No. 18-349

In the Supreme Court of the United States

DARRELL PATTERSON, PETITIONER

v.

WALGREEN CO.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an employer has "reasonably accommodate[d]" an employee's religious practice, 42 U.S.C. 2000e(j), if the accommodation does not eliminate all conflicts between the employee's religious practice and work.

2. Whether an employer can show that accommodating an employee's religious practice would impose an "undue hardship," 42 U.S.C. 2000e(j), based on speculative future hardships.

3. Whether the statement in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), that requiring an employer "to bear more than a *de minimis* cost" to accommodate an employee's religious practice "is an undue hardship," *id.* at 84, should be revisited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Miscellaneous—Continued: Page

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the third question presented.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253-266, generally prohibits employment discrimination against an individual "because of such individual's * * * religion." § 703(a)(1) and (2), 78 Stat. 255 (42 U.S.C. 2000e-2(a)(1) and (2)). In 1972, Congress clarified that "'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without un-

due hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (42 U.S.C. 2000e(j)). Together, those provisions require an employer "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship." 29 C.F.R. 1605.2(b)(1).

Title VII does not define "undue hardship." In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), this Court stated that an accommodation imposes an "undue hardship" if it requires an employer "to bear more than a *de minimis* cost." *Id.* at 84; see *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (explaining that "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer") (citation omitted); see also 29 C.F.R. 1605.2(e)(1).

2. a. Petitioner was a "training instructor" at a Walgreens call center in Orlando, responsible for "training newly hired employees." Pet. App. 2a, 23a. He is a Seventh Day Adventist whose religious beliefs prevent him from working during his Sabbath (sundown on Friday to sundown on Saturday). *Id.* at 2a. During petitioner's six-year tenure, Walgreens generally had been able to accommodate that scheduling constraint by moving petitioner's regular training schedule to avoid his Sabbath and by allowing voluntary shift swaps whenever an emergency training was scheduled during the Sabbath hours. *Id.* at 2a-3a, 23a-24a.

On August 17, 2011 (a Wednesday), the Alabama Board of Pharmacy ordered Walgreens to shut down an Alabama call center that handled mail-order prescriptions. Pet. App. 3a, 24a. In response, Walgreens routed

the Alabama calls to the Orlando call center, which required it to hire dozens of new call center representatives in Orlando, and to train the new and existing representatives, to handle the additional volume of calls. *Id.* at 3a, 24a. Accordingly, on Friday, August 19, Walgreens directed petitioner to conduct an emergency training session the next day. Petitioner contacted the other Orlando training instructor (Alsbaugh), but she could not cover the training session for him because she could not find childcare. *Id.* at 3a. Although petitioner did not call anyone else to cover the shift, the parties dispute whether he was permitted to swap with anyone other than Alsbaugh. See *id.* at 4a n.1. That evening, petitioner left a voicemail message for his supervisor informing her that he would not be able to conduct the Saturday training. *Id.* at 3a-4a, 25a. Petitioner's supervisor later said she offered to do the training, but another supervisor told her not to. See D. Ct. Doc. 62, at 9, 11, 32 (June 30, 2016). Petitioner then conducted the training the following Monday, and Walgreens completed the transfer of calls from Alabama to Orlando by the end of that day. Pet. App. 25a-26a.

The following week, Patterson asked for a "guarantee[] that he would not have to work on Friday nights or Saturdays" in the future. Pet. App. 4a. Walgreens said it could not offer a guarantee, but instead gave petitioner two options. *Ibid.* First, he could become a call center representative, his prior position before he was promoted to training instructor. *Ibid.* Alternatively, he could find a position at a neighboring facility with a larger employee pool. *Id.* at 4a, 25a-26a. Either would have made it more likely, though not certain, that Walgreens could accommodate his scheduling needs.

