No. 21-648

In the Supreme Court of the United States

EDWARD HEDICAN,

Petitioner,

v.

WALMART STORES EAST, L.P., *et al.*

Respondents.

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

BRIEF OF AMICUS CURIAE THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Jewish Coalition for Religious Liberty ("JCRL") is an interdenominational association of rabbis, lawyers, and professionals who practice Judaism. Jewish practices sometimes conflict with the standard work calendar and expectations for grooming and dress. Accordingly, Jews are among the many diverse religious communities that seek shelter under Title VII's prohibition on religious discrimination in the workplace.

Hardison's erroneous understanding of Title VII requires many Americans—including those who practice Judaism—to make the Hobson's choice between honoring the requirements of their religion and keeping their jobs. JCRL thus has a strong interest in ensuring that Americans of all faiths receive the full protection afforded by the plain language of Title VII.

INTRODUCTION & ARGUMENT SUMMARY

In the early 20th Century, workers across this country routinely lost job opportunities because their religious practices inconvenienced their employers. Immigrants, including many Jewish families, sought opportunity in America only to face a choice between their faith and their jobs. A generation ago, against

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties were timely notified and have consented to the filing of this brief.

this backdrop, Congress attempted to protect religious Americans through Title VII. But because of this Court's interpretive error in *Hardison*, Americans unfortunately still suffer loss of employment for requesting time off for their Sabbath. Americans still lose jobs for attending worship services. And they still lose jobs for requesting variances from dress and grooming requirements. Even more tragically, other Americans—forced to choose between their faith and feeding their families—have forsaken their religious practices to keep their jobs.

This is the devastating legacy of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which concluded that employers need not incur anything more than a "*de minimis* cost" to accommodate an employee's religious practice under Title VII. That understanding sits at odds with the text of Title VII, which requires that the employer suffer "undue hardship" before he may refuse to accommodate an employee's religious observance and practice.

Mr. Hedican's petition is the latest in a growing stack imploring this Court to revisit *Hardison*. *Hardison*'s "*de minimis*" gloss on Title VII's "undue hardship" standard has wrought hardship upon untold religious Americans—especially those from minority faith traditions. This Court should grant certiorari, correct *Hardison*'s error, and allow Title VII to safeguard religious minorities as was always intended.

ARGUMENT

I. *Hardison* Has Prevented Jewish Americans From Fully Realizing Title VII's Promise Of A Workplace Free Of Needless Discrimination.

A. A long history of religious discrimination has plagued Jewish immigrants seeking work in America.

Americans have long connected the freedom to work and the freedom to worship. For example, Alexander Hamilton believed that "a perfect equality of religious privileges," more than "mere religious toleration," would encourage skilled workers to "flock from Europe to the [U]nited [S]tates to pursue their own trades or professions." Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *in* 5 The Founders' Constitution 95, 95 (Philip B. Kurland & Ralph Lerner eds., 1986); *see also* James Madison, *Property* (Mar. 29, 1792), *in* 1 The Founders' Constitution 598, 598 (describing the freedom to work and freedom of worship as property rights).

These dual promises have proven elusive for many immigrants who sought equality and opportunity on American soil. The combination of a Monday-through-Saturday work week and "strictly enforced" Sunday closure laws had a particularly devastating effect on the lives of Jewish immigrants. Jonathan D. Sarna, *American Judaism: A History* 162 (2004). "[U]nsympathetic employers" told their Jewish employees, "if you don't come in on Saturday, don't bother coming in on Monday." *Id.* at 162–63; *see also*

Jason Despain, *A Peculiar Clause of Political Compromise for California's Religious Minorities*, 21 Rutgers J. L. & Religion 390, 393–94 (2021) (describing how one rabbi's pleas to secure accommodations for Russian Jewish immigrants in West Hollywood "often fell on deaf ears"); *Jews in America: Shabbat as Social Reform (1925)*, Jewish Virtual Library (last visited Dec. 17, 2021) ("Almost no employers—even Jewish employers—honored Saturday as a day of rest.").[2]

Though some Jewish workers "preserve[d] their Sabbath at all costs," many more succumbed to the need "to feed themselves and their families." Sarna, *supra*, at 163. "[T]he decline of Sabbath observance" indicated "spiritual collapse within the Jewish immigrant community." *Id.* at 162.

