No. _____

In the Supreme Court of the United States

EDWARD HEDICAN,

Petitioner,

v.

WALMART STORES EAST, L.P., ET AL.,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is use of voluntary shift swaps to cover a religious employee's holy day always an "undue hardship" under Title VII, as the Seventh Circuit held below, or can it sometimes be a reasonable accommodation, as the First, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have held?

2. Must a company asserting undue hardship based on costs prove that those costs are likely to occur, as the First, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have held, or may the defendant company meet its burden of proof by offering speculation about possible future burdens instead, as the Fifth, Seventh, and Eleventh Circuits have held?

3. Should this Court reconsider *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977)?

PARTIES TO THE PROCEEDINGS

Petitioner Edward Hedican was the charging party before the EEOC, and proposed intervenor-plaintiff-appellant in the court of appeals.

Respondents Walmart Stores East, L.P., and Wal-Mart Stores, Inc., were the defendants in the district court and the appellees in the court of appeals.

Respondent Equal Employment Opportunity Commission was the plaintiff in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

Hedican v. *Walmart Stores East, L.P.*, *et al.*, No. 21M24 (motion to intervene denied Oct. 12, 2021).

Hedican v. *Walmart Stores East, L.P.*, *et al.*, No. _____ (Petition for a Writ of Certiorari filed on Oct. 29, 2021 challenging denial of intervention in Seventh Circuit).

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INTRODUCTION

This case presents an important and recurring question: when must an employer accommodate an employee's religious practices? On its face, Title VII's text is clear, as are its history and purpose: employers must "reasonably accommodate * * * religious observance or practice" unless doing so poses "undue hardship." 42 U.S.C. 2000e(j). This guarantees significant workplace protections—indeed, "favored treatment"—to employees who need accommodation so that "otherwise-neutral" policies are not used to exclude them from the workplace. *EEOC* v. *Abercrombie & Fitch Stores*, 575 U.S. 768, 775 (2015).

But that guarantee has never taken full effect. In 1977, this Court interpreted "undue hardship" to mean anything "more than a de minimis cost." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977). That decision "effectively nullif[ied]" the protection of the statute's "plain words," forcing "thousands" to choose between their "livelihood" and their "conscience." *Id.* at 88, 89, 96 (Marshall, J., dissenting); see also *Small* v. *Memphis Light, Gas & Water*, 141 S.Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari).

Since that reading is not "the most likely interpretation[,]" three current Justices have called for the Court to "reconsider the proposition" that accommodation is not required when an employer would face "more than a *de minimis* burden." *Patterson* v. *Walgreen Co.*, 140 S.Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari). Two of those Justices, and the United States in an earlier case, have opined that "it is past time for the Court to correct"

Hardison. *Small*, 141 S.Ct. at 1229 (Gorsuch, J., dissenting); see also U.S. Br.19, *Patterson* v. *Walgreen Co.*, No. 18-349 (*Hardison* was "incorrect"); *Kennedy* v. *Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (statement of Alito, J.) (raising prospect of revisiting *Hardison*). Lower court judges, along with scholars and other commentators, have also chafed at how *Hardison* "rewr[o]te" Congress' effort to protect religious employees in a manner that "most often harm[s] religious minorities." *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring).

Edward Hedican's case against Walmart, originally carried forward by the EEOC, turns solely on the question of what an employer must show to prove undue hardship. And it illustrates the absurdity of *Hardison*'s logic. A divided panel of the Seventh Circuit found that Walmart had shown "a slight burden" if it had to allow for even *voluntary* shift-swapping to accommodate Hedican. App.6a. The court found that even "let[ting]" Hedican "trade shifts with other assistant managers" would go too far, by burdening those "other workers" and disrupting the current "rotation system." App.5a; 6a.

None of this, without more, would amount to a hardship—much less an "undue hardship"—for most large employers, let alone the largest private employer in the United States. But while the Seventh Circuit majority acknowledged the problematic nature of equating "undue hardship" and "slight burden," it threw up its hands: "Our task, however, is to apply *Hardison* unless the Justices themselves discard it." App.7a.

This Court should accept the invitation. Even if this Court decides not to overrule *Hardison*, it should still address the other two circuit splits identified by the EEOC in its *en banc* petition below. App.41a-43a. As the EEOC explained, the below decision splits with other circuits in two ways that would allow employers to evade even the requirement to show barely more than *de minimis* costs.

First, the decision below created a 7-1 circuit split by holding that "Title VII *never* requires an employer" to use one of the most common accommodations known to this area of law: voluntary shift-swaps that allow religious employees to meet their Sabbath obligations. App.42a (emphasis added). Every other circuit to confront the question has held that voluntary shift swap systems can be required. By contrast, the Seventh Circuit held that such swaps "thrust" the duty to accommodate on "other workers" and thus can never be required of employers, even if employees would voluntarily swap shifts. App.5a. That rule is a gross deviation from the law of other circuits, and would come at the expense of religious minorities.

Second, the decision below adds to an existing 6-2 circuit split over the evidentiary standard an employer must meet to make out an undue hardship defense. It relies on speculation about other employees' presumed preferences, which, as the EEOC put it below, both conflicts with other circuits that "forbid[] reliance on such speculation" and undermines the rule that "employers bear the burden of proving undue hardship." App.42a; 43a. In *Patterson*, three Justices took note that the United States had flagged this "speculative harm" question as "important" for future resolution. *Patterson*, 140 S.Ct. at 686 (Alito, J., concurring).

Ultimately, both splits are attributable to *Hardison*. Only in a world warped by *Hardison* could lower courts be in conflict about whether merely *allowing* an employee to *ask* fellow shift-workers to swap is so burdensome on the employer as to defeat the duty to accommodate. Only in a world warped by *Hardison* could employers be deemed to have *proven* an undue hardship simply by *guessing* one might exist. Fixing *Hardison* would resolve all three splits.

But even if this Court reaches only the more modest questions, the guidance it would then provide is badly needed. It has been nearly forty-five years since this Court addressed the meaning of "undue hardship." Title VII's reasonable-accommodation provision should not be considered a nullity, and this Court should say as much.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 992 F.3d 656 and reproduced at App.1a. The district court's opinion is unreported but available at 2020 WL 247462 and reproduced at App.13a.