Id. at 4a. Petitioner declined both options. *Ibid.* Concluding that petitioner's insistence on a guarantee meant that Walgreens "could not rely on [petitioner] if an urgent business need arose that required emergency training on a Friday night or a Saturday," Walgreens fired petitioner. *Id.* at 5a. He then filed suit under Title VII, alleging as relevant here that Walgreens had failed to reasonably accommodate his religious beliefs and practices. *Ibid.*

b. The district court granted Walgreens' motion for summary judgment and denied petitioner's motion for summary judgment. Pet. App. 20a-34a. The court observed that "Walgreens provided religious accommodations on multiple occasions during [petitioner's] employment" by allowing petitioner "to swi[tch] shifts with other employees when he was scheduled to work during the Sabbath hours." *Id.* at 30a-31a. Although petitioner did not find someone to switch shifts for the August 20 training, the court stated that "Walgreens did not have the duty to attempt to arrange schedule swaps for [petitioner]." *Id.* at 30a. The court further stated that "[c]onsidering Walgreens' shifting and urgent business needs, allowing [petitioner] to maintain his position as a Training Instructor with a guarantee that he would never be obligated to work during the Sabbath hours would present an undue hardship on the conduct of Walgreens' business." *Id.* at 32a.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-17a. As relevant here, the court determined that, based on the record before it, "Walgreens offered [petitioner] reasonable accommodations that he either failed to take advantage of or re-

fused to consider, and that the accommodation he insisted on would have posed an undue hardship to Walgreens." *Id.* at 8a.

a. The court of appeals recognized that "a reasonable accommodation is one that 'eliminates the conflict between employment requirements and religious practices.'" Pet. App. 7a (citations omitted). The court explained that "[a]n employer may be able to satisfy its obligations involving an employee's Sabbath observance by allowing the employee to swap shifts with other employees, or by encouraging the employee to obtain other employment within the company that will make it easier for the employee to swap shifts and offering to help him find another position." *Id.* at 8a.

The court of appeals further explained that moving petitioner's regular schedule to Sunday through Thursday had "minimized conflicts," and that for training sessions that had to be scheduled during the Sabbath hours, "Walgreens allowed [petitioner] to find other employees to cover his shifts, and he did so on several occasions." Pet. App. 8a-9a. The court observed that petitioner believed he could have found another employee to cover his August 20 shift, but "he did not attempt to contact any of" those employees. *Id.* at 9a. The court concluded that "Walgreens was not required to ensure that [petitioner] was able to swap his shift, nor was it required to order another employee to work in his place." *Ibid.*

The court of appeals also observed that Walgreens offered petitioner the options of "seek[ing] a different position within the company, including his former position as a customer care representative," and found that petitioner's refusal to consider those options violated his "duty to make a good faith attempt to accommodate

his religious needs through the means offered by Walgreens." Pet. App. 9a-10a. The court rejected petitioner's argument that returning to his former position would entail a pay cut because "he ha[d] not presented any evidence to support that assertion." *Id.* at 10a.

The court of appeals also rejected petitioner's argument that the proposed accommodations were unreasonable because they could not guarantee the elimination of any future conflict: "Guarantees are not required. * * * [E]ven if moving to the customer care representative position did not completely eliminate the conflict, it would have enhanced the likelihood of avoiding it because there were so many more employees with whom he could swap shifts, as he had done during his almost six years with the company." Pet. App. 10a-11a.

b. Although the court of appeals found the proposed accommodations reasonable, it explained that even if those accommodations "were not reasonable, allowing [petitioner] to retain his training instructor position with a guarantee that he would never have to work [during his Sabbath] would have posed an undue hardship" on Walgreens. Pet. App. 11a-12a. The court observed that Walgreens "operates seven days a week and sometimes needs emergency training for its employees based on business needs," and that the circumstances of the August 20 training in response to the Alabama Board of Pharmacy's directive "were a true emergency." *Id.* at 12a.

The court of appeals explained that acceding to petitioner's request would require Walgreens "to schedule all training shifts, including emergency ones, based solely on [petitioner's] religious needs, at the expense of other employees who had nonreligious reasons for not working on weekends." Pet. App. 13a. The court observed that Alsbaugh, the other training instructor, was

leaving the Orlando facility, "which would have left [petitioner] as the only training instructor" and which in turn would have required Walgreens "either to eliminate Friday night and Saturday training sessions altogether, regardless of its business needs, or to schedule less-effective non-trainers to train the untrained some of the time." *Ibid.* "Under those circumstances," the court determined, "the accommodation [petitioner] sought would have imposed an undue hardship on Walgreens." *Ibid.*

DISCUSSION

Petitioner presents three questions for review: (1) whether in "reasonably accommodat[ing]" an employee's religious practice, 42 U.S.C. 2000e(j), an employer must fully eliminate the conflict between the employee's religious practice and work; (2) whether an employer can show that accommodating an employee's religious practice would impose an "undue hardship," *ibid.*, based on speculative hardships; and (3) whether this Court should revisit its statement in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), that an accommodation qualifies as an undue hardship if the employer must "bear more than a *de minimis* cost," *id.* at 84.

