contrary, both the district court and the court of appeals based their decisions solely on the issue of undue hardship. The legal standard for assessing undue hardship is therefore squarely presented in this petition and ready for this Court to resolve.

CONCLUSION

The Court should seize this opportunity to interpret Title VII's "undue hardship" provision in a way that is consistent with its text and history. Until *Hardison* is repudiated, employees of faith—especially members of minority faiths like Dalberiste—will be left without vital protections for their ability to live out their religious principles. Both Title VII and our richly pluralistic and diverse society require more. The petition should be granted.

Respectfully submitted,

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JUNE 24, 2020

APPENDICES

APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11101

Non-Argument Calendar

D.C. Docket No. 0:18-cv-62276-RS

MITCHE A. DALBERISTE,

Plaintiff – Appellant,

versus

GLE ASSOCIATES, INC.,
a Florida Corporation,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 19, 2020)

Before MARTIN, ROSENBAUM, and LAGOA, Circuit Judges.

PER CURIAM:

Mitche Dalberiste ("Dalberiste") appeals the district court's grant of summary judgment in favor of GLE Associates, Inc. ("GLE") and moves for summary affirmance. For the following reasons, we grant Dalberiste's motion and summarily affirm the decision below.

I. FACTUAL AND PROCEDURAL HISTORY

Dalberiste is a practicing Seventh-day Adventist whose religion forbids him from working on the Sabbath, which occurs from sundown on Friday to sundown on Saturday. In April 2016, Dalberiste applied for an industrial hygiene technician position at GLE, a company that provides worksite engineering, architectural, and environmental services, including asbestos monitoring by industrial hygienist technicians.

One of GLE's customers is Turkey Point Nuclear Generating Station ("Turkey Point" or "station"). Each year, Turkey Point schedules planned outages, where part of the station is closed for maintenance. An outage typically lasts from thirty to sixty days but in one year lasted eighty days. GLE was hired for the Fall 2016 outage. Turkey Point, and not GLE, determines the number of GLE technicians needed to work during an outage.

GLE technicians assigned to Turkey Point for the outages are required to pass extensive background checks and complete several safety and training courses before they can begin working at the station. Having satisfied these requirements, the technicians are given a badge to enter and work in Turkey Point during the outage. Because Turkey Point intends to resume operations as quickly as possible, GLE technicians assigned to Turkey Point during an outage are expected to work seven days per week in twelve-hour shifts.

In April 2016, Dalberiste was interviewed by GLE for a technician position. GLE initially did not hire

Dalberiste and issued a turndown letter around April 28, 2016. Dalberiste reapplied for the same position in June 2016, and on June 21, 2016, GLE offered him the technician position. Dalberiste's offer letter stated that he might be required to work nights and weekends. After Dalberiste accepted the position, he informed GLE for the first time that he would not be able to work from sundown Friday to sundown Saturday. GLE did not offer to accommodate Dalberiste's religious observance and rescinded its job offer in July 2016.

Later that month, Dalberiste filed a charge of discrimination with the Equal Employment Opportunity Commission, which gave him a Notice of Right to Sue letter in June 2018. On September 21, 2018, Dalberiste sued GLE and alleged that the company engaged in religious discrimination, retaliated against him based on his religion, and failed to accommodate his religious observance in violation of Title VII and the Florida Civil Rights Act.

GLE moved for summary judgment on the grounds that it could not have accommodated Dalberiste without incurring undue hardship. After finding that Dalberiste established a prima facie case of religious discrimination, the district court turned to GLE's burden to demonstrate that it could not reasonably accommodate Dalberiste without undue hardship to its business. Dalberiste argued that GLE could have shifted other technicians' work schedules and duties to accommodate his religious observance. Relying on *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), however, the district court concluded that Dalberiste's proposed accommodations would force

GLE to bear more than a de minimis cost. The district court reasoned that Dalberiste's accommodations would require other GLE technicians to bear an additional workload of an already demanding job, would force GLE to change its scheduling and work assignment procedures, would force GLE to incur additional costs to hire an additional employee, would put GLE's contract with the plant at risk, and would affect Turkey Point's badging and security procedures. In light of these efficiency, administrative, and safety costs, the district court granted summary judgment in favor of GLE. Dalberiste filed a timely notice of appeal.

In March 2020, Dalberiste filed an unopposed motion for summary affirmance and asked this Court to summarily affirm the district court's decision. Conceding for the purposes of this appeal that the district court correctly applied *Hardison*'s de minimis cost standard, Dalberiste—raising this argument for the first time on appeal—states that *Hardison* was wrongly decided. Noting our inability to overrule binding Supreme Court precedent, Dalberiste moves this Court to summarily affirm the decision below so he can file a writ of certiorari before the Supreme Court and directly challenge *Hardison*. This is the only argument Dalberiste makes on appeal.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, "viewing the evidence in the light most favorable" to the non-moving party and "drawing all inferences in h[is] favor." *Walden* v. *Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1283 (11th Cir. 2012). Although a party may make a concession on appeal, that "is by no means dispositive

of a legal issue." *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253 (1999).

Summary disposition is appropriate in "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc.* v. *Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[1]

III. ANALYSIS

Title VII prohibits workplace discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined as "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j). Generally, an employer is required to accommodate an employee's religious practices. 29 C.F.R. § 1605.2. However, if "an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without *undue hardship* on the conduct of the employer's business," the employer need not provide an accommodation. § 2000e(j) (emphasis added); see also 29 C.F.R. § 1605.2(b)(1) (stating that it is an unlawful practice "for an employer to fail to reasonably accommodate the religious practices of an employee . . . unless the employer demonstrates that accommodation would

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[1] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted all Fifth Circuit decisions issued before October 1, 1981, as binding precedent.

result in undue hardship on the conduct of its business").

"In religious accommodation cases, we apply a burden-shifting framework akin to that articulated in *McDonnell Douglas Corp.* v. *Green*." *Walden*, 669 F.3d at 1293 (citing *McDonnell Douglas*, 411 U.S. 792 (1973)); see also *Patterson* v. *Walgreen Co.*, 727 F. App'x 581, 585–89 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (2020). The employee has the initial burden to establish a prima facie case of religious discrimination and must show that "(1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed his employer of his belief; and (3) he was discharged for failing to comply with the conflicting employment requirement." *Beadle* v. *Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994) (referencing *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982)). The employee need not show that "employer has 'actual knowledge' of" his "need for an accommodation"; the employee "need only show that his need for an accommodation was a motivating factor in the employer's decision." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).