> A heartrending Yiddish prayer (*techinah*) written in America for women to recite privately when they lit their Sabbath candles, and printed in a widely distributed prayer book . . . laments that in "this diaspora land" where the "burden of making a living is so great," resting on Sabbath and holidays had become impossible, and it pleads for divine compassion. "Grant a bountiful living to all Jewish children," it entreats, "that they should not have to desecrate your holy day."

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[2] https://www.jewishvirtuallibrary.org/shabbat-as-social-reform-1925

Id. at 164 (quoting *Shas Tehinah Hadashah* 38–41 (1916)).

B. Shortly after Congress strengthened Title VII's protections for religious workers, including Jews, *Hardison*'s error effectively erased them.

Title VII took a critical step toward answering these prayers and alleviating suffering among Jewish immigrants and their descendants. Congress reinforced protections for religious minorities by amending Title VII to require employers "to reasonably accommodate an employee's or prospective employee's religious observance without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

But that relief was short-lived. Only five years after Congress strengthened Title VII's protections for religious workers, *Hardison* eviscerated those protections. The *Hardison* majority concluded that requiring an employer "to bear more than a *de minimis* cost" to accommodate an employee's religious observance "is an undue hardship." *See* 432 U.S. at 84.

Hardison places American Jews and other religious minorities back in the position of their immigrant ancestors—at the mercy of their employers. America has undisputedly grown more tolerant and welcoming over the decades, and such difficulties are not as widespread as they were in the past. But Congress passed Title VII to eliminate such cruelty and discrimination. Title VII cannot serve that function while *Hardison* remains in place. Today,

notwithstanding the remarkable cultural progress, some Jews still must choose between the demands of their job and the demands of their faith. *See, e.g.*, *Miller v. Port Auth. of New York & New Jersey,* 351 F. Supp. 3d 762 (D.N.J. 2018), *aff'd*, 788 F. App'x 886 (3d Cir. 2019). This should not be. This Court should grant review and restore the promise embedded in Title VII's "undue hardship" standard.

II. The Court Should Not Ask Millions Of Religious Americans To Wait Longer Before It Corrects *Hardison*'s Mistake.

A. *Hardison* disproportionately harms religious minorities least able to absorb economic hardship.

The sting of *Hardison* is particularly painful to working-class Americans who belong to minority religious groups. Consider the petitioners in recent cases asking this Court to overrule *Hardison*: a Jehovah's Witness service dispatcher;[3] a Sabbatarian industrial hygienist;[4] a Sabbatarian trainer at Walgreens;[5] and, in this case, a Sabbatarian who hoped to become an assistant manager at Walmart. Calls to overrule

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[3] *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (Apr. 5, 2021) (No. 19-1388).

[4] *Dalberiste v. GLE Assocs., Inc.*, 814 Fed. App'x 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (Apr. 5, 2021) (No. 19-1461).

[5] *Patterson v. Walgreen Co.*, 727 Fed. App'x 581 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (Feb. 24, 2020) (No. 18-349).

Hardison have come from Jews, Sikhs, Hindus, Adventists, and Lutherans, among others. *See generally, e.g.*, Br. for Jewish Coalition for Religious Liberty; The Coalition for Jewish Values; The Sikh Coalition; The International Society for Krishna Consciousness; Ethics & Religious Liberty Commission of the Southern Baptist Convention; The Lutheran Church–Missouri Synod; and Church Of God In Christ, Inc. as *Amici Curiae* Supporting Petitioner, *Dalberiste v. GLE Assocs., Inc.*, No. 19-1461 (July 31, 2020).

One can also look to the lower courts for examples of *Hardison*'s pernicious effect on the lives of working-class Americans including: Muslim factory production workers, *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017); a Pentecostal juvenile detention officer, *Finnie v. Lee Cty., Miss.*, 907 F. Supp. 2d 750 (N.D. Miss. 2012); a Jewish dump truck driver, *E.E.O.C. v. Thompson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d 738 (E.D.N.C. 2011); a Russian Orthodox Christian hotel kitchen mechanic, *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010); and an Adventist part-time grocery store clerk, *Prach v. Hollywood Supermarket, Inc.*, No. 09-13756, 2010 WL 3419461 (E.D. Mich. Aug. 27, 2010). The list goes on.

