No. 18-349

In The Supreme Court of the United States

DARRELL PATTERSON,

Petitioner,

v.

WALGREEN CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, AMERICAN ISLAMIC CONGRESS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND QUEENS FEDERATION OF CHURCHES IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** (CLS) is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

The **American Islamic Congress** (AIC) serves both Muslims and non-Muslims through the promotion of civil and human rights, including religious freedom. Its programs have reached tens of thousands of people in 40 U.S. states and across the globe. AIC recognizes that American Muslims have prospered under this country's tradition of religious tolerance, and that American Muslims must champion and protect such tolerance for people of all faiths.

The **Association of Christian Schools International** (ACSI) is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 2500 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member schools educate some 5.5 million children around the world. ACSI accredits Protestant pre-K-12 schools, provides professional development and teacher certification,

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[1] Pursuant to Rule 37.2(a), *amici* gave all parties' counsel of record timely notice of their intent to file this brief. By letters of blanket consent filed with the Clerk of this Court, all parties gave written consent to its filing. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. ACSI's calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The **Institutional Religious Freedom Alliance** (IRFA), founded in 2008 and now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents important questions under the religious-accommodation provision, section 701(j), of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(j). That provision makes it illegal for an employer to act against an employee based on the employee's religiously grounded observance or practice, unless the employer "demonstrates that he is unable to reasonably accommodate to [the] observance or practice without undue hardship on the conduct of the employer's business." *Amici* agree with petitioner that conflicts between rulings in the courts of appeals on the questions presented call for this Court's review.

We write to focus on a related point. The legal rules followed in the court of appeals decision in this case—and properly challenged in the petition—undermine the protection that the accommodation provision gives to employees in their religious practices, especially to employees of minority faiths. The decision below is merely one example of rulings on the same legal questions that have undermined the accommodation provision. Those rulings constitute yet another reason that the petition raises "important questions of federal law" meriting review. Sup. Ct. R. 10(c).

I. As the petition explains, an employer should not be able to establish "undue hardship," and thus deny reasonable accommodation, on the basis of speculative or hypothetical future harms. Here the court of appeals allowed Walgreens to rely on such harms,

based on a reorganization that was planned to occur several months in the future. In permitting reliance on such harms, the court of appeals adopted a rule that conflicts not only with other circuits but with the nature and purpose of the accommodation provision.

A. Most fundamentally, allowing a showing of hardship to be based on future contingencies undermines the protection that Title VII's religious-accommodation provision gives to employees. Allowing employers to rely on predicted future events creates at least three problems that undermine the effectiveness of the provision. First, it allows employers to fire or otherwise adversely affect employees now based on events that might never occur—events that might never necessitate the firing. Second, reliance on future, hypothetical events makes it much more difficult to identify specific accommodations that might be available at the time the conflict arises. Third, reliance on speculative or hypothetical harms relieves the employer of the duty to search for reasonable accommodation—and at the worst, may incentivize employers to dream up scenarios of future hardship.

B. A requirement that the employer show actual, not hypothetical, hardship is supported by other authorities and by this Court's rulings in comparable contexts. Reliance on hypothetical hardships has been rejected not only by the Equal Employment Opportunity Commission, but in guidelines promulgated by both the Clinton and Trump administrations. Likewise, constitutional decisions of this Court under both intermediate and rational-basis scrutiny have required

government to demonstrate more than "mere speculation or conjecture."

C. Allowing speculative or hypothetical hardships particularly undermines the accommodation provision when combined with the definition this Court has adopted for "undue hardship"—which allows anything "more than a *de minimis* cost" to count as undue hardship. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977) (italics in original). As long as that weak standard of justification remains in place, the use of speculative or hypothetical hardships to satisfy it makes the duty of accommodation doubly weak.

II. In the alternative, as the petition also explains, this Court should reconsider *Hardison*'s holding that anything more than "*de minimis* harm" from an accommodation constitutes "undue hardship." The *de minimis* standard has multiple fundamental flaws.

A. First and foremost, the *de minimis* standard is inconsistent with the text of Title VII. The ordinary meaning of "undue hardship" at the time the accommodation provision was enacted (1972) included not only that some "suffering" or "deprivation" existed—"a condition that is difficult to endure"—but also that it was serious enough as to be "excessive" or "inappropriate." That meaning is irreconcilable with a standard of mere "*de minimis*" cost.

B. Moreover, the premise of the *de minimis* standard has been undercut by this Court's recent decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). The Court in *Hardison* adopted the

weak *de minimis* standard largely based on the assertion that Title VII aims only at preventing intentional discrimination against religion. But *Abercrombie* makes clear that Title VII, in its accommodation provision, also requires protection against the effects of a religion-neutral employer policy.

C. A weak interpretation of Title VII's religious-accommodation provision is particularly harmful to religious minorities, who are particularly likely to come in conflict with formally neutral employer policies reflecting the majority's norms. Such disproportionate effects are apparent in the accommodation cases listed in the appendix to the petition, a disproportionate number of which involve religious minorities.