The first two questions do not warrant the Court's review. Petitioner is correct that an employer must eliminate conflicts between an employee's religious practice and work, absent undue hardship; and the employer may not rely on speculation to establish undue hardship. But the court of appeals purported to apply both of those legal rules in its unpublished decision below, and there is no clear division in the circuits on either question.

The third question—whether to revisit the *de minimis* standard for undue hardship—does warrant the Court's attention. "More than a *de minimis* cost" is not a reasonable interpretation of the statutory phrase "undue hardship," and subsequent case law has eroded *Hardison*'s doctrinal underpinnings.

A. The Question Whether A Reasonable Accommodation Must Eliminate The Religious Conflict Does Not Warrant Review

Petitioner is correct that a reasonable accommodation must eliminate all conflicts between the employee's religious practice and work as long as it would not impose an undue hardship on the employer. Nevertheless, the court of appeals purported to apply that standard here. And although the court's understanding of "undue hardship" warrants further review—an issue discussed separately below—its factbound application of the elimination standard itself does not.

1. a. Title VII generally prohibits employment discrimination against an individual "because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1) and (2). The statute defines "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). As this Court has recognized, in combination those provisions impose, albeit "somewhat awkwardly," a "reasonable accommodation duty" on an employer unless it would result in an undue hardship, *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 63 n.1 (1986).

In the government's view, an "accommodation" must eliminate any conflict between an employee's religious practice and work requirements. That follows from the meaning of "accommodate." 42 U.S.C. 2000e(j). Because Title VII does not define "accommodate" or "accommodation," the terms should "be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). In this context, the ordinary meanings of "accommodate" and "accommodation" are "[t]o make suitable; adapt; adjust," and "[a]nything that meets a need; convenience," respectively. *American Heritage Dictionary of the English Language* 8 (1969); see 1 *Oxford English Dictionary* 79 (2d ed. 1989) ("[t]o suit, oblige, convenience" and "[t]he supplying with what is suitable or requisite," respectively).

Under those ordinary meanings, an employer's "accommodation" of an employee's religious practice must be suitable to meet the employee's religious needs—that is, it must actually allow the employee to engage in the religious practice without adverse employment consequences. That is possible only if it *eliminates* the conflict between the employee's religious practice and work. In *Ansonia*, this Court appeared to recognize that principle when, in holding that the accommodation there satisfied Title VII's requirements, it observed that the accommodation "eliminate[d] the conflict between employment requirements and religious practices." 479 U.S. at 70.

In the context of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*), which similarly requires employers to make "reasonable accommodations" for their disabled employees, 42 U.S.C. 12112(b)(5), this Court

has recognized that "the word 'accommodation' * * * conveys the need for effectiveness." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 400 (2002). Just as a method or policy cannot be considered effective under the ADA if it does not actually eliminate the barriers otherwise preventing a "qualified individual with a disability [from] perform[ing] the essential functions of a position," *id.* at 399 (brackets and citation omitted), so too a method or policy under Title VII cannot be considered effective if it does not actually eliminate all conflicts between the employee's religious practice and workplace demands.

That conclusion is reinforced by Title VII's requirement that accommodations be "reasonabl[e]." 42 U.S.C. 2000e(j); see *Ansonia*, 479 U.S. at 63 n.1. As EEOC has long recognized, "[a]n accommodation is not 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship." *EEOC Compliance Manual* § 12-IV(A)(3) (2008); see U.S. Amicus Br. at 9, *Ansonia*, *supra* (No. 85-495). An employer who offers a reasonable accommodation has satisfied its duty under Title VII; it need not consider other reasonable accommodations that the employee might prefer. *Ansonia*, 479 U.S. at 68. But if an employer does not offer a reasonable accommodation that eliminates the religious conflict, it must demonstrate that such an accommodation would impose an undue hardship. See 29 C.F.R. 1605.2(b)(1); *Ansonia*, 479 U.S. at 63 n.1.

b. Although a reasonable accommodation must fully eliminate all conflicts between an employee's religious practice and work unless it would impose an undue hardship, an employer has not satisfied Title VII

merely by showing that every complete accommodation would impose an undue hardship; Title VII should not be read to create that kind of all-or-nothing regime. Instead, the statute should be read to require the employer to reasonably accommodate the employee's religious practice to the extent that it can without suffering an undue hardship. If the employer demonstrates that every complete accommodation would result in an undue hardship, it still must offer what might be called a "partial" accommodation that would not result in undue hardship. Cf. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) ("Title VII calls for reasonable rather than absolute accommodation.").