After the employee establishes his prima facie case, the burden shifts to the employer to establish that it provided the employee with a reasonable accommodation or that an accommodation would cause an undue hardship. *Beadle*, 29 F.3d at 591–93; see § 2000e(j). The Supreme Court in *Hardison* "described 'undue hardship' as any act requiring an employer to bear more than a '*de minimis* cost' in

accommodating an employee's religious beliefs." *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (quoting *Hardison*, 432 U.S. at 84). A "*de minimis* cost" includes "not only monetary concerns, but also the employer's burden in conducting its business." *Id.*

In his unopposed motion for summary affirmance, Dalberiste acknowledges that *Hardison* is binding precedent and further stipulates for purposes of this appeal that the accommodation he requested would impose more than a de minimis burden on GLE. Dalberiste argues for the first time, however, that *Hardison* was wrongly decided and that the Supreme Court should overturn its decision. It is, of course, one of the fundamental principles of our judicial system that we do not have the authority to overrule Supreme Court precedent. See *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982); *Jaffree* v. *Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983). As such, summary affirmance is appropriate here because "there can be no substantial question as to the outcome of the case." *Groendyke Transp.*, 406 F.2d at 1162. Dalberiste's motion for summary affirmance is granted, and the district court's grant of summary judgment in favor of GLE is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-62276-CIV-SMITH

MITCHE A. DALBERISTE,

Plaintiff,

v.

GLE ASSOCIATES, INC.,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Mitche A. Dalberiste, brought this lawsuit against Defendant, GLE Associates, Inc. (GLE), under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and the Florida Civil Rights Act (FCRA), Fla. Stat. § 760.10 *et seq.*, for failure to accommodate religious practices, religious discrimination, and retaliation. Plaintiff alleges that GLE failed to accommodate his request to not work during his Sabbath and that GLE rescinded an offer of employment in retaliation for his request for religious accommodation. GLE filed a Motion for Summary Judgment [DE 29] on grounds that it could not have accommodated Plaintiff's request without incurring undue hardship and it did not discriminate or retaliate against Plaintiff. Plaintiff filed a Memorandum of Law in Opposition to the Motion [DE 40] and GLE filed a Reply [DE 52]. This matter is ripe for adjudication.

I. BACKGROUND

Plaintiff is a life-long, practicing Seventh Day Adventist. (Pl. Dep. [DE 44-1] at 31:22-32:13, 161:15-23.) As a Seventh Day Adventist, Plaintiff's religious beliefs prohibit him from working during his Sabbath, which occurs from sundown on Friday to sundown on Saturday each week. (Pl. Dep. 43:8-15, 44:18-45:21, 161:21-23.) In April 2016, Plaintiff applied for an Industrial Hygiene Technician position at GLE's Fort Lauderdale office. (Pl. Dep. 48:5-49:18; 91:2-92:8.) GLE is an architectural, engineering, and environmental services firm headquartered in Tampa, Florida. (Greene Decl. [DE 31] ¶ 3.) GLE is solely owned by Robert Greene, who founded the business in 1989 and has overseen all areas of its operation in the thirty years since then. (Greene Decl. ¶¶ 3, 11, 46.) GLE currently has roughly eighty employees across all locations and had sixty back in 2016. (Greene Decl. ¶¶ 14-15; Ward Dep. [DE 45-1] 99:3–7.)

One of GLE's primary services is worksite safety monitoring, which includes asbestos monitoring performed by its industrial hygienists. (Greene Decl. ¶¶ 4-5, 8; Padgett Dep. [DE 33-1] 24:20–27:11.) One of GLE's clients in this area served by its Fort Lauderdale office is Turkey Point Nuclear Generating Station ("the Nuclear Station" or "the plant"). (Greene Decl. ¶ 22; Simmons Dep. [DE 34-1] at 65:20–68:8.) The plant is a twin reactor nuclear power station owned by Florida Power & Light (FP&L) and located in Homestead, Florida. FP&L handles the operations of the plant itself but has a contractor ("the Contractor") that handles all other necessary work at the facility. (Padgett Dep. 31:24–33:25.) GLE

maintains contracts with both FP&L and the Contractor. (Simmons Dep. 38:23–40:5.) Each year, the Nuclear Station has planned outages in the fall, and every other year it has an additional outage in the spring. (Simmons Dep. 28:8-25; Padgett Dep. 36:17–20.) These outages, which shut down parts of the facility for maintenance, last anywhere from thirty to eighty days. (Simmons Dep. 28:22–29:1, 70:21-71:2, 162:3-10; Padgett Dep. 34:18-21, 35:2–12.)

FP&L and the Contractor set terms to govern the work GLE performs at the Nuclear Station. For example, they tell GLE how many workers are needed during an outage. (Padgett Dep. 36:17-25, 37:15-38:8, 43:2-11.) Once selected, the GLE employees must receive badges from the plant before they can begin working. (Padgett Dep. 38:16-39:3, 49:9-10; Simmons Dep. 31:20-33:21, 62:12-21.) The badging process takes about two to three weeks and involves an extensive background check, urinalysis, and a psychological exam. (Padgett Dep. 38:16-39:3, 49:9-10; Simmons Dep. 31:20-33:21, 62:12-21.) Ahead of the outage, GLE employees must also attend training classes at the plant, which last about a week. (Padgett Dep. 38:16-39:3, 49:9-10; Simmons Dep. 31:20-33:21, 62:12-21.) The employees must have previously had asbestos and air monitoring training pertaining to Phase Contrast Microscopy Samples (PCM) and National Institute of Occupational Safety and Health (NIOSH) certification. (Simmons Dep. 71:17-20; Padgett Dep. 66:19-73:10; Ward Dep. 29:15-32:13.) NIOSH and PCM training are usually out of state and

collectively take about two weeks to complete.[1] (Simmons Dep. 71:17-20; Padgett Dep. 66:19-73:10; Ward Dep. 29:15-32:13.)

Generally, the work done by industrial hygienists in GLE's Fort Lauderdale office is described as "very physical and dirty," "mostly field work," "mostly after hours," and requiring flexibility. (Padgett Dep. 26:16-27:1, 44:4-12, 57:3-4, 78:6-25, 111:4-11, 112:2-23, 114:1-23; Simmons Dep. 70:3-20, 79:6-80:12, 173:1-22.) Indeed, much of GLE's work requires its employees to be on job sites during evenings and weekends when they will create the least interference with the clients' businesses. (Greene Decl. ¶ 10; Simmons Dep. 78:24–82:7, 85:9–86:6.) It is project-based work; that is, technicians are assigned to a project and are expected to see their project through to the end. (Simmons Dep. 81:4-19; 82:8-16; Padgett Dep. 111:12-112:22.) While the outage work at the Nuclear Station is an entry-level job, it is just as demanding. GLE employees assigned to the Nuclear Station during an outage work seven days per week in twelve-hour shifts, anywhere from thirty to eighty days. (Greene Decl. ¶¶ 25-26; Padgett Dep. 35:5-8, 37:2-5, 57:14–21.) FP&L and the Contractor require this exacting schedule because they need to get the plant back up as quickly as possible. (Padgett Dep. 37:1–5; Simmons Dep. 70:3-20.)