D. Finally, if the Court retains the *de minimis* standard based on principles of *stare decisis*, at the very least it should make clear that that standard does not extend to cases where the asserted harms from accommodation are hypothetical or speculative. Starting with a relatively weak substantive standard (*de minimis*) and adding a toothless conception of permissible evidence to satisfy it (hypothetical harms) will guarantee no protection at all.

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ARGUMENT

I. An Employer Should Not Be Able to Establish "Undue Hardship," and Thus Deny Reasonable Accommodation, on the Basis of Speculative or Hypothetical Future Harms.

This case presents the issue whether an assertion of future hardship, based on predicted events that have not yet happened, is sufficient to demonstrate the "undue hardship" that relieves an employer of the duty to make an accommodation. 42 U.S.C. § 2000e(j). Walgreens fired petitioner Darrell Patterson, a Seventh-day Adventist, after he was unable to conduct a training session on a Saturday, his Sabbath.

As the petition explains, Walgreens could not justify its refusal to accommodate petitioner based on any hardship it had already suffered from his failure to conduct the Saturday session: the training had simply gone forward on Monday, and calls began transferring on Tuesday, "thereby meeting [Walgreens'] internal goal." Pet. 9 (citing record); see *id.* at 23 (Walgreens' transfers of calls on Tuesday satisfied "the only schedule it ever established"). Instead, Walgreens claimed, and the court of appeals accepted, that accommodating petitioner "would produce undue hardship for Walgreens in the future," based on a prediction that the other trainer, Alsbaugh, would be transferring out of the position at a future point. Pet. App. 13a.[2] For

[2] Petitioner was fired in August 2011 (Pet. 9); the other trainer, Alsbaugh, transferred from Walgreens in May 2012, nine months later. Doc. 61:11-13 (Alsbaugh Dep.).

several reasons, such a prediction cannot justify a finding of undue hardship under Title VII.

A. Allowing Hypothetical Hardship Undermines the Employer's Responsibility to Make Reasonable Accommodations for its Employees.

Most fundamentally, allowing a showing of hardship to be based on future contingencies undermines the protection that Title VII's accommodation provision gives to employees. "[P]rojected 'theoretical' future effects cannot outweigh" the fact that no costs "were actually incurred" by the employer. *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979). And potential future harms cannot justify firing an employee now—like petitioner, or other employees. Allowing employers to rely on predicted future events that might not occur creates at least three problems that undermine the effectiveness of the religious accommodation provision.

First, there is a good chance that the predicted future hardship will not materialize. If the employer does not wait—and has no duty to wait—until the projected circumstances actually arise, it is impossible to know whether terminating employment is necessary.

This case presents just one example of such a problem. Walgreens asserted it would face "undue hardship" in accommodating petitioner because he would be the only trainer once Alsbaugh left. Pet. App. 13a. But the reason Alsbaugh was predicted to leave was

because Walgreens was to sell the initiative that had constituted a large portion of her work—a sale that was not set to take place until May 2012, nine months after petitioner was fired. Pet. 9; Doc. 61:11-13 (Alsbaugh Dep.). During the nine months, however, the sale might have fallen through or a new source of work might have arisen, allowing or even requiring the additional trainer to stay. Similarly, the workload might have decreased, making Saturday training unnecessary.

Such unknowns exist whenever employers engage in speculation or projections about future events. By its very nature, Title VII's accommodation provision entails that an employer should take action against an employee only when "accommodation of [the employee's] practices without undue hardship [i]s *impossible*." *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (emphasis added). Avoiding hardship cannot be "impossible" when the hardship might not occur. Accordingly, hypothetical or future predicted situations cannot establish "undue hardship."

Second, when an employer acts before actual harm has occurred or is at least imminent, it is more difficult to determine what reasonable accommodations might be possible. This is precisely why an "employee's religious practices are required to be tolerated" "until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship." *Brown*, 601 F.2d at 961.

Again, this case provides just one example of the problem. Even when the other trainer was unavailable to conduct training on petitioner's Sabbath, their supervisor offered to conduct the training instead. Pet. 8-9 (citing Doc. 62:11, 26, 32). Thus, even if petitioner had become the only available trainer after the reorganization, there would remain possibilities for accommodation—possibilities that could never be identified, because Walgreens terminated him based on the hypothetical future situation.

Third, allowing for speculation or hypotheticals relieves the employer of the duty to work out a reasonable accommodation. This Court has held that "'bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.'" *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (quotation omitted). The accommodation provision's purpose is to require "a thorough exploration of all the alternatives that would meet the employee's needs, and the fact-based determination of whether any of those programs could be implemented without a predictably certain undue hardship," before waving the white flag and declaring undue hardship. *Benton v. Carded Graphics, Inc.*, 28 F.3d 1208, 1994 WL 249221, at *2 (4th Cir. 1994) (unpublished). The EEOC *Guidelines on Discrimination Because of Religion* echo this sentiment: "A refusal to accommodate is justified only when an employer . . . can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation." 45 Fed.