Consider three hypothetical employees: one who attends religious services on Fridays, one who observes the Sabbath on Saturdays, and one who does both. Suppose the employer can reasonably accommodate Friday schedule changes, but a Saturday schedule change would impose an undue hardship. Because the employer can eliminate the first employee's Friday conflict, Title VII would of course require it to offer that accommodation. Conversely, because the employer cannot eliminate the second employee's Saturday conflict without undue hardship, Title VII would not require an accommodation. The employer also cannot fully accommodate the third employee without undue hardship. Yet Title VII should not be read to relieve the employer of all obligations with respect to that employee. Instead, the third employee should be in the same position as his colleagues: the employer must accommodate the Friday, but not the Saturday, conflict.

Courts of appeals generally have ruled consistently with that principle. For example, in *Knight* v. *Connecticut Department of Public Health*, 275 F.3d 156 (2d Cir. 2001), the court held that the employer did not violate Title VII when it accommodated an employee's need to proselytize by allowing religious speech when the employee was not working with clients on state business. See *id.* at 168. That allowance did not eliminate the religious conflict (the employee was obliged to proselytize at all times), but allowing the employee to proselytize on government business would have "jeopardize[d] the state's ability to provide services in a religion-neutral manner," which the court apparently concluded would pose an undue hardship. *Ibid.* The court sensibly recognized, however, that the employer still was required to offer a reasonable partial accommodation. Similarly, in *EEOC* v. *Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997), the court—immediately after stating that the employer's proffered accommodation was unacceptable "because it d[id] not eliminate the conflict"—suggested that if giving a full day off for a religious holiday would impose an undue hardship, the employer still should "offer a partial day off" rather than no time off at all. *Id.* at 1576.

c. The court of appeals acknowledged the principles set forth above. It correctly recognized that "a reasonable accommodation is one that 'eliminates the conflict between employment requirements and religious practices.'" Pet. App. 7a (citations omitted). The court also acknowledged that an employer discharges its burden under Title VII by offering a reasonable accommodation, and that an employer need not offer accommodations that result in undue hardships. *Id.* at 7a-8a. Those, too, are correct statements of law.

In the particular context of Sabbath observance, moreover, the court of appeals applied the correct governing legal principles. In the frequently arising context of a "conflict between work schedules and religious practices," reasonable accommodations may include "voluntary substitutes and 'swaps,'" "flexible scheduling," and "lateral transfer and change of job assignments." 29 C.F.R. 1605.2(d)(1)(i), (ii), and (iii) (capitalization omitted); see *EEOC Compliance Manual* § 12-IV(C)(1)-(3). Consistent with those principles, the court recognized that "allowing the employee to swap shifts with other employees," and "encouraging the employee to obtain other employment within the company that will make it easier for the employee to swap shifts," may constitute reasonable accommodations. Pet. App. 8a.

Petitioner argues that the proffered accommodations were nevertheless unreasonable because they "d[id] not *ensure* that [petitioner] will * * * be able to 'abstain from work totally' every Saturday" in the future. Pet. 20 (emphasis added; citation omitted). But Title VII does not require an employer to accommodate an employee's religious practice "at all costs." *Ansonia*, 479 U.S. at 70. Based on the factual record before it, the court of appeals found that providing the requested guarantee would have posed an undue hardship. Pet. App. 8a. The court therefore applied the correct legal standard (save for its understanding of "undue hardship," which is separately addressed below).