JURISDICTION

The court of appeals entered its judgment on March 31, 2021. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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," and a defense to otherwise-unlawful discharge, as follows:

> 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

I. Factual Background

A. Petitioner Edward Hedican

Petitioner Edward Hedican was baptized into the Seventh-day Adventist Church in 2002. He later became an Elder in his local congregation, App.110a, assisting the pastor with church functions and occasionally teaching lessons and giving sermons.

The Seventh-day Adventist Church is a Protestant Christian denomination with more than 21 million members and a presence in over 200 countries. See Ted N.C. Wilson, *A Message to the Seventh-day Adventist Church from the President*, ANN News, Apr. 4, 2019, https://perma.cc/6GNN-WY32. As the Church's name indicates, a central tenet of the Seventh-day Adventist faith is observance of the Sabbath from sundown Friday to sundown Saturday. App.2a; App110a.

For Adventists, the Sabbath is "God's perpetual sign of His eternal covenant between Him and His people." *What Adventists Believe about the Sabbath*, Seventh-day Adventist Church, https://perma.cc/MR98-V4ZC. This practice is rooted in the commands of Holy Scripture. The Fourth Commandment instructs: "Remember the sabbath day, to keep it holy. * * * [T]he seventh day is the sabbath of the Lord thy God, in it thou shalt not do any work * * * ." Exodus 20:8-10 (King James Version). App.110a.

The hours of the Sabbath are sacred time devoted to God in worship and pursuit of Him for His purposes. Seventh-day Adventists must spend the day in rest, prayer, and collective worship. See *What Adventists Believe about the Sabbath*, Seventh-day Adventist Church, https://perma.cc/MR98-V4ZC. The Sabbath "encompasses [Seventh-day Adventist's] entire relationship with God." Not keeping it has serious consequences, leading "to the distortion and eventual destruction of a person's relationship with God." *Sabbath Observance*, Seventh-day Adventist Church, https://perma.cc/6S7Z-HLYV.

As a practicing Seventh-day Adventist, Hedican observed the Sabbath every week, refraining from work starting at sundown on Friday until sundown on Saturday. App.110a. On Saturdays, Hedican would attend Sabbath school classes and church services, travel to different churches to attend church functions or district meetings, and spend time with his family.

B. Walmart offers Hedican an assistant manager position.

On April 25, 2016, Walmart offered Edward Hedican a position as assistant manager at its Hayward,

Wisconsin store. App.102a. As an assistant manager, Hedican would be responsible for overseeing hourly associates, "the stocking and rotation of merchandise," "monitoring expenses, asset protection and safety controls, overseeing safety and operational reviews, [and] analyzing reports and modeling proper customer service." App.18a. All assistant managers are also assigned a specific area of responsibility in the store. While assistant managers typically rotate areas of responsibility annually, some assistant managers maintained the same area of responsibility for several years. App.19a.

In 2016, the Hayward store had one manager and eight assistant managers. The Hayward store was open 24 hours a day, seven days a week, and an assistant manager's schedule usually varied "from day to day and week to week." App.20a. In any given week, two assistant managers worked overnight shifts (working four days on and three days off) and the remaining six were assigned to daytime shifts (working five days a week). App.20a. Generally, the store manager made the shift schedules about three weeks in advance, sometimes more. When assistant managers rotated to a new area of responsibility, they typically also rotated to a new schedule. App.20a.

C. Hedican seeks an accommodation for his Sabbath observance and Walmart rescinds the offer.

On May 1, 2016, Hedican accepted Walmart's offer, explaining that he was "very excited to accept the position and begin my career with the Walmart family." App.109a. He also informed the company that he was a Seventh-day Adventist and that his "religious faith

[wa]s extremely important" to him. App.110a. And he explained that he "believe[d] and ke[pt] the biblical 7th day Sabbath in the 10 Commandments which is Saturday." App.110a. Accordingly, he would "not [be] able to work any Saturdays until after sundown," but was "available any other day of the week and can be available after sundown on Saturday nights if needed." App.110a. When Lori Ahern, Walmart's market human resources manager, received Hedican's request, she sent him a form for a disability or medical accommodation, with questions mostly irrelevant to Hedican's request for a religious accommodation. App.16a-17a; App.109a. Ahern also told Hedican that Walmart's Americans with Disabilities Act department would handle his accommodation request. App.17a; App.109a. However, when the ADA department returned his completed form to Ahern and told her they did not handle religious accommodations, the decision fell to her. App.17a.

Ahern stated that, in making her determination, she considered Walmart's expectations for the role of assistant manager, the Hayward store's specific staffing needs, and overall manager coverage at the store. App.17a-18a. Ahern also consulted Walmart's religious accommodations guidelines. These guidelines specifically addressed accommodating Sabbath observance, noting that "flexible arrival and departure times," "staggered work hours," and "voluntary swaps with other associates" "may be necessary, unless providing the accommodation will result in an undue

hardship." App.16a; 98a-99a.[1] This guidance specifically addressed Sabbath-observing managers like Hedican, explaining that managers "may be able to arrange a shift swap with another manager and that [Walmart] can help facilitate that by providing an email or other means of communication." App.16a; 99a. Walmart's guidance also encouraged "all managers to work collaboratively and swap shifts as needed for personal or religious reasons." App.99a. The guidance also explained that on the "rare occasion" when a manager is unable to find another manager to swap shifts, the manager may "be permitted to take a PTO day in lieu of working his/her Sabbath." App.99a-100a.

Despite this guidance, and without talking to Hayward's seven other assistant managers or making additional inquiries, Ahern assumed that accommodating Hedican would impose "a hardship on the business because it could cause them to be understaffed or to have to add an additional assistant manager to ensure that we have the coverage." App.132a. Ahern later testified she did not *think* Hedican would be able to swap shifts with other assistant managers, as other assistant managers "may have plans" or may not want to work extra Saturdays. App.132a-133a; App.23a. Ahern also did not consider other potential scheduling accommodations (like letting Hedican work night shifts or 12-hour shifts), instead asserting that all assistant managers needed to be available to work "various days" and "various shifts" given the variable needs of the store. App.133a. Accordingly, despite

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[1] Under these guidelines, any accommodation imposing "more than minimal cost" could be denied as an undue hardship. App.96a-97a.