Reg. 72,610 (1980) (codified as revised at 29 C.F.R. § 1605.2(c)(1)).

Employers, however, can avoid this statutory duty if they can rely on future, contingent events. And many members of minority faiths throughout the nation may lose their jobs when that result might have turned out not to be necessary.

At its worst, permitting speculation as proof of undue hardship will incentivize employers to dream up scenarios of future hardship in order to avoid not only reasonable accommodation, but the smallest inconvenience. In sum, allowing employers to assert hypothetical or future problems would "interpret undue hardship in a manner that would essentially render § 701(j) meaningless." Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 575, 611 (2000).[3]

[3] Moreover, if employers are allowed to speculate about the employee at issue, they could also factor in speculative hardship that would arise if coworkers sought similar accommodations. If "anticipated or multiplied hardship" counted, "any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level." *Brown*, 601 F.2d at 961.

B. The Requirement of Actual, Not Hypothetical, Hardship Is Supported by Other Authorities and by This Court's Rulings in Comparable Contexts.

Requiring a showing of actual as opposed to hypothetical hardship is not only consistent with the statutory language and concept but, as the petition shows, is the longstanding position of the Equal Employment Opportunity Commission. Pet. 16, 18, 24. We would add that in the context of federal employment, presidential administrations across the spectrum of views have taken the same position. During the Clinton Administration, the White House's *Memorandum on Religious Exercise and Religious Expression in the Federal Workplace* mandated that to justify denying an employee a religious accommodation, "cost or hardship [to an agency] must be real rather than speculative or hypothetical." Administration of William J. Clinton, *Memorandum on Religious Exercise and Religious Expression in the Federal Workplace*, § 1(C) ("Accommodation of Religious Exercise") (Aug. 14, 1997), https://www.gpo.gov/fdsys/pkg/PPP-1997-book2/pdf/PPP-1997-book2-doc-pg1104.pdf. Similarly, the Department of Justice in the Trump Administration has made clear, in its *Principles of Religious Liberty*, that a federal employer "cannot rely on assumptions about hardships that might result from an accommodation." Office of the Attorney General, *Memorandum on Federal Law Principles of Religious Liberty*, 82 Fed. Reg. 49,668, 49,670 (Oct. 26, 2017). This consensus between administrations with diverse legal and policy

perspectives is telling evidence that the logic of "undue hardship" requires a showing of actual, not merely potential future, harm.

In addition, speculation is impermissible as a means of meeting a burden of justification in other contexts comparable to Title VII religious accommodation. For example, to regulate commercial speech consistently with the First Amendment, the government must satisfy mid-level scrutiny: it has the burden to demonstrate that its rule is tailored "in a reasonable manner to serve a substantial state interest." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)); see *Edenfield*, 507 U.S. at 769 (restriction on commercial speech must be "designed in a reasonable way to accomplish [the government's substantial] end"). Under this standard, the Court has repeatedly held that the government's "burden is not satisfied by mere speculation or conjecture." *Id.* at 770. "[R]ather, [the] governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71 (citations omitted).

Mid-level scrutiny of commercial speech is analogous to the "undue hardship" Title VII standard in that, while neither imposes strict scrutiny, they also do not give simple deference. The government must "demonstrate" the "real" harms that speech would cause (*id.* at 771), as it must "demonstrate . . . undue hardship" from a religious accommodation (42 U.S.C.

§ 2000e(j)). In both cases, the harm should be real: that is, actual rather than hypothetical.

Indeed, speculative predictions of harm have failed to pass even the minimum level of constitutional scrutiny. For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court invalidated a city's denial of a permit for a home for the mentally disabled. The city argued, among other things, that residents of the home might face harassment from youth attending school across the street; but this Court determined that these "vague, undifferentiated fears" did not provide even a rational basis for denying the permit. *Id*. at 449. If speculation about future events cannot satisfy minimal constitutional scrutiny, it likewise should not satisfy any "undue hardship" standard.

C. Reliance on Hypothetical Hardships Particularly Undermines the Accommodation Provision When Combined with the "*De Minimis*" Definition of "Undue Hardship."

Allowing speculative or hypothetical hardships especially undermines statutory protection given the relatively low substantive standard that previous decisions have set forth for defining an undue hardship. As Part II, *infra*, details, this Court has indicated that "[t]o require [an employer] to bear more than a *de minimis* cost in order to [accommodate an employee] is an undue hardship." *Trans World Airlines v. Hardison*,

432 U.S. 63, 84 (1977) (italics in original). And lower courts have followed this suggestion. *Amici* believe (see part II) that the Court should reconsider the *de minimis* standard. But as long as that standard remains in place, the use of speculative or hypothetical hardships to satisfy it makes the duty of accommodation doubly weak. The conjunction of the two rules means that an employer may hypothesize innumerable potential situations that might arise to create slightly more than minimal costs. It is difficult to imagine any employer failing such a toothless standard. Consequently, allowing employers to use harms that are not actual or imminent would significantly undermine the accommodation provision.