To be sure, the court of appeals observed that the shifting of petitioner's "regular training schedule to Sunday through Thursday * * * minimized conflicts." Pet. App. 8a. Likewise, it observed that petitioner's transferring to a customer-care position "would have

enhanced the likelihood of avoiding" a conflict in the future. *Id.* at 10a. In isolation, those statements could be read to suggest that an accommodation need only minimize, not eliminate, religious conflicts. See Pet. 20. But the court's first observation immediately followed its holding that "[t]he undisputed facts show * * * that the accommodation [petitioner] insisted on"—namely, a *guarantee* of never having to work on his Sabbath—"would have posed an undue hardship to Walgreens." Pet. App. 8a. And the second immediately followed the court's explanation that "[g]uarantees are not required." *Id.* at 10a. In context, therefore, the court's observations are best read as explaining its view that although fully eliminating petitioner's religious conflict by providing the requested guarantee would have imposed an undue hardship, Walgreens nevertheless was required to reasonably accommodate petitioner's religious practice to the extent that it could without incurring an undue hardship; Walgreens was not relieved of its duty to offer any accommodation at all.

2. Petitioner alleges (Pet. 13-22) a division of authority on whether a reasonable accommodation must eliminate, not merely lessen, a religious conflict. Although there is some tension in the language used by the lower courts, this case is a poor vehicle in which to resolve it because, as explained above, the court of appeals correctly adopted the "elimination" standard that petitioner presses here. See Pet. App. 7a.

Moreover, the circuit conflict likely is illusory. Despite some differences in phrasing, courts of appeals have not applied standards that are materially different in practice. See Br. in Opp. 13-16. Rather, the various decisions appear to have turned on whether the particular employer demonstrated an undue hardship. When

an employer utterly fails to address the employee's religious conflict without demonstrating an undue hardship, courts have correctly stated that a reasonable accommodation must eliminate the conflict. See Pet. 14-16 (listing cases); see also *EEOC* v. *Universal Mfg. Corp.*, 914 F.2d 71, 73 (5th Cir. 1990) (per curiam).

Conversely, when an employer demonstrates that elimination of the conflict would impose an undue hardship, courts have recognized that Title VII does not require elimination *in that circumstance*. For example, the decisions that petitioner cites (Pet. 17-18, 21-22) as having approved partial accommodations for employees' Sabbath observances involved situations in which the employer demonstrated that it could not guarantee no future Sabbath work without suffering an undue hardship. See *Sánchez-Rodríguez* v. *AT & T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2012) (offering two different positions at comparable pay, along with shift-swaps and forgiveness of past absenteeism); *EEOC* v. *Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315-316 (4th Cir. 2008) (permitting voluntary shift-swapping, paid and unpaid leave, ability to take vacation days in half-day increments, and preferential status for shift substitutions); *Sturgill* v. *United Parcel Serv., Inc.*, 512 F.3d 1024, 1028-1033 (8th Cir. 2008) (allowing "split" delivery loads to enable early completion on Friday, subject to a collectively bargained requirement to balance loads across employees); *Tabura* v. *Kellogg USA*, 880 F.3d 544, 555-557 (10th Cir. 2018) (providing voluntary shift swaps and vacation time).

Notwithstanding some imprecise language in those decisions, they are not necessarily inconsistent with the elimination standard as described above. Instead, they may be viewed as holding that the accommodations in

those cases satisfied (or potentially could satisfy) Title VII because any further accommodations would have imposed undue hardships on the respective employers. For instance, despite rejecting a per se rule that an employer must in every circumstance eliminate the religious conflict, *Sturgill* expressly acknowledged that "there may be many situations in which the only reasonable accommodation is to eliminate the religious conflict altogether." 512 F.3d at 1033. Likewise, *Tabura* observed that "an accommodation will not be reasonable if it only provides [the employee] an opportunity to avoid working on some, but not all, Saturdays." 880 F.3d at 550.

So viewed, those cases are simply illustrations of the principle that an employer must reasonably accommodate (that is, eliminate) the conflict to the extent that it can without suffering an undue hardship. As explained above, even the circuits that petitioner agrees have adopted the elimination standard recognize that principle. See, *e.g.*, *Knight*, 275 F.3d at 168; *Ilona of Hungary*, 108 F.3d at 1576. Indeed, the circuits favorable to petitioner even recognize, consistent with EEOC guidance, that voluntary shift swaps—which by definition cannot guarantee elimination of future conflicts—nevertheless could under some circumstances constitute the best reasonable accommodation that would not impose an undue hardship on an employer. See, *e.g.*, *Opuku-Boateng* v. *California*, 95 F.3d 1461, 1470-1471 (9th Cir. 1996), cert. denied, 520 U.S. 1228 (1997); cf. *Baker* v. *The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006).