In early 2016, employees in the Fort Lauderdale office were overworked and as a result the Director of GLE's South Florida Operations, John Simmons,

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[1] Internally, GLE also requires that new employees have corporate training at its Tampa headquarters. This training lasts about three days. (Ward Dep. 30:15-24.)

sought to hire two new employees to staff the fall outage at the Nuclear Station. (Simmons Dep. 20:19-22:8, 41:14-20, 60:12-61:4, 93:24-94:6; Ward Dep. 110:6-10.) Typically, GLE would send an experienced employee and a new employee to work an outage. (Simmons Dep. 40:8-41:10; Padgett Dep. 39:21-40:9, 59:1-9.) Experienced employees work the day shift and liaise with FP&L and the Contractor on planning and logistical issues, and new employees work the night shift. (Padgett Dep. 39:21-40:9.) In 2016, because of the workload at the Fort Lauderdale office, Simmons decided it would be more efficient to send the two new employees to the plant and keep his experienced staff on other projects, which required higher proficiency. (Simmons Dep. 20:19-22:8, 57:2-21, 93:24-94:16.) To get the two new employees acclimated, GLE planned to send a third, experienced employee to the plant for about two to three days at its own expense to get them started. (Simmons Dep. 41:14-42:5, 46:14-22, 52:22-53:9.)

Plaintiff testified that GLE did not inform him during the application or interview process that he was being hired to work, at least initially, at the plant. (Pl. Dep. 114:18-115:6, 32:23-133:5, 166:1-5, 168:5-18.[2]) On the other hand, Simmons, Amber Ward (GLE's current head of Human Resources), and Rafe Padgett (a Senior Project Manager at GLE) testified that they discussed Turkey Point with Plaintiff in

[2] After the fall outage, GLE would have kept Plaintiff on staff, continuing to train him in the different job areas covered by the Fort Lauderdale office. On average it takes about two to three years before an employee can work on his or her own without needing to be paired with a senior employee or project manager. (Simmons Dep. 71:10-73:11.)

detail and explained the exacting schedule that would be required of him, including the need to work on nights and weekends. (*See, e.g.*, Padgett Dep. 77:19-20, 84:10-85:4; Ward Dep. 80:6-17, 108:20-110:10; Simmons Dep. 109:7-114:10.) In short, there is a dispute between the parties regarding what aspects of the job requirements and GLE's business — particularly concerning the Nuclear Station — were discussed prior to Plaintiff's acceptance of the job offer. Nonetheless, the following material facts regarding the hiring process are not disputed. GLE first interviewed Plaintiff by phone in early April 2016. (Pl. Dep. 53:8-54:8, 77:14-25; Ward Dep. 57:6-19, 62:5-8.) During the phone interview, Plaintiff told GLE that he had no problems traveling or working nights and weekends, as those issues were discussed by him and Ward. (Pl. Dep. at 67:20-68:6, 150:15-21.) Plaintiff also recalls reading on the employment application form that GLE could require him to work unscheduled hours such as on weekends and recalls that the job advertisement "said sometimes night and weekend" work could be required. (Pl. Dep. 98:1-12, 148:15-149:24, 151:19-23.)

Shortly after the phone interview, Plaintiff had an in-person interview at GLE's Fort Lauderdale office with Simmons, Padgett, and possibly a third individual.[3] (Pl. Dep. 53:8-19, 77:14-25.) During the in-person interview, GLE referenced its contract at the Nuclear Station, explaining that it staffed the facility

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[3] Plaintiff testified that there was a third person in the room during the interview. (Pl. Dep. 77:23-25, 79:7-9.) Simmons identified only one other interviewer, Padgett. (Simmons Dep. 91:1-5.)

with two employees who together work twenty-four-hour shifts; one person worked twelve hours in the morning and one worked twelve hours at night. (Pl. Dep. 80:12-19, 81:1-8, 86:20-24, 113:9-24, 164:16-165:14.) The interviewers also discussed the distance to travel to the plant. (Pl. Dep. 80:24-81:8, 105:15-106:3, 14:2-17, 168:7-18.)

GLE did not offer Plaintiff the position and issued a turndown letter around April 28, 2016. (Pl. Dep. 89:13-90:28; Ward Dep. 61:18-24, 63:8-15.) Plaintiff reapplied for the same position in June 2016, by personally dropping off his resume at the Fort Lauderdale office and speaking to Simmons. (Pl. Dep. 90:14-16, 101:17-103:10.) GLE extended a job offer to Plaintiff on June 21, 2016. (Pl. Dep. 103:11-104:17.) The offer letter highlighted the requirement that Plaintiff pass a background and drug test by GLE as well as potentially by GLE's clients, such as "nuclear power plants." (Pl. Dep. 80:24-81:8, 105:15-106:3, 14:2-17, 168:7-18.) Plaintiff also remembers reading in the offer letter that "[o]ut of town travel, weekend and night work may be required for th[e] position." (Pl. Dep. 106:6-11.) Plaintiff accepted the job offer on June 21, 2016. (Pl. Dep. 103:11-104:17.)

After he was hired and a few days before his start date in July, Plaintiff informed GLE for the first time that he was unable to work from sundown on Friday to sundown on Saturday because of his Sabbath. (Pl. Dep. 76:10-77:5, 115:7-16; Simmons Dep. 127:9-128:4.) Plaintiff did not disclose his schedule restrictions prior to being hired because he concluded that "[i]t wasn't information that needed to be discussed" since it was a matter of religion, and GLE was legally required to

make an accommodation once it hired him. (Pl. Dep. 71:24-72:1, 76:10-77:5, 135:8-13.) Without offering any accommodation, on July 5, 2016, GLE rescinded the job offer because of Plaintiff's inability to work from sundown on Friday to sundown on Saturday. (Pl. Dep. 112:14-23, 140:15-16.) GLE was unable to hire someone to replace Plaintiff in time for the October outage and, at additional costs to the company, ended up bringing one of its workers from Tampa to work at the Nuclear Station. (Simmons Dep. 46:1-6, 54:1-55:1, 56:14-25, 58:18-23; Greene Decl. ¶ 17.[4])

On July 20, 2016, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). (Pl. Dep. 138:3-22.) The EEOC issued a Notice of Rights to Sue on June 26, 2018. (Compl. ¶ 7.) Plaintiff filed the Complaint on September 21, 2018. In his Complaint, Plaintiff asserts a religious discrimination claim under theories of disparate treatment and failure to accommodate. Plaintiff also alleges that GLE's failure to accommodate his religious beliefs and rescission of the job offer constitute unlawful retaliation. (*Id.* ¶¶ 32-36, 48-53.) GLE denies these allegations and maintains that it rescinded the job offer only because of Plaintiff's inability to work from sundown on Friday to sundown on Saturday, which rendered him unable to perform the job required at the Nuclear Station. (Mot. at 1-3, 9.) GLE states that it could not have accommodated Plaintiff's religious beliefs without incurring undue hardship. *Id.*

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[4] The Tampa office employee worked with a new employee. (Simmons Dep. 45:24-46:6.)

