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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