In any event, to the extent there is tension in the courts of appeals, this case would be a poor vehicle in which to address it. The court of appeals here purported to apply the elimination standard that petitioner

favors. And the court determined, based on the factual record before it, that Walgreens had eliminated petitioner's conflict to the extent it could without incurring an undue hardship. The critical question, therefore, is whether the court properly understood the "undue hardship" standard—an issue addressed separately below. But the court's application of the elimination standard itself does not merit further review.

B. The Question Whether An Employer May Rely On Speculative Hardships Does Not Warrant Review

Petitioner again is correct that an employer may not simply speculate that it will suffer an undue hardship. See *EEOC Compliance Manual* § 12-IV(B)(1). But no court, including the court of appeals here, has endorsed such speculation. At most, courts have held that an employer may rely on predictions of future hardships that are likely to materialize, given the objective facts in the record. For example, *Weber* v. *Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000), explained that "federal law does not require [the employer] to wait until it [feels] the effects of [the employee's] proposal" before it can predict that the proposal, if implemented, likely would impose a hardship. *Id.* at 275. Likewise, *Virts* v. *Consolidated Freightways Corp.*, 285 F.3d 508 (6th Cir. 2002), explained that "an employer does not have to actually experience the hardship in order for the hardship to be recognized as too great to be reasonable." *Id.* at 519.

Far from endorsing reliance on speculation, those cases hold that an employer may demonstrate an undue hardship based on the likely, as opposed to "remote or unlikely," effects of a proposed accommodation. *Weber*, 199 F.3d at 274-275. Indeed, the rule could not be otherwise. Disputes under Title VII often arise precisely because the employee desires an accommodation that

the employer has been theretofore unwilling to provide. Under those circumstances, an employer has no choice but to rely on reasonable predictions of the future hardships it would suffer were it compelled to grant that accommodation.

The courts of appeals that petitioner identifies (Pet. 23-24) as having rejected the "speculation" standard therefore have not stated that Title VII prohibits an employer's reliance on reasonable predictions of future hardships. To the contrary, they agree that an employer may rely on known conditions to project future hardships. See *Benton* v. *Carded Graphics, Inc.*, 28 F.3d 1208, 1994 WL 249221, at *2 (4th Cir. Mar. 9, 1994) (Tbl.) (per curiam) (explaining that an employer need not "actually implement an accommodating program," but must demonstrate a "predictably certain undue hardship"); *Toledo* v. *Nobel-Sysco, Inc.*, 892 F.2d 1481, 1489 (10th Cir. 1989) (explaining that "the more reasonable approach" is to allow "'an employer to prove undue hardship without actually having undertaken any of the possible accommodations'" in certain circumstances) (citation omitted), cert. denied, 495 U.S. 948 (1990); *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239, 1243-1244 (9th Cir.) (acknowledging that a future loss of union dues could be "sufficient to establish undue hardship," but that the "'likelihood' of hardship to the union" given "'the particular factual context'" there was too "'remote'" to qualify) (citation omitted), cert. denied, 454 U.S. 1098 (1981); *Brown* v. *General Motors Corp.*, 601 F.2d 956, 960 & n.5 (8th Cir. 1979) (acknowledging that "'foreseeable'" future costs may sometimes establish an undue hardship, but that "future effects cannot outweigh [evidence of costs that] were actually incurred") (citation and emphasis omitted).

The court of appeals here did not engage in speculation about potential harms to Walgreens. Instead, it relied on findings about whether Walgreens foreseeably could face a factual scenario similar to the one that gave rise to this case. Pet. App. 12a-13a. Whether or not those findings are correct, they were based on the factual record before the court rather than on mere speculation. The court's application of the correct legal standard to the facts here does not merit further review.

C. The Question Whether To Revisit *Hardison*'s *De Minimis* Standard Warrants Review

In *Hardison*, this Court stated that requiring an employer "to bear more than a *de minimis* cost" to accommodate an employee's religious practice "is an undue hardship." 432 U.S. at 84. That formulation is incorrect. It does not naturally follow from the statutory text. A *de minimis* cost is "very small or trifling." *Black's Law Dictionary* 482 (Rev. 4th ed. 1968). That is how the Court seemed to understand it in *Hardison*, finding that a potential cost to the employer of just "$150 for three months," 432 U.S. at 92 n.6 (Marshall, J., dissenting), would be an undue hardship. See *id.* at 84. Accordingly, "more than a *de minimis* cost" appears to mean any cost that is "more than a trifle."