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56, "summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). "[G]enuine disputes of facts are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant." *Mann* v. *Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (internal marks and citation omitted). A fact is material if, under the applicable substantive law, it might affect the outcome of the case. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A party seeking summary judgment bears the initial responsibility of supporting its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts about the facts in favor of the non-movant." *Rioux* v. *City of Atlanta, Ga.*, 520 F.3d 1269, 1274 (11th Cir. 2008) (internal marks and citation omitted).

III. DISCUSSION

Decisions construing Title VII guide the analysis of claims under the FCRA, which was patterned after Title VII. *Harper* v. *Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). Therefore, the Court's analysis of Plaintiff's Title VII claims is equally applicable to Plaintiff's FCRA claims.[5] All three of Plaintiff's claims are based on GLE's failure to accommodate his observance of the Sabbath. As a result, the Court need not analyze the claims separately. See *Patterson* v. *Walgreen Co.*, 727 F. App'x 581, 589 (11th Cir. 2018). As a final preliminary matter, the Court notes that the evidence reflects that GLE extended an offer of employment, Plaintiff accepted the offer, and then GLE communicated to Plaintiff that it could no longer hire him. While these facts suggest termination, the parties — who have more intimate knowledge of all the facts — have framed this case as failure-to-hire case. Hence, the Court will treat this action as such. The Court now turns to the merits.

A. Title VII Standard

"Title VII * * * prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship." *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2031, 192 L. Ed. 2d 35 (2015). As defined in

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[5] "Because neither party asserts otherwise, [the Court] assume[s], without deciding, that a religious[] accommodation claim is cognizable under FCRA." *Telfair* v. *Fed. Exp. Corp.*, 567 F. App'x 681, 683 n.2 (11th Cir. 2014).

the statute, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

On summary judgment, the Court applies the burden-shifting principles provided in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In the first step, Plaintiff must submit evidence that (1) he had a bona fide religious belief that conflicted with an employment requirement, (2) he informed the employer of his belief, and (3) he was not hired for failing to comply with the employment requirement. *Walden* v. *Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012). "If the plaintiff establishes a prima facie case, the burden shifts to the defendant to demonstrate 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.* (citation and internal marks omitted).

Here, Plaintiff has established a prima facie case. Plaintiff's bona fide religious beliefs as a Seventh Day Adventist prohibit him from working from sundown on Friday to sundown on Saturday and GLE rescinded the job offer because of Plaintiff's inability to work those hours. The burden now shifts to GLE to demonstrate that it was unable to reasonably accommodate Plaintiff's beliefs without incurring undue hardship.

B. Accommodation and Undue Hardship

"[A] reasonable accommodation is one that eliminates the conflict between employment requirements and religious practices." *Walden*, 669 F.3d at 1293 (citation and internal marks omitted). An employer, however, is not required to accommodate at all costs. *Morrissette-Brown* v. *Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322 (11th Cir. 2007). "Undue hardship" is defined "as any act that would require an employer to bear greater than a '*de minimis* cost' in accommodating an employee's religious beliefs." *Beadle* v. *Hillsborough Cty. Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994) (citing *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 75, 97 S. Ct. 2264, 2272, 53 L. Ed. 2d 113 (1977)). "'[*D*]*e minimis* cost' entails not only monetary concerns, but also the employer's burden in conducting its business." *Patterson*, 727 F. App'x at 586 (citing *Hardison*, 432 U.S. at 84 n.15).

GLE did not offer any accommodation and takes the position that there was no accommodation option that would have avoided undue hardship to its business. Plaintiff disagrees. Plaintiff points to a prior outage, for instance, where GLE had only one person working at the Nuclear Station on double-shifts to suggest that the same arrangement could have been made in his case. Plaintiff further argues that a manager from the Fort Lauderdale office or an employee from another office could have been assigned to cover the times he was unavailable. Plaintiff also highlights the fact that GLE had originally intended to send a third employee to the plant and argues that GLE could have simply assigned this third employee to his Sabbath shift for the duration of the project. The

Court concludes that based on the evidence these proposals would have caused undue hardship on GLE's business operations.

To start, regarding Plaintiff's suggestion that his co-worker at the plant do double-shifts each week to cover his unavailability, "Title VII does not contemplate such unequal treatment." *Hardison*, 432 U.S. at 81. Indeed, the Supreme Court has made it clear that an accommodation that requires other employees to assume a disproportionate workload or which deprives other employees of their shift preference is an undue hardship. See *id.* ("[T]o give [plaintiff] Saturdays off, [the employer] would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. . . . It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.").

The Eleventh Circuit confirmed as much in a recent persuasive opinion in which it observed that, "[t]o ensure that [plaintiff] received the time off for Sabbath observance that he was insisting on, Walgreens [the employer] would have had to schedule . . . shifts, including emergency ones, based solely on [plaintiff's] religious needs, at the expense of other employees who had nonreligious reasons for not working on weekends." *Patterson*, 727 F. App'x at 588-89. "In the immediate future," the court continued,

"the burden to work all Friday night and Saturday shifts would have fallen on Alsbaugh, Walgreens' only other training instructor at the time. . . . Under those circumstances, the accommodation [plaintiff] sought would have imposed an undue hardship on Walgreens just as it would have for the employer in *Hardison*." *Id.*; see also *Bruff* v. *N. Mississippi Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) (holding that requiring one or more of plaintiff's co-workers to assume a disproportionate workload or to travel involuntarily with plaintiff to accommodate plaintiff constitute an undue hardship as a matter of law); *Weber* v. *Roadway Exp., Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship.").

The law does not require GLE to impose a disproportionate workload on Plaintiff's co-worker at the plant to accommodate Plaintiff's beliefs. This conclusion is particularly warranted on the facts of this case. GLE employees who work during the Nuclear Station's outages are subject to a grueling schedule; they work seven days per week, twelve hours per day, for thirty to eighty days — depending on the length of the outage. The work is very physically demanding and dirty. To impose on another employee an added twenty-four hour shift one day every week on top of this taxing schedule merely to accommodate Plaintiff would amount to unfair treatment of Plaintiff's co-worker.