II. The Court Should Reconsider the *TWA v. Hardison* Definition of "Undue Hardship" as "Anything More than *De Minimis* Harm," and at the Very Least Should Not Extend That Standard to Cases of Hypothetical Hardships.

As the petition urges, this Court should reconsider the *de minimis* standard adopted in *Hardison*.[4] For

[4] *Amici* focus here on the flaws in *Hardison*'s reasoning in adopting the *de minimis* standard. We agree with petitioner that a further reason to reconsider that standard is that "*Hardison*'s discussion of 'undue hardship' was technically dicta." Pet. 28 (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2040 n.* (2015) (Thomas, J., concurring in part and dissenting in part) ("Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained

multiple reasons, this standard is fundamentally flawed as a definition of "undue hardship."

A. The *De Minimis* Standard Is Inconsistent with the Text of Title VII.

First and foremost, the phrase "undue hardship" in Title VII simply will not bear the meaning that expands it to "[anything] more than a *de minimis* cost." In construing a statute, this Court "'start[s], of course, with the statutory text,'" and "proceed[s] from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (some brackets in original) (quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). Consequently, the Court sharply rejects interpretations that are "completely unmoored from the statutory text." *Nat'l Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 632 (2018). Ordinary meaning is determined "at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018).

Here, the phrase at issue is "undue hardship." Because Title VII does not "otherwise defin[e]" it (*Cloer*, *supra*), the phrase should be interpreted according to its ordinary meaning in 1972, the time Congress added the provision to the statute. Begin with the term "hardship": At that time, Random House defined hardship

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an 'undue hardship' defense—not the amended statutory definition.")).

as "a condition that is difficult to endure; suffering; deprivation; oppression; or something hard to bear, as a deprivation, lack of comfort, constant toil or danger, etc." *Random House Dictionary* 646 (1973). "[H]ardship," it added, "applies to a circumstance in which excessive and painful effort of some kind is required." *Id*. Similarly, Webster's Dictionary defined hardship as "something that causes or entails suffering or privation." *Webster's New American Dictionary* 379 (1965). Black's Law Dictionary echoes the others, defining hardship as "privation, suffering, adversity." *Black's Law Dictionary* 646 (5th ed. 1979). In a zoning example, hardship means that a restriction applied is "unduly oppressive, arbitrary or confiscatory." *Id*.

With respect to "undue," Random House defined it as "unwarranted" or "excessive"; "inappropriate, unjustifiable or improper"; or "not owed." *Random House Dictionary*, *supra*, at 1433. Webster's defined it as "not due," as "inappropriate" or "unsuitable," and as "exceeding or violating propriety or fitness." *Webster's New American Dictionary*, *supra*, at 968. And Black's defined "undue" to mean "more than necessary; not proper; illegal. It denotes something wrong." *Black's Law Dictionary*, *supra*, at 1370.

In other words, the ordinary meaning of "undue hardship" includes not only that some "suffering" or "deprivation" exists—"a condition that is difficult to endure"—but also that it is serious enough as to be "excessive" or "inappropriate."

It is impossible to reconcile that ordinary meaning of "undue hardship" with *Hardison*'s definition of it as "[anything] more than a *de minimis* cost." See also Pet. 28-29. A cost that is barely more than minimal does not correspond either with the baseline idea that a hardship involves "suffering" and "a condition difficult to endure," or with the further idea that this suffering is serious enough as to be "undue" or "excessive."

In short, as Justice Marshall pointed out in *Hardison*, it is "seriously question[able] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.'" 432 U.S. at 92 n.6 (Marshall, J., dissenting). In other cases besides *Hardison*, this Court has repeatedly "decline[d] the . . . invitation to override Congress' considered choice by rewriting the words of the statute." *Nat'l Ass'n of Manufacturers*, 138 S. Ct. at 632; see *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1948-49 (2016). This case presents the opportunity to rectify *Hardison's* mistaken rewriting of the words of Title VII's accommodation provision.

The ordinary meaning of "undue hardship" as of 1972 is far closer to the definition of that phrase under the Americans with Disabilities Act (ADA), which requires an employer to make "reasonable accommodations" of an employee's disability unless accommodation would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). According to the ADA, undue hardship means "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A). Nor is there a good reason to protect

religious freedom rights less than disability rights. In fact, as we now discuss, this Court has made clear that Title VII's accommodation provision gives religious practice "favored [rather than lesser] treatment." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

B. The Premise Underlying *Hardison*'s *De Minimis* Standard Has Been Undercut by This Court's Decision in *Abercrombie & Fitch*.