That is an ill fit to the word "undue," whose ordinary meaning is "[e]xceeding what is appropriate or normal; excessive." *American Heritage Dictionary* 1398; see 18 *Oxford English Dictionary* 1010 ("Going beyond what is appropriate, warranted, or natural; excessive."). An undue hardship is thus an "excessive hardship" or a hardship that is "more than appropriate or normal." As petitioner correctly observes (Pet. 28), "some burdens are surely more than 'trifling' but less than 'excessive.'"

And in ordinary parlance, "more than a trifle" generally does not mean the same as "more than appropriate or normal." Contrary to *Hardison*, therefore, an "undue hardship" is not best interpreted to mean "more than a *de minimis* cost."

Of course, determining exactly what Congress meant by "undue hardship" is difficult because determining whether a cost is "excessive," or "more than appropriate or normal," requires a valuation of the thing being purchased. Yet that sort of balancing is inappropriate here because it would require a court to weigh the employer's costs against the value of accommodating the employee's religious beliefs or practices. Those are fundamentally incommensurable. And, in any event, a court is in no position to place a value on a particular religious belief or practice. Cf. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) (government officials should not make "bureaucratic judgment[s]" about "sincerely held religious belief[s]").

Therefore, to the extent the word "undue" requires courts to engage in balancing, that balancing should be solely on the employer's side of the equation; that is, the court should weigh the cost of a given accommodation against what the particular employer may properly be made to bear. For example, EEOC considers, among other things, "the identifiable cost in relation to the size and operating cost of the employer." 29 C.F.R. 1605.2(e)(1); see *EEOC Compliance Manual* § 12-IV(B)(2). That is the approach Congress expressly took in the ADA, which defines "undue hardship" as "an action requiring significant difficulty or expense," and lists as factors to be considered the accommodation's

cost and the employer's financial resources. 42 U.S.C. 12111(10)(A) and (B).

Granting review here would present the Court with its first meaningful opportunity to interpret "undue hardship" in Title VII with the benefit of full briefing. The parties' briefs in *Hardison* did not focus on that issue, but instead principally addressed whether the duty to provide a reasonable accommodation may require an employer to violate a collectively bargained seniority system, and whether that duty violates the Establishment Clause. The Court did not explain why it adopted the *de minimis* standard, see *Hardison*, 432 U.S. at 84-85, which neither the government nor any of the parties had urged. To the contrary, the government presupposed a higher standard, observing that the duty to provide a reasonable accommodation absent undue hardship "removes an artificial barrier to equal employment opportunity * * * except to the limited extent that a person's religious practice *significantly and demonstrably affects* the employer's business." U.S. Amicus Br. at 20, *Hardison*, *supra*, (No. 75-1126) (emphasis added). Even the employer in *Hardison* appeared to assume that being forced to incur potentially substantial "out-of-pocket costs," "particularly if the employer is large," would not be deemed an undue hardship. Pet. Br. at 41, 47, *Hardison*, *supra* (No. 75-1126).

Nor is revisiting *Hardison*'s *de minimis* standard precluded by stare decisis. When, as here, civil-rights statutes are involved, this Court has often declined to "place on the shoulders of Congress the burden of the Court's own error." *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 695 (1978) (citation omitted); see *Johnson* v. *Transportation Agency*, 480 U.S. 616, 672-673 (1987) (Scalia, J., dissenting). Reliance interests

also are less of a concern in this context, because this case does not involve "property [or] contract rights," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), and any interest in refusing to accommodate an employee's religious practice going forward should be outweighed by the "countervailing interest * * * in having [employees' Title VII] rights fully protected," *Janus* v. *American Fed'n of State, County, & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018) (citation omitted). Moreover, *Hardison*'s "doctrinal underpinnings" have "eroded over time." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015). In the sentence immediately following its adoption of the *de minimis* standard, *Hardison* suggested that Title VII does not require accommodations that would result in "unequal treatment of employees on the basis of their religion." 432 U.S. at 84. Yet this Court has since made clear that "Title VII does not demand mere neutrality with regard to religious practices," but rather "gives them favored treatment." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015). That observation is irreconcilable with *Hardison*'s focus on neutrality.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the third question presented.

Respectfully submitted.

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