Additionally, regarding Plaintiff's proposal that a third local or non-local employee be assigned to cover for him, GLE had no obligation to revamp the way it

schedules and assigns its employees to accommodate Plaintiff, especially where there is evidence that the company's business efficiency would be affected. See *Patterson*, 727 F. App'x at 589 (employer not required to change training sessions to accommodate Plaintiff; occasional Saturday trainings were a business necessity and sometimes required on an urgent basis); *Berry* v. *Meadwestvaco Packaging Sys., LLC*, No. 3:10CV78-WHA-WC, 2011 WL 867218, at *8 (M.D. Ala. Mar. 14, 2011) ("[T]he *Hardison* court emphasized that it is an undue hardship to force an employer to change the way it schedules its employees merely to satisfy the needs of an employee with a religious objection to the schedule."); *Bruff*, 244 F.3d at 501 ("Requiring the [employer] to schedule multiple counselors for sessions, or additional counseling sessions to cover areas [plaintiff] declined to address [because of her religious beliefs], would also clearly involve more than *de minimis* cost.").

At the relevant time, the Fort Lauderdale office had a substantial workload and projects which required more experience than the entry-level work done at the plant. Under these circumstances, Simmons concluded that he needed to hire additional employees to staff the plant and that the better business decision was to have the new employees work the outage so that experienced employees could remain on more advanced assignments. Further, GLE uses a project-based model so the company generally keeps its employees on the projects they are assigned to. This evidence supports GLE's position that it did not have adequate resources to staff the Nuclear Station with a third employee each week. GLE's staffing decisions are based on its view of the most

efficient allocation of resources. Absent evidence of discrimination, this Court does not sit as a super-personnel department that reexamines an entity's business decisions. *Elrod* v. *Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (citation omitted). The evidence reflects legitimate business concerns and, therefore, the Court will not second-guess GLE's staffing decisions.

While Plaintiff points to GLE's original plan to send a third employee to the plant, the evidence is that the company planned to do so for only two or three days, not for the entirety of the outage. Likewise, Plaintiff's reliance on testimony that GLE relied on a non-local employee to cover Turkey Point in the past is not compelling because the company did so out of necessity after it was unable to find a replacement for Plaintiff in time for the fall outage.

Above all, Plaintiff's proposals come with added economic costs to GLE. GLE has offices in Atlanta, Nashville, Gainesville, Orlando, Fort Lauderdale, Tampa, and Jacksonville. (Lemen Dep. [DE 46-1] 30:19-23.) Still, in 2016, the company had only roughly sixty employees. It is a relatively small company, and it hires employees for specific offices based on the needs of the office. It is not normal practice to send employees to work away from their home office.[6] In fact, the evidence in the record is that it was more cost

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[6] The evidence is that employees work outside of their home office in limited circumstance: (1) in emergency situations where another office may need coverage (for example, during a hurricane); (2) if another office is busy and needs assistance; and (3) if there is a posted vacancy in another office. (Padgett Dep. 22:21-24:9; Simmons Dep. 16:2-20, 17:6-19.)

effective to use local employees (that is, from the Fort Lauderdale office) than out-of-town employees to cover the Nuclear Station. For instance, Simmons testified that using the employee from Tampa to cover the fall outage after Plaintiff's offer was rescinded ended up costing the company more money than it would have expended if a local employee was available and had been assigned, because GLE had to absorb per diem and hotel expenses.[7] Likewise, if GLE were to send a third employee from Fort Lauderdale to the plant each week to cover for Plaintiff, GLE would have to absorb the associated costs. (Simmons Dep. 52:22-53:7 (plant would not have covered cost of the third employee).)

Even worse, staffing the outage with a third employee as Plaintiff proposes would have imposed an unreasonable burden on the Nuclear Station as well. For economic and safety reasons, the plant restricts the number of badges it issues. (Simmons Dep. 130:23-133:6.) The number of badges issued correlates to the shifts or the number of employees the plant requests of GLE, which would have been two in 2016. In urgent situations or on daily non-outage jobs, a non-badged GLE employee can get access upon twenty-four-hour

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[7] Plaintiff questions GLE's assertion that it did not have enough time to hire a replacement to the extent that Plaintiff's job offer was rescinded in July and the outage would not have been until perhaps October. Plaintiff's speculation is unsupported by any evidence. Further, given that (1) Plaintiff applied for the position in April, (2) was not hired until June 21st, (3) would not have started working until the beginning of July, and (4) would have also been required to undergo at least three to four weeks of training prior to working the outage (NIOSH, PCM, GLE corporate, and the Nuclear Station training), the evidence supports GLE's position that there was not enough time to have a job-ready employee.

notice to the plant and on condition that the non-badged employee be escorted around the plant by a badged GLE employee or by one of the Contractor's employees (at a cost to the Contractor and the Contractor decides who can serve as an escort). (Simmons Dep. 30:11-31:19, 42:18-43:1, 46:14-16, 53:10-13; Padgett Dep. 49:9-18.)

In this scenario, the non-badged GLE employee covering for Plaintiff would have to be escorted around the facility by the Contractor's staff, at the Contractor's expense, one day each week for at least twelve hours straight.[8] That would be an undue burden on the plant and would possibly result in GLE losing its contract with the Contractor. Indeed, on a previous occasion, the plant came close to terminating GLE's contract due to a staffing shortage caused by an employee's sudden resignation, which left only one worker doing double-shifts and left the plant questioning whether GLE could properly cover the shifts. (Simmons Dep. 59:1-60:8.) Overall, in the end, Plaintiff's proposals would require not only GLE but also the Nuclear Station to change business practices and incur added costs. This finding supports GLE's position that it could not have accommodated Plaintiff without incurring undue hardship.

To essentially show that GLE did not make a good faith effort to try to accommodate him, Plaintiff points to the short amount of time it took GLE to decide to rescind the job offer. On the day Plaintiff called

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[8] Plaintiff points to the fact that badge access lasts a year. Still, the uncontroverted evidence is that at the relevant time no Fort Lauderdale employee had access. (Simmons Dep. 49:12-50:4)

Simmons to inform him of his Sabbath requirements, Simmons reached out to Ginny Lemen, GLE's former Corporate Administrator, to inform her of Plaintiff's request. (Simmons Dep. 128:2-11; Lemen Dep. 59:3-61:16.) Upon speaking with Simmons, Lemen called GLE's attorney to consult on the matter. (Lemen Dep. 61:13-25.) After speaking with the attorney, Lemen went to Greene's office to discuss the issue. (Lemen Dep. 62:3-22.)