Hedican's offer to work nights or any other weekend hours, Ahern concluded that Walmart could not accommodate Hedican. App.132-134a; App.113a.

In a May 18, 2016 email, Ahern denied Hedican's requested accommodation, claiming that his Sabbath observance constituted an "inability to perform the essential functions of the job." App.113a. Ahern said she could "assist him in the application process" for other positions in the store, App.113a, but all of these positions were hourly (instead of salaried, like the assistant manager position) and paid less. See App.29a.

II. The proceedings below

A. Hedican's charge and the EEOC's complaint

Hedican filed a charge with the EEOC, outlining Walmart's recission of his employment offer and denial of a religious accommodation. At that time—and up until seeking intervention for purposes of filing a petition for *certiorari*—Hedican acted *pro se*. After investigating Hedican's charge, the EEOC brought suit against Walmart on September 27, 2018. App.70a. As the charging party, Hedican was not included in the EEOC's complaint, through the EEOC's Prayer for Relief included a request for monetary damages for Hedican.

On January 16, 2020, the district court dismissed the case and held, under the *Hardison* standard, that Walmart "could not accommodate [Hedican's] request to have every Saturday off without incurring undue hardship." App.14a. As the Court explained, accommodating Hedican's religious exercise meant that Walmart would have to allow Hedican to swap shifts

with his coworkers, "hir[e] another manager who could help cover those shifts (which would be an extra cost), or operat[e] the store with one less manager than needed (which would create operational inefficiencies and lost sales)." App.23a; App.33a.

B. Seventh Circuit proceedings

The EEOC appealed. In its brief, the EEOC argued that Walmart should have considered voluntary shift swaps, see EEOC CA7 Br.44-48, and that Walmart could not rely on speculative hardships, see *id.*, 46-47. The EEOC also stated that this Court should overrule *Hardison*. See *id.*, 36 n.5.

On March 31, 2021, a divided panel of the Seventh Circuit affirmed. App.7a. The majority acknowledged an ongoing debate at the Supreme Court over the validity of the *Hardison* standard, noting "[t]hree Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed[,]" but stated that "[o]ur task, however, is to apply *Hardison* unless the Justices themselves discard it." App.7a. Accordingly, the panel held that Walmart's options for accommodating Hedican—including hiring "a ninth assistant manager"—would "require Walmart to bear more than a slight burden," in violation of *Hardison*. App.3a; App.7a. The majority rejected voluntary shift swaps as an accommodation, asserting that this "would not be an accommodation *by the employer*" because it "would thrust [accommodating Hedican] on *other workers*." App.5a. The majority also thought other workers might "balk[]" and refuse to swap shifts, but acknowledged this was hypothetical as Walmart didn't even ask. App.5a-6a.

Judge Rovner dissented. She observed that "Hedican was available to work on Fridays, Saturday nights and Sundays," and explained that "if he were willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, then other managers might have been willing to pick up the slack on Friday nights and Saturdays." App.8a. She noted Walmart "could not know for certain unless [it] asked" the other assistant managers, "and yet [it] did not." *Ibid*. Had Walmart done so, it "might have discovered that it was in fact feasible to accommodate both Hedican and the other managers." *Ibid*. Judge Rovner further noted that, while "Walmart's scheduling needs are genuine," the company cannot simply rely on past practices: "the duty to reasonably accommodate entails an obligation to look at matters with fresh eyes and to separate what is necessary from what, to date, has been customary." App.9a.

On May 17, 2021, the EEOC filed a petition for panel rehearing and rehearing en banc, raising a division of authority among the circuits on two different questions regarding what constitutes an "undue hardship" under Title VII. App.41a. On June 1, 2021, the Seventh Circuit denied the EEOC's petition. App.39a.

Hedican obtained his own legal counsel for the first time on May 26, 2021. One week later, he moved to intervene at the Seventh Circuit for the sole purpose of filing a petition for review in this Court. App.58a-85a. Hedican explained to the Seventh Circuit that the federal government, now represented by the Solicitor General, might not seek this Court's review of the panel's decision and that the federal government for

the first time in the litigation did not adequately represent Hedican's interests. *Ibid.*

On June 4, 2021, the Seventh Circuit, in a single-judge order issued by Judge Easterbrook, denied Hedican's motion as "untimely" because "Hedican had opportunity to intervene before the case was argued to the panel many months ago." App.35a-36a.

Hedican immediately sought reconsideration, explaining that, because he sought intervention for the sole purpose of seeking Supreme Court review, his request was timely. App.86a-92a. The Seventh Circuit, in another single-judge order issued by Judge Easterbrook, denied his reconsideration motion. App.37a.

REASONS FOR GRANTING THE PETITION

I. The Court should resolve the 7-1 circuit split over whether a system of voluntary shift swaps can ever be a required reasonable accommodation for Sabbath observance.

The Seventh Circuit concluded that shift swaps are not "an accommodation *by the employer*, as Title VII contemplates." App.5a. The Seventh Circuit thus held that voluntary shift swap systems—that is, systems where the employer allows non-observant employees to volunteer to take on shifts that conflict with a Sabbath-observant employee's religious practice—*cannot be* reasonable accommodations, much less religious accommodations that Title VII requires in some cases. This categorical rejection of voluntary shift swap systems splits from seven other courts of appeals, in two different ways.

1. First, five courts of appeals have specifically held that, at least in some circumstances, voluntary shift

swaps do not impose an undue hardship on employers and thus must be offered as a reasonable accommodation under Title VII.