Hardison's *de minimis* standard should be reconsidered not only because it is textually indefensible, but also because the premise underlying it has been undermined by this Court's decision in *Abercrombie & Fitch*, 135 S. Ct. 2028. This Court has revisited previous decisions, including decisions interpreting statutes, "when the theoretical underpinnings of those decisions are called into serious question" by subsequent decisions. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); accord *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings").

In *Hardison*, the Court justified its weak "*de minimis*" standard on the ground that religious practices should not be protected more than nonreligious practices: "[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal

treatment of employees on the basis of their religion." 432 U.S. at 84. The Court found such treatment unwarranted based on its conclusion that "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment." *Id.* at 85. Focusing on protecting against overt discrimination, the Court thus declined to require accommodation for the employee from a neutral policy that coincidentally interfered with his religious practice. See *id.* at 82 (refusing to order accommodation in face of seniority system because system "was not designed with the intention to discriminate against religion").

Four terms ago, however, the Court in *Abercrombie & Fitch* rejected the theoretical underpinnings of *Hardison*'s rule. Contrary to *Hardison*'s reasoning that Title VII aims only at actions treating religion worse than other practices, the Court in *Abercrombie* said:

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice."

135 S. Ct. at 2034.[5] As the Court pointed out: "An employer is surely entitled to have, for example, a

[5] To make the point explicitly: When an employer takes adverse action against an employee because of an employee's practice that is religiously grounded, it is acting "because of [the employee's] religious observance and practice," 42 U.S.C. § 2000e-2(a)—even if

no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an 'aspec[t] of religious practice . . . ,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy." *Id.* (ellipses in original).

As one commentator has put it, this Court in *Abercrombie*, "for the first time, emphasized that § 701(j) mandates more than formal equality. . . . The Court used different rhetoric than it had in its earlier decisions in *Hardison* and *Philbrook*, where it emphasized formal equality." Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 130 (2015). *Abercrombie* has cut the legs out from under the *de minimis* standard, and this case presents the opportunity for this Court to confirm that reality.

Moreover, this reasoning in *Abercrombie* was important to the Court's ultimate holding there: that an employer can be held liable for refusing to accommodate an employee's practice that is religiously grounded even if the employer had no actual knowledge the practice was religious. Abercrombie & Fitch had argued that a claim for accommodation could be brought only as a disparate-impact claim, not as a disparate-treatment (or intentional-discrimination) claim. 135 S. Ct. at 2033. Specifically, Abercrombie &

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the employer's action is "neutral" in the sense that it does not target the employee's practice only when it is religiously grounded. *Abercrombie*, 135 S. Ct. at 2034.

Fitch argued that "the statute limits disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices." *Id.* at 2034. The Court held that disparate-treatment claims were not so limited, and explained its holding on the basis that Title VII's accommodation provision gives "favored treatment," not "mere neutrality[,] with regard to religious practices." *Id.*

The reasoning in *Abercrombie* aligns with Justice Marshall's dissent in *Hardison*, not with the majority. As that dissent explained, the *Hardison* majority's claim that Title VII focuses only on "intentional discrimination" against religion, and rejects "unequal treatment" favoring employee religious practices, is irreconcilable with the very concept of accommodation:

> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. . . . In each instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs," unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

Hardison, 432 U.S. at 87-88 (Marshall, J., dissenting). *Hardison*'s *de minimis* standard, which could be read to reject "even the most minor special privilege to religious observers to enable them to follow their faith"

(*id.* at 87), therefore rests on the very misunderstanding of Title VII that this Court has now rejected in *Abercrombie*.

C. The *De Minimis* Standard Particularly Harms Accommodation of Religious Minorities.

Title VII's religious-accommodation provision is particularly vital to the protection of minority religious practices. Because facially or formally neutral workplace policies by nature reflect the perspective of the cultural majority, they will disproportionately come into conflict with the practices of religious minorities. Therefore, a meaningful requirement of religious accommodation disproportionately protects religious minorities—but a weak accommodation requirement, conversely, disproportionately hurts them.

These disproportionate effects appear, for example, in the cases listed in the appendix to the petition: reported religious accommodation cases decided on summary judgment motions concerning "undue hardship" from 2000 to the present. See Pet. App. 35a-67a. In our own appendix to this brief, we identify the religion of the employee claimants in those cases. Of 102 cases where the employee's religion is apparent, the number of cases involving claimants of varying faiths are:

General Christian	28
Seventh-day Adventist	22

Muslim	19
Sabbatarian Christian sects	6
Jehovah's Witness	5

Idiosyncratic religions, Pentecostal Christian: 4 each

Jewish, Hebrew Israelite: 3 each

Non-religious, Rastafarian, Sikh, African religions: 2 each

Muslims, a classic religious minority, constitute 18.6 percent of this large set of accommodation decisions (19 of 102), even though, according to a comprehensive 2014 study, they constitute only 0.9 percent of the population. Pew Research Center, *America's Changing Religious Landscape*, at 4 (May 12, 2015), http://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf. Overall, claims by members of non-Christian faiths (Muslims, idiosyncratic faiths, Jews, Hebrew Israelites, Rastafarians, Sikhs, and African religions) make up 34.3 percent of the accommodation cases (35 of 102), even though non-Christian faiths made up only 5.9 percent of the population in 2014 (and significantly less than that in earlier years). *America's Changing Religious Landscape*, *supra*, at 4. The percentage of cases in the appendix involving religious minorities climbs to 62 percent when one combines the various non-Christians (34.3 percent of the cases) with sects that follow the minority practice of Saturday Sabbath observance: Seventh-day Adventists (22 of 102, or 21.6 percent of

the cases) and other small Saturday-observing sects (6 of 102, or 5.9 percent of the cases).[6] Together, these statistics leave no doubt that *Hardison*'s *de minimis* standard harms religious minorities, especially by comparison to "majority" faith groups.

D. At the Very Least, the *De Minimis* Standard Should Not Be Extended to Cases Involving Speculative or Hypothetical Hardships.

For the foregoing reasons, the Court should grant review in this case to reconsider *Hardison*'s "*de minimis*" standard and adopt an interpretation consistent with the text and purpose of Title VII. But if the Court decides not to overturn the *de minimis* standard in general, then at the very least it should reject the lower courts' inappropriate extension of that standard to cases where the asserted harms from accommodation are hypothetical or speculative. As we have already shown in part I-C, *supra*, starting with a relatively weak substantive standard (*de minimis*) and adding a toothless conception of permissible evidence to satisfy it (hypothetical harms) will guarantee no protection at

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[6] The cases reflect a variety of religious observances and practices conflicting with employer rules. For example, among Muslims, the cases involve the ability to conduct prayer during the workday, see, e.g., *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017) (space for prayer); to wear a beard, see, e.g., *Hussein v. The Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001); and to wear a hijab or woman's head-scarf, see, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

all. It is even easier for employers to make speculative predictions of hypothetical harms when those hypothesized harms can be relatively minor.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Breakdown by Employee's Religion in Religious Accommodation Cases from Petition Appendix 35a-67a

Cases in the list are drawn from petitioner's list of decisions, Pet. App. 35a-67a. Unless otherwise indicated, percentages of the U.S. population for particular faiths are drawn from the figures at Pew Research Center, *America's Changing Religious Landscape*, at 4 (May 12, 2015), http://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf (hereinafter "*America's Changing Religious Landscape*").

General Christian: 28 of 102 (27.4 percent versus approximately 65 percent of population)[1]

1. *O'Brien v. City of Springfield*, 319 F. Supp. 2d 90 (D. Mass. 2003)
2. *Rivera v. Choice Courier Sys., Inc.*, 2004 WL 1444852 (S.D.N.Y. June 25, 2004)
3. *Daniels v. City of Arlington, Tex.*, 246 F.3d 500 (5th Cir. 2001)

[1] The Pew study, *America's Changing Religious Landscape*, lists Christians as 70.6 percent of the population. *Id.* at 4. In this Appendix, we separate out Pentecostal Christians (4.6 percent) and Jehovah's Witnesses (0.8 percent). Subtracting those groups leaves our category of "general" Christians as approximately 65 percent of the population.

4. *Quental v. Connecticut Comm'n on Deaf & Hearing Impaired*, 122 F. Supp. 2d 133 (D. Conn. 2000)

5. *E.E.O.C. v. Aldi, Inc.*, 2008 WL 5429624 (W.D. Pa. Dec. 31, 2008)

6. *Jacobs v. Scotland Mfg., Inc.*, 2012 WL 2366446 (M.D.N.C. June 21, 2012)

7. *Daniel v. Kroger Ltd. P'ship I*, 2011 WL 5119372 (E.D. Va. Oct. 27, 2011)

8. *George v. Home Depot Inc.*, 51 F. App'x 482 (5th Cir. 2002)

9. *Bolden v. Caravan Facilities Mgmt., LLC*, 112 F. Supp. 3d 785 (N.D. Ind. 2015)

10. *Davis v. Fort Bend Cty.*, 765 F.3d 480 (5th Cir. 2014)

11. *Andrews v. Virginia Union Univ.*, 2008 WL 2096964 (E.D. Va. May 16, 2008)

12. *U.S. Equal Employment Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017)

13. *Shatkin v. Univ. of Texas at Arlington*, 2010 WL 2730585 (N.D. Tex. July 9, 2010)

14. *Moore v. Metro. Human Serv. Dist.*, 2010 WL 1462224 (E.D. La. Apr. 8, 2010)

15. *Gay v. Lowe's Home Centers, Inc.*, 2007 WL 1599750 (S.D. Miss. June 4, 2007)

16. *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010)

17. *Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002)

18. *U.S. E.E.O.C. v. Bridgestone/Firestone, Inc.*, 95 F. Supp. 2d 913 (C.D. Ill. 2000)

19. *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581 (7th Cir. 2007)