During the conversation, Greene asked Lemen: (1) if she consulted with the company's attorney and what advice she received; (2) if Plaintiff was prescreened and what was the result; (3) about the nature and substance of Plaintiff's interview with Simmons; and (4) if anyone else interviewed Plaintiff and what was the result. (Greene Dep. [DE 49-1] 19:19-21:15.) Upon receiving responses to his questions and based on "his extensive experience knowing that nights and weekends are required extensively in all offices, including the South Florida office, for work in the asbestos environment," Greene instructed Lemen to rescind the job offer. (Greene Dep. 23:25-24:20; 26:8-17.) Greene did not do any other evaluation because by that point he felt "it would create undue hardship for the company for [Plaintiff] not to be able to work nights and weekends, or weekends specifically." (Greene Dep. 28:3-29:12.) Greene made his decision within ten minutes from the time Lemen walked into his office. (*Id.*)

Plaintiff takes issue with Greene's failure to: (1) consult with him or other GLE employees; (2) confirm the facts given by Lemen; (3) confirm the number of Friday and Saturday nights worked by industrial

hygienists in the Fort Lauderdale office; and (4) determine the extent of the accommodation requested. Plaintiff provides no evidence, however, that longer deliberations would have produced a different outcome, especially one that would have avoided undue hardship to the company. To the contrary, as discussed above, the evidence in the record shows that undue hardship was likely to result had GLE granted Plaintiff's accommodation request. Further, Greene, the decision maker, started and built the company and has run GLE for the last thirty years. These facts support his assertion that he had enough knowledge of the company's client, project, and staffing needs to evaluate the situation and make a prompt decision.

Hence, short of Plaintiff electing to work throughout the weekend (which was not possible given his religion) the Court cannot conclude, based on the evidence, that further discussions would have been fruitful. Plaintiff's proposed interactive process would have been futile. See *E.E.O.C.* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 n.7 (9th Cir. 1988) ("If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act" of taking "initial steps to reach a reasonable accommodation of the particular religious belief at issue.") (citing *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69, 107 S. Ct. 367, 372, 93 L. Ed. 2d 305 (1986) and cases similarly allowing an employer to argue "undue hardship" where it made no attempt at accommodation); *Weber*, 199 F.3d at 275 (explaining that even though employer failed to make an effort to accommodate plaintiff's religious beliefs it is entitled to summary judgment

where it demonstrates that any accommodation would impose an undue hardship) (citation omitted).

As a final observation on Plaintiff's failure-to-accommodate claim, it is not lost on the Court that Plaintiff specifically represented to GLE during the interview process that he could work nights and weekends, with full knowledge that the position potentially required work during those times and knowing that he was unable to work at least half the weekend. The Court further notes that this case is distinguished from other cases where the evidence shows that the employer had either a sufficiently large workforce or a manageable workload to reasonably facilitate a plaintiff's request for accommodation. In addition, the evidence consistently demonstrates that the industrial hygienist work done by GLE's Fort Lauderdale office is inflexible in terms of the time commitment required and the restrictions imposed by the Nuclear Station, and is so physically taxing that passing Plaintiff's workload to his co-worker at the plant would have been unjust.

For all these reasons, the Court concludes that GLE is entitled to summary judgment on its religious accommodation, discrimination, and retaliation claims. See *Patterson*, 727 F. App'x at 589 (district court did not err in granting summary judgment on all three of plaintiff's claims — failure to accommodate, discrimination, and retaliation — where they were all based on the employer's failure to accommodate plaintiff's observation of his Sabbath). All three claims turn on GLE's alleged failure to accommodate Plaintiff's religious beliefs. The uncontroverted facts in the record are enough to foreclose any genuine issue

of material fact on all claims. Furthermore, even if the Court were to independently analyze the discrimination and retaliation claims, it would similarly conclude that the claims must fail because Plaintiff cannot show that GLE's reason for not hiring him was a pretext for religious discrimination.

C. Pretext

To briefly elaborate, where a discrimination or retaliation claim is supported by circumstantial evidence, like this case, the *McDonnell Douglas* framework addressed above governs the Court's analysis. *Lubetsky* v. *Applied Card Sys., Inc.*, 296 F.3d 1301, 1305 (11th Cir. 2002) (discrimination); *Bush* v. *Regis Corp.*, 257 F. App'x 219, 222 (11th Cir. 2007) (retaliation). Assuming Plaintiff can meet his burden under the first prong and demonstrate a prima facie case of discrimination and retaliation, "the burden of proof shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Lubetsky*, 296 F.3d at 1305. If the defendant carries his burden, the plaintiff must demonstrate by competent evidence that the presumptively valid reasons offered by the defendant were a pretext for discrimination or prohibited, retaliatory conduct. *Id.*; *Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (citing *Olmsted* v. *Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998)).

GLE articulated legitimate non-discriminatory reasons for not accommodating Plaintiff's request to be off from sundown on Friday to sundown on Saturday. Plaintiff has not offered any evidence to rebut those reasons. Plaintiff attempts to do so by

arguing that the requirement to work twelve-hour shifts at the Nuclear Station was pretext for discrimination because GLE did not specifically inform him during the interview process that he was being hired to work at the plant and, in any event, he was prepared to work all non-Sabbath hours. This argument is not persuasive because even if he was not given a specific schedule during his interview, the undisputed evidence is that Plaintiff was on notice of GLE's work at the plant, was on notice of the possibility of working nights and weekends, and he informed GLE he could meet such temporal requirements. Plus, regardless of his availability at other times, Plaintiff's absence for at least half of the weekend would have created undue hardship for GLE, undermined its business efficiency, and put its contract with the plant at risk.

Next, Plaintiff argues that he has shown pretext by flagging purported conflicting testimony concerning GLE's hiring decision. More specifically, Plaintiff argues that there are inconsistencies regarding why Plaintiff was not hired the first time he applied in April 2016 and regarding who made the final hiring decision.[9] This argument is neither here nor there. GLE did not become aware of Plaintiff's religious beliefs until July 2016, so its reason for not hiring Plaintiff in April 2016, or who made the decision to hire Plaintiff in June 2016, is not relevant or material to the Court's determination of whether religious bias motivated GLE's decision to rescind the job offer in

[9] In connection with these arguments, the Motion refers to a "Jean-Pierre." See Mot. at 10-12. The Court assumes this is an error and the discussion pertains to Plaintiff, Mitche Dalberiste.

July once it became aware of Plaintiff's schedule restrictions. In the end, there is no evidence of discrimination or that GLE acted with retaliatory animus by virtue of its failure to accommodate Plaintiff's beliefs. Accordingly, it is

ORDERED that:

1) Defendant's Motion for Summary Judgment [DE 29] is **GRANTED**;

2) The Court will enter separate judgment;

3) All pending motions not otherwise ruled on are **DENIED AS MOOT**; and

4) The case is **CLOSED**.