In *EEOC* v. *Ithaca Industries, Inc.*, the religious employee plaintiff observed a Sunday Sabbath. 849 F.2d 116, 118 (4th Cir. 1988) (en banc). The en banc Fourth Circuit recognized that "Section 701(j) clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief requires some offer of accommodation by employers." *Ibid.* Because the employer refused to employ a system of "voluntary substitutes" and because the employer did not "suggest[]" that the religious employee use an existing system for "find[ing] a qualified substitute" to work a Sunday shift, the Fourth Circuit held that the employer violated Title VII. *Id.* at 119 nn.4-5. This Court denied certiorari. 488 U.S. 924 (1988).

Similarly, in *Davis* v. *Fort Bend County*, the Fifth Circuit concluded that although "requiring an employee to substitute" for a plaintiff may impose an undue hardship as a matter of law, "[s]ubstituting a volunteer does not necessarily impose the same hardship on the employer, if any." 765 F.3d 480, 488-489 (5th Cir. 2014). The Fifth Circuit held that "because there was a ready and willing *volunteer* to substitute for Davis" the County could not prove undue hardship. As the Fifth Circuit pointed out, "[s]ubstituting a volunteer does not necessarily impose the same hardship on the employer, if any, as requiring an employee to substitute for another's religious observance." *Id.* at 489. The Fifth Circuit reversed summary judgment for the

County and this Court denied certiorari. 576 U.S. 1004 (2015).[2]

In *Smith* v. *Pyro Mining Co.*, the plaintiff sought an accommodation for his Sunday Sabbath. 827 F.2d 1081, 1089 (6th Cir. 1987). The Sixth Circuit found "it difficult to see why soliciting replacements for [the religious plaintiff] would have been an undue hardship for" the employer. *Ibid.* And because the employer "had the mechanism in place for soliciting replacements" but did not use that mechanism, it "failed to meet its burden of establishing that such an accommodation of [the plaintiff]'s religious convictions would be an undue hardship." *Ibid.* This Court denied certiorari. 485 U.S. 989 (1988); see also *EEOC* v. *Arlington Transit Mix, Inc.,* 957 F.2d 219, 222 (6th Cir. 1991) (employer did not explore voluntary shift-swap arrangement and so was "in no position to argue" undue hardship).

Likewise, in *Opuku-Boateng* v. *California*, the Ninth Circuit recognized that the employer "had an obligation to investigate whether voluntary trading of shifts was feasible." 95 F.3d 1461, 1471 (9th Cir. 1996). And because the employer "failed to offer any probative evidence that would demonstrate that a system of voluntary shift trades was infeasible" summary judgment in its favor was inappropriate. *Ibid.* This Court denied certiorari. 520 U.S. 1228 (1997).

Finally, in *Tabura* v. *Kellogg USA*, the Tenth Circuit held that the employer not only had to allow a system of voluntary shift swaps to exist, but also "had to

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[2] *Davis* later came before the Court on a different question. See *Fort Bend County*. v. *Davis*, 139 S.Ct. 1843 (2019).

take a more active role in helping arrange swaps in order for that to be a reasonable accommodation of Plaintiffs' Sabbath observance." 880 F.3d 544, 556-557 (10th Cir. 2018).

Had Hedican's case been decided in any of these circuits, Walmart's failure even to consider voluntary shift swaps would have precluded summary judgment.

2. In addition to those circuits that have treated voluntary shift-swap accommodations as required in some cases, two other circuits have—contrary to the decision below—treated voluntary shift swaps as reasonable accommodations satisfying Title VII's requirements.

In *Sánchez-Rodríguez* v. *AT&T Mobility P.R., Inc.,* the First Circuit held that voluntary shift swaps—in conjunction with offers of other jobs and withholding penalties for prior absences—constituted a reasonable accommodation. 673 F.3d 1, 12-13 (1st Cir. 2012). The Court did not reach the question of whether voluntary shift swaps alone would constitute a reasonable accommodation. *Ibid.*

Similarly, in *Beadle* v. *Hillsborough County Sheriff's Department,* the Eleventh Circuit treated a shift swap system as a reasonable accommodation. 29 F.3d 589, 593 (11th Cir. 1994).

The Seventh Circuit's contrary conclusion—that voluntary swap shift systems are categorically not reasonable accommodations—thus also splits from these two circuits.

3. The Seventh Circuit justified its novel standard by claiming that *Hardison* "rejected the sort of shift-trading system that the EEOC now proposes." App.5a.

That gets *Hardison* exactly backwards. In *Hardison*, the Court based its ruling for the defendant TWA in part on TWA's decision to allow voluntary shift swaps. 432 U.S. 63, 77 (1977) (noting that TWA "authorized the union steward to search for someone who would swap shifts"). The Court *credited* TWA for authorizing voluntary shift swaps, distinguishing that from TWA's unwillingness to deviate from its collective bargaining agreement. *Id.* at 78-79. That is hardly a "reject[ion]" of voluntary shift swaps. App.5a.

No other court of appeals has adopted the Seventh Circuit's anomalous understanding of *Hardison*. In *Pyro Mining*, for example, the Sixth Circuit held that "[u]ndoubtedly, one means of accommodating an employee who is unable to work on a particular day due to religious convictions is to allow the employee to trade work shifts with another qualified employee." 827 F.2d at 1088. See also *Tabura*, 880 F.3d at 556-557 (Title VII can require an "active role in securing a voluntary swap for the employee"); *Davis*, 765 F.3d at 489 (assessing voluntary swaps). Indeed, Congress' "stated purpose" when amending Title VII in 1972 was "to protect Sabbath observers whose employers fail to adjust work schedules to fit their needs." *Ithaca Indus.*, 849 F.2d at 118; cf. 118 Cong. Rec. 1, 705 (1972) (Sen. Randolph: amendment designed to protect "a steadfast observance of the Sabbath").[3] Thus both the Seventh Circuit's standard and its reasoning stand in stark contrast to that of the other courts of appeals.

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[3] See also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 380 (1997) ("concern for Sabbatarians" motivated 1972 amendment).