20. *Walker v. Alcoa, Inc.*, 2008 WL 2356997 (N.D. Ind. June 9, 2008)

21. *Adams v. Retail Ventures, Inc.*, 325 F. App'x 440 (7th Cir. 2009)

22. *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000)

23. *Kenner v. Domtar Indus., Inc.*, 2006 WL 522468 (W.D. Ark. Mar. 3, 2006)

24. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)

25. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006)

26. *Slater v. Douglas Cty.*, 743 F. Supp. 2d 1188 (D. Or. 2010)

27. *Ross v. Colorado Dep't of Transp.*, 2012 WL 5975086 (D. Colo. Nov. 14, 2012)

28. *Dixon v. The Hallmark Companies, Inc.*, 627 F.3d 849 (11th Cir. 2010)

Seventh-day Adventist: 22/102 (21.6 percent versus 0.5 percent of population)[2]

1. *Leonce v. Callahan*, 2008 WL 58892 (N.D. Tex. Jan. 3, 2008)
2. *Jones v. United Parcel Serv., Inc.*, 2008 WL 2627675 (N.D. Tex. June 30, 2008)
3. *E.E.O.C. v. Dalfort Aerospace*, 2002 WL 255486 (N.D. Tex. Feb. 19, 2002)
4. *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013)
5. *Ford v. City of Dallas, Tex.*, 2007 WL 2051016 (N.D. Tex. July 12, 2007)
6. *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075 (N.D. Tex. 2003)
7. *Crider v. Univ. of Tennessee*, *Knoxville*, 492 F. App'x 609 (6th Cir. 2012)
8. *Prach v. Hollywood Supermarket, Inc.*, 2010 WL 3419461 (E.D. Mich. Aug. 27, 2010)
9. *Burdette v. Fed. Exp. Corp.*, 367 F. App'x 628 (6th Cir. 2010)
10. *Morris v. Four Star Paving, LLC*, 2013 WL 1681835 (M.D. Tenn. Apr. 17, 2013)
11. *Rose v. Potter*, 90 F. App'x 951 (7th Cir. 2004)
12. *Filinovich v. Claar*, 2005 WL 2709284 (N.D. Ill. Oct. 19, 2005)

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[2] *America's Changing Religious Landscape*, *supra*, Appendix B (Classification of Protestant Denominations), at 102.

13. *Maroko v. Werner Enterprises, Inc.*, 778 F. Supp. 2d 993 (D. Minn. 2011)

14. *Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011)

15. *Brown v. Hot Springs Nat. Park Hosp. Holdings, LLC*, 2013 WL 1968483 (E.D. Ark. May 13, 2013)

16. *Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018)

17. *Patterson v. Walgreen Co.*, 727 F. App'x 581 (11th Cir. 2018)

18. *Rice v. U.S.F. Holland, Inc.*, 410 F. Supp. 2d 1301 (N.D. Ga. 2005)

19. *Kilpatrick v. Hyundai Motor Mfg. Alabama, LLC*, 911 F. Supp. 2d 1211 (M.D. Ala. 2012)

20. *Ashley v. Chafin*, 2009 WL 3074732 (M.D. Ga. Sept. 23, 2009)

21. *Cameau v. Metro. Atlanta Rapid Transit Auth.*, 2014 WL 11379548 (N.D. Ga. Feb. 20, 2014)

22. *E.E.O.C. v. Rent-A-Ctr., Inc.*, 917 F. Supp. 2d 112 (D.D.C. 2013)

Muslim: 19/102 (18.6 percent versus 0.9 percent of population)

1. *Robinson v. Children's Hosp. Boston*, 2016 WL 1337255 (D. Mass. Apr. 5, 2016)

2. *Hussein v. Hotel Employees & Rest. Union, Local 6*, 108 F. Supp. 2d 360 (S.D.N.Y. 2000)

3. *Abdelwahab v. Jackson State Univ.*, 2010 WL 384416 (S.D. Miss. Jan. 27, 2010)

4. *Nichols v. Illinois Dep't of Transportation*, 152 F. Supp. 3d 1106 (N.D. Ill. 2016)

5. *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017)

6. *Hussein v. The Waldorf-Astoria*, 134 F. Supp. 2d 591 (S.D.N.Y. 2001)

7. *Wallace v. City of Philadelphia*, 2010 WL 1730850 (E.D. Pa. Apr. 26, 2010)

8. *E.E.O.C. v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010)

9. *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009)

10. *Equal Employment Opportunity Comm'n v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298 (D. Colo. 2015)

11. *King v. Borgess Lee Mem'l Hosp.*, 2015 WL 852324 (W.D. Mich. Feb. 26, 2015)

12. *Mohamed-Sheik v. Golden Foods/Golden Brands LLC*, 2006 WL 709573 (W.D. Ky. Mar. 16, 2006)

13. *U.S. Equal Employment Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949 (N.D. Cal. 2013)

14. *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006)

15. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015)