DONE AND ORDERED in Fort Lauderdale, Florida, this 18th day of February, 2020.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

APPENDIX C: TITLE VII ACCOMMODATION APPEALS SINCE 2000

Court	*Cases*	*Non-Minority Religion*	*Minority Religion*	*Minority Status Unknown*	*Employee Won*	*Non-Minority Won*	*Minority Religion Won*
CA1	2	0	2	0	0/2	N/A	0/2
CA2	1	0	0	1	0/1	N/A	N/A
CA3	6	0	4	2	0/6	N/A	0/4
CA4	7	2	2	3	1/7	1/2	0/2
CA5	9	3	4	2	2/9	0/3	1/4
CA6	8	3	3	2	3/8	2/3	1/3
CA7	5	2	1	2	1/5	1/2	0/1
CA8	2	0	1	1	0/2	N/A	0/1
CA9	3	1	0	2	0/3	0/1	N/A
CA10	3	2	1	0	1/3	0/2	1/1
CA11	3	0	3	0	0/3	N/A	0/3
CADC	0	0	0	0	N/A	N/A	N/A
Total	49	13/49 (26.5%)	21/49 (43%)	15/49 (30.5%)	8/49 (16.3%)	4/13 (30.7%)	3/21 (14.3%)

Decisions in the First Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Cloutier v. *Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)	Church of Body Modification (minority)	Summary judgment to employer affirmed.	Requiring an employer to modify its dress code would impose more than *de minimis* harm.
Sanchez-Rodriguez v. *AT & T Mobility Puerto Rico, Inc.*, 673 F.3d 1 (1st Cir. 2012)	Seventh-day Adventist (minority)	Summary judgment to employer affirmed.	Requiring an employer to provide shift switches would impose more than *de minimis* harm.

Decisions in the Second Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Doughty v. *Dep't of Dev. Servs. STS*, 607 F. App'x. 97 (2d Cir. 2015)	Unspecified	Summary judgment to employer affirmed.	Requiring an employer to redo its schedule, or pay another employee double time, would impose more than *de minimis* harm.

Decisions in the Third Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
EEOC v. *Geo Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010)	Muslim (minority)	Summary judgment to employer affirmed.	Requiring an employer to suffer alleged safety risks because of a head covering would impose more than *de minimis* harm.
Webb v. *City of Phila.*, 562 F.3d 256 (3d Cir. 2009)	Muslim (minority)	Summary judgment to employer affirmed.	Requiring an employer to allow religious employee to modify its uniform would impose more than *de minimis* harm.
Shelton v. *Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220 (3d Cir. 2000)	Pentecostal	Summary judgment to employer affirmed.	Requiring a hospital to allow healthcare workers to refuse to treat a patient would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Miller v. *Port Auth. of N.Y. & N.J.*, 788 F. App'x 886 (3d Cir. 2019)	Jewish (minority)	Summary judgment to employer affirmed.	Requiring an employer to violate its seniority system or collective bargaining agreement would impose more than *de minimis* harm.
Aron v. *Quest Diagnostics, Inc.*, 174 F. App'x 82 (3d Cir. 2006)	Jewish (minority)	Summary judgment to employer affirmed.	Requiring an employer to hire another employee as an accommodation would impose more than *de minimis* harm.
Fouche v. *NJ Transit*, 470 F. App'x 96 (3d Cir. 2012)	Unspecified Christian	Summary judgment to employer granted and affirmed.	Requiring an employer to violate its seniority system or collective bargaining agreement would impose more than *de minimis* harm.

Decisions in the Fourth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
EEOC v. *Thompson Contracting, Grading, Paving, & Util.*, 499 F. App'x. 275 (4th Cir. 2012)	Hebrew Israelite (minority)	Summary judgment to employer affirmed.	Requiring an employer to "creat[e] a pool of substitute drivers" would impose more than *de minimis* harm.
EEOC v. *Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017)	Evangelical Christian	Denial of JMOL to employer affirmed.	Requiring an employer to provide an accommodation that it had already provided to two non-religious employees would not impose more than *de minimis* harm.
EEOC v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008)	Living Church of God	Summary judgment to employer affirmed.	Requiring an employer to violate its seniority system would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
McIntyre-Handy v. *W. Telemarketing Corp.*, 238 F.3d 413 (4th Cir. 2000)	Atheist (minority)	Summary judgment to employer summarily affirmed.	Requiring an employer to displace another employee would impose more than *de minimis* harm.
Perkins v. *Town of Princeville*, 216 F. App'x 293 (4th Cir. 2007)	Seventh-day Adventist (minority)	Summary judgment to employer summarily affirmed.	Requiring an employer to alter its rotating scheduling system to provide a permanent schedule would impose more than *de minimis* harm.
Dale v. *TWC Admin. LLC*, 686 F. App'x 240 (4th Cir. 2017)	Unspecified	Summary judgment to employer summarily affirmed.	Requiring an employer to violate a North Carolina law requiring "all employees of an alarm systems business to be * * * fingerprinted" would impose more than *de minimis* harm.[1]

[1] *Dale* v. *TWC Admin. LLC*, 2016 WL 11430762, at *7 (E.D.N.C. 2016).

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Baltgalvis v. *Newport News Shipbuilding Inc.*, 15 F. App'x. 172 (4th Cir. 2001)	Unspecified Christian	Summary judgment to employer summarily affirmed.	Requiring an employer to violate federal law by using identification other than the social security number would impose more than *de minimis* harm.

Decisions in the Fifth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Weber v. *Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000)	Jehovah's Witness (minority)	Summary judgment to employer affirmed.	Requiring an employer to potentially adversely impact other employees' schedules would impose more than *de minimis* harm.
Tagore v. *United States,*735 F.3d 324 (5th Cir. 2013)	Sikh (minority)	Summary judgment to employer affirmed.	Requiring an employer to incur any safety risk, no matter how speculative, would impose more than *de minimis* harm.
Davis v. *Fort Bend Cty.,*765 F.3d 480 (5th Cir. 2014)	Church Without Walls (unknown)	Summary judgment to employer reversed.	Unclear whether requiring an employer to allow an employee to get a replacement so she could attend church would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Daniels v. *City of Arlington*, 246 F.3d 500 (5th Cir. 2001)	Evangelical Christian	Summary judgment to employer affirmed.	Requiring a government employer to allow religious symbols on its uniforms would impose more than *de minimis* harm.
Stolley v. *Lockheed Martin Aeronautics Co.,* 228 F. App'x 379 (5th Cir. 2007)	United Church of God	Summary judgment to employer affirmed.	Requiring an employer to violate its collective bargaining agreement would impose more than *de minimis* harm.
Antoine v. *First Student, Inc.,* 713 F.3d 824 (5th Cir. 2013)	Seventh-day Adventist (minority)	Summary judgment to employer reversed.	Requiring an employer to allow a voluntary shift swap allowed by collective bargaining agreement would not impose more than *de minimis* harm, and other questions of hardship remained.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Lorenz v. *Wal-Mart Stores,* 225 F. App'x 302 (5th Cir. 2007)	Muslim (minority)	Summary judgment to employer affirmed.	Requiring an employer to create a new position solely to accommodate employee would impose more than *de minimis* harm.
George v. *Home Depot Inc.*, 51 F. App'x 482 (5th Cir. 2002)	Catholic	Summary judgment to employer affirmed.	Requiring an employer to hire a new employee would impose more than *de minimis* harm.
Bruff v. *N. Miss. Health Servs.,* 244 F.3d 495 (5th Cir. 2001)	Unspecified Christian	Reversed JMOL in favor of employee and found for employer.	Requiring an employer to allow a counselor to refuse to counsel gay/lesbian patients would impose more than *de minimis* harm.