4. Moreover, it is worth noting that the Seventh Circuit's conclusion that voluntary shift swaps are *never* reasonable accommodations under Title VII also runs counter to the commonplace employer practice of facilitating voluntary shift swaps. See EEOC Compl. Man., sec. 12-IV-C ("voluntary substitutes" among "most common methods" used by employers); 29 C.F.R. 1605.2(d)(i) (noting "[o]ne means of substitution is the voluntary swap" which, where available, means "[r]easonable accommodation without undue hardship is generally possible"). Indeed, Walmart's own nationwide policy states its understanding that "[v]oluntary swaps" are in the category of "reasonable accommodations[.]" App.93a; App.99a. Accordingly, Walmart's nationwide policy is that shift swaps for managers like Hedican "may be necessary," and that it "[e]ncourage[s]" employees to "swap shifts" for "religious reasons." App.97a-99a. The Seventh Circuit's decision would upend all that, both for Walmart and other employers.

* * *

The Seventh Circuit's decision runs counter to the position of other courts of appeals, to *Hardison*, and to common practice by large employers, including Walmart itself. Since only this Court can resolve the resulting split of authority, it should grant review on the first question presented.

II. The Court should resolve the 6-3 circuit split over whether employers must prove likelihood of undue hardship or merely offer hypothetical hardships.

In assessing undue hardship, the Seventh Circuit held Walmart could satisfy its burden by showing

speculative, merely possible costs—not concrete evidence that those costs were likely. App.5a ("What would Walmart do if * * * "); App.6a ("If, say, * * * "; "If Hedican became a specialist * * * "). This adoption of a vanishingly low evidentiary bar has deepened an acknowledged, longstanding, and intractable circuit split, with the Fifth, Seventh, and Eleventh Circuits on one side, and the First, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits on the other.

1. The Fifth, Eleventh, and now Seventh Circuits hold that an employer's burden to show undue hardship is met by showing a "mere possibility" of a more than *de minimis* cost. *Weber* v. *Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000).

In *Weber*, a trucker had a religious objection to being alone with someone of the opposite sex, and requested to be excused from such paired assignments. 199 F.3d at 272. The Fifth Circuit concluded that, even without evidence on the other employees' preferences on shifts, "[t]he *mere possibility* of an adverse impact" was "sufficient to constitute an undue hardship" on the employer. *Id.* at 274 (emphasis added). Indeed, "hypotheticals" alone suffice. *Ibid.*

In *Patterson* v. *Walgreen Co.*, an employee was terminated because he could not lead trainings on his Sabbath. 727 F.App'x 581, 589 (11th Cir. 2018), cert. denied, 140 S.Ct. 685 (2020). While Walgreens faced no immediate hardship, the Eleventh Circuit found Walgreens had carried its burden by showing "undue hardship * * * in the future" based on what might

"have been required" if and when another trainer left the company. *Id.* at 588-589.[4]

The Seventh Circuit has adopted the same low evidentiary bar. The panel unambiguously relied on 'if-then' hypotheticals. App.5a-6a. It cited no concrete evidence. See App.8a (Rovner, J., dissenting) (noting Ahern never "asked" as to other managers' willingness and availability). But without citation to any other circuit addressing the issue, the majority simply found that that the mere possibility of future adverse impact sufficed.

2. By contrast, six circuits addressing the question take the view that employers showing "merely conceivable or hypothetical hardships" have not carried their burden. *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989)).[5]

The Eighth Circuit addressed the issue shortly after *Hardison*, in *Brown* v. *General Motors Corp*. 601 F.2d 956 (8th Cir. 1979). There, General Motors was "content to speculate on the future impact of accommodating" Sabbath observance. 601 F.2d at 961. The Eighth Circuit concluded that if "anticipated or multiplied hardship" could satisfy the undue hardship inquiry, then "even the most minute accommodation" would be ruled out "if sufficiently magnified through predictions of the future behavior of the employee's co-

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[4] While the Solicitor General took the view that *Patterson* did not "turn[] on" the question of "speculative harm," three Justices of this Court expressed doubt on this point. *Patterson*, 140 S.Ct. at 686 (Alito, J., concurring) ("I am less sure about [the Solicitor General's] interpretation").

[5] See App.42a (EEOC en banc petition describing split).

workers." *Ibid.* See also *Brown* v. *Polk County*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996). ("Any hardship asserted, furthermore, must be real rather than speculative, merely conceivable, or hypothetical.") (cleaned up).

The Ninth Circuit has held that "[u]ndue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." *Anderson* v. *General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). And "undue hardship cannot be supported by merely conceivable or hypothetical hardships[.]" *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) cert. denied, 454 U.S. 1098 (1981). In *Opuku-Boateng*, the Ninth Circuit considered a mirror-image case. California declined to offer "voluntary shift trades" to a Sabbatarian based on the "hypothetical difficulty" that could arise if other workers were unwilling to swap shifts. 95 F.3d at 1471. The Ninth Circuit reached the opposite conclusion to the Seventh Circuit here, holding that California had an "obligation to investigate whether voluntary trading of shifts was feasible" and that because California had not established that other "employees were collectively unwilling to accommodate Opuku-Boateng," it had not met its burden. *Id.* at 1472.

The First, Fourth, Sixth and Tenth Circuits likewise have rejected reliance on speculative or merely conceivable hardships:

- In *Toledo*, the Tenth Circuit found that an employer's concern for additional tort liability arising from an employee's religious peyote use was "too speculative," noting "merely conceivable or

hypothetical hardships" do not carry an employer's burden. 892 F.2d at 1492. This Court denied certiorari. 495 U.S. 948 (1990).

- In *Cloutier* v. *Costco Wholesale Corp.*, the First Circuit adopted the *Toledo* standard, but found that under that standard Costco could forbid a member of the "Church of Body Modification" from wearing a facial piercing because of the "specific hardship[]" that would cause based on damage to Costco's image. 390 F.3d 126, 128, 135 (1st Cir. 2004). This Court denied certiorari. 545 U.S. 1131 (2005).
- In *EEOC* v. *Firestone Fibers & Textiles Co.*, the Fourth Circuit adopted the rule of *Brown* v. *Polk County*, stating that the undue hardship analysis "may not be based on mere speculation or conjecture." 515 F.3d 307, 317 (4th Cir. 2008). Cf. *Benton* v. *Carded Graphics, Inc.*, 28 F.3d 1208 (Table), 1994 WL 249221, at *1 (4th Cir. 1994) (hardship "cannot be proved by assumptions" or "hypothetical facts").
- In *Pyro Mining*, the Sixth Circuit said the employer could not "rely merely on speculation" to treat a shift-swap accommodation as an undue hardship. 827 F.2d at 1086. See also *McDaniel* v. *Essex Int'l, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978) ("hypothetical hardships" do not suffice; "no factual basis in the record" for undue hardship finding).