16. *Fazlovic v. Maricopa Cty.*, 2012 WL 12960870 (D. Ariz. Sept. 28, 2012)

17. *E.E.O.C. v. JBS USA, LLC*, 2013 WL 3302429 (D. Colo. July 1, 2013)

18. *Farah v. A-1 Careers*, 2013 WL 6095118 (D. Kan. Nov. 20, 2013)

19. *E.E.O.C. v. 704 HTL Operating, LLC*, 979 F. Supp. 2d 1220 (D.N.M. 2013)

Other (or Unspecified) Saturday-Sabbatarian Sects: 6/102

1. *Stolley v. Lockheed Martin Aeronautics Co.*, 228 F. App'x 379 (5th Cir. 2007)

2. *Rumfola v. Total Petrochemical USA, Inc.*, 2012 WL 860405 (M.D. La. Mar. 13, 2012)

3. *O'Barr v. United Parcel Serv., Inc.*, 2013 WL 2243004 (E.D. Tenn. May 21, 2013)

4. *Creusere v. James Hunt Constr.*, 83 F. App'x 709 (6th Cir. 2003)

5. *E.E.O.C. v. Chemsico, Inc.*, 216 F. Supp. 2d 940 (E.D. Mo. 2002)

6. *E.E.O.C. v. Texas Hydraulics, Inc.*, 583 F. Supp. 2d 904 (E.D. Tenn. 2008)

Jehovah's Witness: 5/102 (4.9 percent versus 0.8 percent of population)

1. *Shepherd v. Gannondale*, 2014 WL 7338714 (W.D. Pa. Dec. 22, 2014)
2. *Westbrook v. N. Carolina A & T State Univ.*, 51 F. Supp. 3d 612 (M.D.N.C. 2014)
3. *Weber v. Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000)
4. *E.E.O.C. v. Sw. Bell Tel., L.P.*, 550 F.3d 704 (8th Cir. 2008)
5. *Zamora v. Gainesville City Sch. Dist.*, 2015 WL 12851549 (N.D. Ga. June 22, 2015)

Idiosyncratic Religions: 4

1. *Lizalek v. Invivo Corp.*, 314 F. App'x 881 (7th Cir. 2009)
2. *E.E.O.C. v. Papin Enterprises, Inc.*, 2009 WL 961108 (M.D. Fla. Apr. 7, 2009)
3. *Lorenz v. Wal-Mart Stores*, 225 F. App'x 302 (5th Cir. 2007)
4. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)

Pentecostal Christian: 4/102 (3.9 percent versus 4.6 percent of population)[3]

1. *Rojas v. GMD Airlines Servs., Inc.*, 254 F. Supp. 3d 281 (D.P.R. 2015)
2. *Chavis v. Wal-Mart Stores, Inc.*, 265 F. Supp. 3d 391 (S.D.N.Y. 2017)
3. *Finnie v. Lee Cty., Miss.*, 907 F. Supp. 2d 750 (N.D. Miss. 2012)
4. *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156 (S.D. Ind. Aug. 27, 2001)

Jewish: 3/102 (2.9 percent versus 1.9 percent of population)

1. *Litzman v. New York City Police Dep't*, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013)
2. *Jamil v. Sessions*, 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017)
3. *Hill v. Cook Cty.*, 2007 WL 844556 (N.D. Ill. Mar. 19, 2007)

Hebrew Israelite: 3/102

1. *Cherry v. Sunoco, Inc.*, 2009 WL 2518221 (E.D. Pa. Aug. 17, 2009)
2. *E.E.O.C. v. Thompson Contracting, Grading, Paving, & Utilities, Inc.*, 499 F. App'x 275 (4th Cir. 2012)

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[3] *Id.*, Appendix B, at 101.

3. *Batson v. Branch Banking & Tr. Co.*, 2012 WL 4479970 (D. Md. Sept. 25, 2012)

Rastafarian: 2/102 (1.9 percent versus <0.3 percent of population)[4]

1. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7 (D. Mass. 2006)

2. *Equal Employment Opportunity Comm'n v. Triangle Catering, LLC*, 2017 WL 818261 (E.D.N.C. Mar. 1, 2017)

Sikh: 2/102 (1.9 percent versus < 0.3 percent of population)

1. *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013)

2. *E.E.O.C. v. Healthcare & Ret. Corp. of Am.*, 2009 WL 2488110 (E.D. Mich. Aug. 11, 2009)

African Religions: 2/102

1. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013)

2. *E.E.O.C. v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005)

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[4] According to Pew's study, "0.3% of American adults identify with a wide variety of other world religions, including Sikhs, Baha'is, Taoists, Jains, Rastafarians, Zoroastrians, Confucians and Druze." *Id.* at 29. Thus Rastafarians and Sikhs each constitute far less than 0.3 percent apiece.

Non-religious: 2/102

1. *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317 (E.D. Pa. 2016)

2. *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 799 F.3d 374 (5th Cir. 2015)