Decisions in the Sixth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Crider v. *Univ. of Tenn.*, 492 F. App'x 609 (6th Cir. 2012)	Seventh-day Adventist (minority)	Summary judgment to employer reversed.	Employer's failure to provide evidence of hardship beyond a coworker "grumbling" meant that employer failed to establish more than *de minimis* harm.
Creusere v. *James Hunt Constr.*, 83 F. App'x 709 (6th Cir. 2003)	Unspecified Sabbatarian	Summary judgment to employer affirmed.	Requiring an employer to accommodate an employee when the accommodation would require extra pay for the employee would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Creusere v. *Bd. of Educ.*, 88 F. App'x 813 (6th Cir. 2003)	Unspecified Sabbatarian	Summary judgment to employer affirmed.	Requiring an employer to accommodate an employee when the accommodation would require extra pay for the employee would impose more than *de minimis* harm.
EEOC v. *Robert Bosch Corp.*, 169 F. App'x 942 (6th Cir. 2006)	Old Path Church of God	Summary judgment to employer reversed.	Unclear whether requiring an employer to accommodate an employee's request to avoid work on his Sabbath would impose more than *de minimis* harm.
Winchester v. *Wal-Mart Stores,* 2017 WL 11489879 (6th Cir. 2017)	Salvation Army (Christian)	Summary judgment to employer vacated.	Unclear whether requiring an employer to accommodate an employee's request to avoid work on his Sabbath would impose more than *de minimis* harm.
Virts v. *Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002)	"Born Again" Christian	Summary judgment to employer affirmed.	Requiring an employer to violate its seniority system or collective bargaining agreement would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Small v. *Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020)	Jehovah's Witness (minority)	Summary judgment to employer affirmed.	Requiring an employer to reassign a worker to different position or shifts would impose more than *de minimis* harm.
Burdette v. *Fed. Exp. Corp.*, 367 F. App'x 628 (6th Cir. 2010)	Seventh-day Adventist (minority)	Summary judgment to employer affirmed.	Requiring an employee to bear any added safety risks would impose more than *de minimis* harm.

Decisions in the Seventh Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Adeyeye v. *Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013)	Unspecified Christian	Summary judgment to employer reversed.	Unclear whether requiring an employer to allow an employee time off to lead his father's burial rites would impose more than *de minimis* harm.
Rose v. *Potter*, 90 F. App'x 951 (7th Cir. 2004)	Seventh-day Adventist (minority)	Summary judgment to employer affirmed.	Requiring an employer to violate its seniority system would impose more than *de minimis* harm.
Endres v. *Ind. State Police*, 349 F.3d 922 (7th Cir. 2003)	Baptist	Judgment in favor of employee reversed.	Allowing a religious police officer to avoid unpopular assignments would impose more than *de minimis* harm.

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Lizalek v. *Invivo Corp.*, 314 F. App'x. 881 (7th Cir. 2009)	Unspecified	Summary judgment to employer affirmed.	Requiring an employer to treat an employee as three legal entities would impose more than *de minimis* harm.
Adams v. *Retail Ventures, Inc.*, 325 F. App'x 440 (7th Cir. 2009)	Unspecified Christian	Summary judgment to employer affirmed.	Requiring an employer to deny other workers their preferred shifts would impose more than *de minimis* harm.

Decisions in the Eighth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Harrell v. *Donahue*, 638 F.3d 975 (8th Cir. 2011)	Seventh-day Adventist (minority)	Summary judgment for employer affirmed.	Requiring an employer to violate its seniority system would impose more than *de minimis* harm.
Seaworth v. *Pearson,* 203 F.3d 1056 (8th Cir. 2000)	Unspecified Christian	Summary judgment for employer affirmed.	Requiring an employer to violate federal law by hiring employee who would not provide social security number would impose more than *de minimis* harm.

Decisions in the Ninth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Peterson v. *Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)	Unspecified Christian	Summary judgment to employer affirmed.	Requiring an employer to sanction demeaning messages to coworkers would impose more than *de minimis* harm.
Berry v. *Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006)	Evangelical Christian	Summary judgment to employer affirmed.	Requiring a government employer to "create a danger" of Establishment Clause violations resulting from public employee's religious speech and displays would impose more than *de minimis* harm.
Hommel v. *Squaw Valley Ski Corp.*, 89 F. App'x 650 (9th Cir. 2004)	Unspecified Christian	Dismissal of employee's claims affirmed.	Requiring an employer to accommodate employee's refusal to provide a social security number would impose more than *de minimis* harm.

Decisions in the Tenth Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Tabura v. *Kellogg USA*, 880 F.3d 544 (10th Cir. 2018)	Seventh-day Adventist (minority)	Summary judgment to employer reversed.	Requiring an employer to allow a religious employee to use vacation and sick time or shift swaps to avoid working on Saturday would not impose more than *de minimis* harm.
Thomas v. *Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000)	Pentecostal	Summary judgment to employer affirmed.	Requiring an employer to violate its collective bargaining agreement would impose more than *de minimis* harm.
Graff v. *Henderson*, 30 F. App'x 809 (10th Cir. 2002)	Worldwide Church of God	Bench trial decision in favor of employer affirmed.	Requiring an employer to violate its collective bargaining agreement would impose more than *de minimis* harm.

Decisions in the Eleventh Circuit

Case Name	*Religious Affiliation*	*Hardship Result*	*Reasoning*
Patterson v. *Walgreen Co.*, 727 F. App'x 581 (11th Cir. 2018)	Seventh-day Adventist (minority)	Summary judgment to employer affirmed.	Requiring an employer to guarantee that a supervisor would never have to train on his Sabbath would impose more than *de minimis* harm.
Dalberiste v. *GLE Associates, Inc.*, 2020 WL 2529752 (11th Cir. 2020)	Seventh-day Adventist (minority)	Summary judgment to employer summarily affirmed.	Requiring an employer to give another employee security clearance or to make other employees to work longer hours would impose more than *de minimis* harm.
Jean-Pierre v. *Naples Cmty. Hosp.*, 2020 WL 3121297 (11th Cir. 2020)	Seventh-day Adventist (minority)	Summary judgment to employer affirmed.	Requiring a short-staffed employer to allow an employee two days off a week when the employee was not able to find someone to cover their shift would impose more than *de minimis* harm.