The rule in these circuits is with the opposite of the approach adopted by the Seventh Circuit below.[6] The Court should therefore grant certiorari to resolve this broad, deep, and lingering split.

III. The Court should reconsider *Hardison*.

While the circuits are hopelessly split on two important questions of interpretation, both splits are just manifestations of a deeper problem: *Hardison*'s rewriting of Title VII. If *Hardison* had not constructed a world in which courts must scrutinize cases for even *de minimis* "hardships" on employers, courts would not be splitting hairs over whether allowing *voluntary* shift swaps is burdensome enough to absolve the employer of the duty to accommodate. Likewise, only *Hardison*'s *de minimis* standard could allow unsubstantiated guesswork about the scheduling preferences of seven other assistant managers to eliminate the duty to accommodate a Sabbath observer.

Multiple Justices and the United States have already said that the continuing validity of *Hardison*'s interpretation of "undue hardship" is worthy of the Court's review. Three main factors support this conclusion. First, *Hardison* conflicts with the text, history, and purpose of Title VII. Second, *Hardison* has had severe consequences, particularly for employees of

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[6] The EEOC has supported the anti-speculation side of the split. See EEOC Compliance Manual, Sec. 12-IV-B-1 ("[a]n employer cannot rely on hypothetical hardship when faced with an employee's religious obligation that conflicts with scheduled work, but rather should rely on objective information."), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination; see also App.53a (EEOC argument below that its rule tracks 42 U.S.C. 2000e(j)'s text).

minority faiths. And third, traditional *stare decisis* factors recommend against retaining *Hardison*.

A. *Hardison*'s definition of undue hardship conflicts with Title VII's text, ordinary statutory construction, and the 1972 amendment's history and purpose.

Hardison's definition of undue hardship was flawed from the beginning. As Justice Thomas pointed out in his separate opinion in *EEOC* v. *Abercrombie & Fitch Stores*, 575 U.S. 768, 787 n.* (2015)—and as Justice Alito reiterated in *Patterson*, 140 S.Ct. at 686 n.*—*Hardison's* discussion of "undue hardship" was not directed at the statute, which was amended *after* TWA terminated Hardison. But even if *Hardison's* analysis were understood to interpret Title VII, as it was (without analysis) in *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60, 67 (1986), and as it has been in the lower courts, that ruling should not stand. 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 history.

1. Whether viewed as an interpretation of the pre-statute regulation, Title VII itself, or both, *Hardison* went astray when it defined "undue hardship" as anything more than a "*de minimis* cost," 432 U.S. at 84. That interpretation simply cannot be squared with the "ordinary meaning" of those words "at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S.Ct. 532, 539 (2019) (cleaned up). No pre-*Hardison* dictionaries we are aware of defined "undue" as just "more than *de minimis*." Nor could they: "[b]y definition, de minimis costs are *not* hardships (much less

'undue' hardships)."[7] Rather, dictionaries at the time of the amendment's enactment defined "undue" in the first instance as "unwarranted," or "excessive." See *undue*, Random House Dictionary of the English Language, College Edition (Laurence Urdang & Stuart Berg Flexner, eds.) 1433 (1968).

By contrast, a *de minimis* burden is defined as one that is "trifling" or "so insignificant that a court may overlook [it] in deciding an issue or case[.]" *De minimis non curat lex*, Black's Law Dictionary (rev. 4th ed. 1968); *De minimis*, Black's Law Dictionary (11th ed. 2019).[8]

Hardison's interpretation of "undue" thus also 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 have been used." *United States* v. *Butler*, 297 U.S. 1, 65 (1936).

Hardison fares no better even if one assumes "undue hardship" was a term of art when the 1972 amendment was adopted. The EEOC provided the most relevant pre-1972 interpretation when it defined "undue

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

[8] Contemporary corpus linguistics data also show that *Hardison*'s interpretation was anomalous. 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/.

hardship" as including situations "where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 29 C.F.R. 1605.1 (1968) (codifying 1967 Guidelines).

EEOC practice in the years before *Hardison* similarly shows that "undue hardship" entailed 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 Decision No. 72-1578, 5 Fair Empl. Prac. Cas. (BNA) 960 (1972).

Given these many shortcomings, it is unsurprising that *Hardison*'s stunted understanding of undue hardship has been criticized by several past and present 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); see also *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 jurists have likewise disagreed with *Hardison*'s conclusions on that ground. *E.g.*, *Small*, 952 F.3d at 828 (Thapar, J., concurring) ("The *Hardison* majority never purported to justify its test as a matter of ordinary meaning. And how could it?").

2. Nor can *Hardison*'s interpretation of "undue hardship" be squared with 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(16); 29 U.S.C. 207(r)(3). Thus, whenever Congress has expressly defined "undue hardship," its definition has *always* required more than *Hardison* demands.

In other contexts, judges typically employ plain-meaning interpretations of "undue hardship" that contravene *Hardison*. 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). And the language those courts have used underscores what an outlier *Hardison* is: In all other contexts, a hardship is "undue" when it is "intolerable," "significant," or "unusual." *Ibid.* "[G]arden-variety hardship" is "insufficient." *Ibid*. (citing *In re Frushour*, 433 F.3d 393, 399 (4th Cir. 2005)).

3. Legislative history similarly confirms *Hardison*'s failure to adequately capture the concerns Congress sought to address. Congress passed the 1972 accommodation amendments based on concern "for the individuals of all minority religions who are forced to choose between their religion and their livelihood." *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643

F.2d 445, 454 n.11 (7th Cir. 1981) (citing 118 Cong. Rec. at 705-706). In addition, the principal proponent of 42 U.S.C. 2000e(j), Senator Randolph, himself a Seventh Day Baptist, stated that his amendment was intended to "protect the same rights in private employment as the Constitution protects in Federal, State, or local governments" and to "assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. at 705. After *Hardison*, the amendment does neither of these things.

B. *Hardison* has had negative consequences for religious workers, particularly those of minority faiths.

The real-world consequences of *Hardison*'s misreading of Title VII have been considerable, and the significant harm that its standard has caused religious workers—especially members of minority faiths—justifies this Court's review. These harms are hardly surprising. At the time *Hardison* was 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).

Thus lower courts applying *Hardison* have permitted employers to burden minority religions in a wide variety of ways. For example, the Third Circuit said a school district could forbid a Muslim teacher to wear a headscarf because a state "religious garb" law (originally targeting Catholic nuns) *might* forbid wearing it. See *United States* v. *Bd. of Educ.*, 911 F.2d 882, 890-891 (3d Cir. 1990). Other courts have held that allowing religious minorities to manifest their faith would

constitute an undue hardship. See *Camara* v. *Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1331-1332 (N.D. Ga. 2017) (allowing employee to wear hijab could "potentially cost it business if some customers go elsewhere"); *EEOC* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 90 (N.D. Ga. 1981) (Sikh beard could "offend[] certain customers" and employees, and also present a "risk of noncompliance with sanitation regulations"). Cf. *Abercrombie*, 575 U.S. at 770 (store refused to hire Muslim woman who wore headscarf for religious reasons).

And as our Nation becomes more religiously diverse, the harm *Hardison* imposes on religious minorities will only continue to increase. Indeed, an empirical study concluded that "American Muslims appear to be at a pronounced disadvantage in obtaining accommodations for religious practices in federal court because they are Muslims[.]"[9] See also CLS Br.23-25, *Patterson* v. *Walgreen Co.* (No. 18-349) (describing statistical data on harms to minorities).

But rather than encouraging employers to compromise when faced with requests from members of minority faiths, *Hardison* tells them to say no if there is more than a *de minimis* cost. Cf. App.97a ("minimal cost"). That means the employer has little to no incentive to engage in the "bilateral cooperation" this Court urged in *Ansonia*, 479 U.S. at 69. And willingness to cooperate is often at its lowest ebb when minority faiths are involved.

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[9] Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 262 (2011).

C. Ordinary *stare decisis* factors do not support retaining *Hardison*.

1. As an initial matter, *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. (6 Wheat.) 264, 399 (1821) (issues that "go beyond the case" not binding); *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 627 (1935) (same); *Central Green Co.* v. *United States*, 531 U.S. 425, 431 (2001) (same). Since *Hardison* interpreted an EEOC regulation, not Title VII, its treatment of Title VII went "beyond the case," and thus lacks precedential value.

Hardison himself was terminated "before the 1972 amendment to Title VII's definition of religion." *Abercrombie*, 575 U.S. at 787 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 Justices Thomas and Alito explained, the *Hardison* court thus applied "not the amended statutory definition" at issue here, but rather a "then-existing EEOC guideline." *Abercrombie*, 575 U.S. at 787 n.*. Based on that understanding, 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*. See also 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."). 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. 479 U.S. at 67. But the Court undertook no analysis of the point, and accordingly its assumption likewise did not constitute a holding as to how Title VII should be interpreted. 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. Even if *Hardison* (or *Ansonia*) actually constituted a holding for *stare decisis* purposes, "several factors" that this Court "consider[s] in deciding whether to overrule a past decision" weigh heavily in favor of overruling *Hardison*. *Knick* v. *Township of Scott*, 139 S.Ct. 2162, 2178 (2019).

First, in the 44 years since *Hardison* was decided, this Court has eroded any justification for the rule it adopted. See *Knick*, 139 S.Ct. 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) (changes in law justify overturning precedent).

Hardison grounded its erroneous interpretation of "undue hardship" in the belief that Title VII required no more than neutrality regarding 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" because Congress deliberately sought to protect religious employees from workplace discrimination. *Abercrombie*, 575 U.S. at 775.

Second, other than the belief (since repudiated by *Abercrombie*) that Title VII required equal treatment of religious and non-protected practices, *Hardison* offered *no* reasoning. See *Patterson*, 140 S.Ct. at 686 (Alito, J., concurring in the denial of certiorari) ("the Court did not explain the basis for this interpretation"). Indeed, *Hardison*'s only justification for its reinterpretation of Title VII was that the "privilege of having Saturdays off would be allocated according to religious beliefs." 432 U.S. at 85. But that is exactly what Title VII requires: Congress determined that religious employees should not be forced to choose between their job and their faith if a reasonable accommodation could be made without imposing an undue hardship on their employer. *Hardison* upended this careful and congressionally-mandated balance.[10]

Third, *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. *AFSCME,* 138 S.Ct. 2448, 2483 (2018); see also *Alleyne* v. *United States*, 133 S.Ct. 2151, 2167

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[10] The lack of reasoning may be explained by the lack of briefing on the point. See U.S. Br.21, *Patterson* v. *Walgreen Co.* (No. 18-349)

(2013) (Breyer, J., concurring in part and concurring in the judgment), or an "outlier." *Id.* at 2165 (Sotomayor, J., concurring). Because of *Hardison*, the prevailing interpretation of Title VII's "undue hardship" provision is as anomalous as they come.[11]

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

D. Title VII's religious accommodation provision should be read *in pari materia* with the ADA's disability accommodation provision.

If the Court concludes that *Hardison* must be overruled, there is a well-developed body of caselaw that lower courts could easily deploy to properly interpret Title VII's religious accommodation provision: the law of disability accommodations under the Americans with Disabilities Act, 42 U.S.C. 12112.

Although the two statutes differ significantly in other areas, they are very similar when it comes to the text of their reasonable accommodation/undue hardship provisions. Title VII requires an employer to provide an accommodation

> unless an employer demonstrates that he is unable to reasonably accommodate to an em-

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

> ployee'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). The ADA similarly requires accommodations

> unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]

42 U.S.C. 12112(b)(5)(A). The main facial distinction between the two statutes are the phrases "the conduct of the employer's business" and "the operation of the business of such covered entity." But it is hard to imagine how that difference in diction could possibly cash out as a true difference in practice.

Moreover, because the ADA has not labored under the artificial constraints of a case like *Hardison*, the ADA jurisprudence surrounding reasonable accommodations and undue hardship has become well-developed, with a detailed body of caselaw and scholarly work concerning a host of fact scenarios. Indeed, as the record in this case demonstrates, Walmart has an entire department tasked to ensure ADA compliance across its thousands of stores. But as Ahern discovered, that department "doesn't do religion" because *Hardison* means it doesn't have to. App.17a. In a post-*Hardison* world, companies could and would simply use their existing ADA compliance operations to cover Title VII compliance.

Nor is the substantive standard that would apply post-*Hardison* any mystery. As Justice Gorsuch has explained, the ADA undue hardship standard means

"an employer must provide an accommodation unless doing so would impose 'significant difficulty or expense' in light of the employer's financial resources, the number of individuals it employs, and the nature of its operations and facilities." *Small*, 141 S.Ct. at 1228 (Gorsuch, J., dissenting). That is a proven, workable standard that can be used for deciding post-*Hardison* Title VII religious accommodation claims.

Thus, should the Court conclude that *Hardison* is incorrect and must be overruled, it would hardly be venturing into the unknown—the ADA has already paved the way.

IV. This case is an excellent vehicle for addressing the questions presented.

This case presents the Court with a clean vehicle to address all three questions presented. Resolved at summary judgment after extensive discovery, this case has a record that is detailed and clear. Emails document Walmart's offer, Hedican's acceptance and immediate request for accommodation, and Walmart's recission due to his request. App.102a-115a. Walmart's written guidance and extensive deposition testimony confirm the considerations used to make the decision, App.93a-101a; App.116a-136a, and the record confirms what both courts also held: Walmart *could* have accommodated Hedican by allowing for voluntary shift swaps, paying other employees overtime to work on Saturdays, or hiring a ninth assistant manager. App.3a; App.33a.

But—instead of seeking to find a workable accommodation—Walmart deployed *Hardison*, saying that these minimal-but-not-*de-minimis* accommodations were "undue." App.113a. This despite both Walmart's

own internal policies encouraging accommodations and Walmart's substantial resources. As the Nation's largest private employer, and with annual operating expenses of over $500 billion, Walmart could easily have accommodated Hedican's religious exercise—it simply chose not to.

The record is particularly clear regarding voluntary shift swaps. Both courts below recognized that such swaps were possible, but that Walmart flatly rejected this option. App.3a; App.33a. As one of eight assistant managers, Hedican could have taken on additional weekday, Sunday, or night shift work in exchange for having his Sabbath off—and he volunteered to do precisely that when he requested an accommodation. App.110a. Indeed, Walmart's own guidance for managers like Hedican encourages shift swaps for both religious and personal reasons, App.99a, and even suggests that in emergencies managers may be able to fall back on PTO (vacation time) to cover their holy days. *Ibid*. This clear record provides ample foundation for the Court to address the first question presented.

Similarly, the record leaves no doubt that Walmart's human resources manager Lori Ahern relied on pure speculation to justify denying Hedican an accommodation. Deposition testimony confirms that Ahern could have, but chose not to, determine whether voluntary shift swaps would be a workable accommodation by talking to the store's seven other assistant managers. App.133a-134a. But instead of making the necessary inquiries of Hedican's future co-workers, Ahern simply *assumed* they "may have plans" or may not want to swap Saturday shifts. App.23a; App.132a. ("Q. Did you have any conversations in that time

frame with any assistant managers? A. No."). Ahern's assessment of the voluntary shift swap accommodation was thus based on pure speculation; and the imagined inability or unwillingness of other employees to work additional Saturdays was key to Ahern's decision to reject shift swaps as a viable accommodation. App.134a (rejecting accommodation because other manager would "have to work more Saturdays because [Hedican] can't"). The clarity of the evidentiary record makes this a strong vehicle for addressing the second question presented.

This case also squarely presents the Court with the opportunity to reconsider *Hardison*. Both lower courts expressly applied *Hardison*, recognizing that its "undue hardship" standard controlled. App.7a; App.31a. Walmart also relied on *Hardison*: its internal religious accommodation guidance confirmed that anything more than a *de minimis* cost justified denying an accommodation request. App.97a.

The petition therefore presents a clean, robust vehicle for this Court to address all three questions presented.

* * *

What was perhaps American history's most famous voluntary shift swap meant to accommodate religion came on October 6, 1965, when Sandy Koufax did not take the mound for the Dodgers in the first game of the World Series. His co-worker Don Drysdale voluntarily took on the job that day so Koufax could observe Yom Kippur. And the Catholic owner of the Dodgers facilitated the switch because he couldn't "let the boy

do that to himself."[12] Koufax's principled stance captivated the Nation, and Koufax's actions—and the willingness of his teammates and the Dodgers to accommodate his religious observance—have served ever since as a kind of parable for how Americans might live and work together in a pluralistic society.

Hardison's pinched view of religious accommodation in the workplace runs directly counter to this vision. It was wrong the day it was decided and is still wrong today, both as a matter of text and a matter of justice. It contradicts the plain text of Title VII. And it wrongly pushes companies like Walmart, who know that religious accommodations are a good thing, to minimize accommodations in the name of cost-cutting. In an increasingly polarized society, it is all the more important that the Court restore the full scope of protection Congress meant to give to Sabbath-observant religious Americans, be they Adventist, Jewish, or something else.

CONCLUSION

The Court should grant the petition.

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[12] Matt Rothenberg, *Sandy Koufax responded to a higher calling on Yom Kippur in 1965*, *National Baseball Hall of Fame*, https://baseballhall.org/discover/sandy-koufax-sits-out-game-one. Although the Dodgers lost Game 1, they went on to win the Series.

Respectfully submitted.

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