And this list excludes the untold number of Americans who—understanding, or informed by counsel, that *Hardison* has stacked the deck against them—capitulate rather than challenge the discriminatory practice. *See, e.g.*, Br. for Appellant at 13, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (No. 85-993) (arguing that an Adventist fired for

keeping her Sabbath should not be denied unemployment benefits because *Hardison* already foreclosed an employment discrimination claim).

Hardison permits employers to "compel" workers from minority religions "to make the cruel choice of surrendering their religion or their job." 432 U.S. at 87 (Marshall, J., dissenting). And it permits them to do so over relatively small matters.

That is, *Hardison* allows the employer to turn its molehill into the employee's mountain. For example, employers may discriminate against religious employees for requesting minor departures from a dress and appearance policy, *e.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134–37 (1st Cir. 2004), for requesting time off before completing the new-hire probationary period, *Thomson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d at 741, or for requesting an accommodation that might create "hard feelings" among coworkers if granted, *Leonce v. Callahan*, No. 7:03-CV-110-KA, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008). *Hardison* itself presents a prime example of this: a global airliner fired the respondent over an accommodation request that would have cost $150 over three months. 432 U.S. at 92 n.6 (Marshall, J., dissenting).

Each of these situations creates a minor inconvenience for the employer. But for the employees, their very conscience and relationship with their creator is at stake. Small wonder that many employees choose to honor their faith despite the financial hardships that result. *E.g.*, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138 (1987) ("[T]he general

manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company. When Hobbie refused to do either, [the company] discharged her."); *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (explaining that Adell Sherbert was fired for keeping her Sabbath and could not find work because of her Sabbath observance); *cf.* James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 The Founders' Constitution 82, 82 (arguing that the demands of faith are "precedent, both in order of time and in degree of obligation, to the claims of Civil Society").

B. *Hardison*'s sting has been particularly painful for Jews seeking to honor the Sabbath.

Consider Sabbath observance—the issue in this case, in the other petitions on this issue that have recently come before this Court, and in *Hardison*. The Torah and Oral Law forbid Orthodox Jews working on the Jewish Sabbath (sundown on Friday to nightfall on Saturday) and designated Jewish holy days. *See generally* 3 Rabbi Yosef Karo, *Shulchan Aruch Orach Chayim* 242–365 (1977) (Sabbath prohibitions); *id.* at 495–529 (holy day prohibitions); *see also* Aryeh Kaplan, *Sabbath: Day of Eternity*, *in* 2 The Aryeh Kaplan Anthology 107, 128 (1998). These restrictions extend beyond paid employment to encompass thirty-nine categories of prohibited activity. *See The 39*

Categories of Sabbath Work Prohibited by Law, Orthodox Union (July 17, 2006).[6]

"The Sabbath is the most important institution of Judaism. It is the primary ritual, the very touchstone of our faith." *Why the Sabbath?*, Orthodox Union (July 17, 2006).[7] The Torah commands severe punishment for those who violate the Sabbath. *See Exodus* 31:14 ("You shall keep the Sabbath, for it is holy to you; any one who profanes it shall be put to death. For whoever does any work on that day shall be cut off from his people.").

The gravity of this obligation commands that half-measures cannot reasonably accommodate Sabbath observance. It's no accommodation at all to relieve the Jewish worker of only some types of prohibited work or give her the day off on alternating Saturdays. The choice between employment and the Sabbath for that person is illusory—the Jewish employee *must* be willing to lose her job rather than violate the Sabbath. *See* 3 Karo, *supra*, at 308. This is precisely the dilemma the amendment to Title VII sought to avoid.

Though Sabbath accommodation claims arise most frequently, Orthodox Jewish employees may also require accommodation from dress codes and grooming policies. Jewish men and married women don head coverings, Aron Moss, *Why Do Jewish Women Cover Their Hair*, Chabbad.org (last visited

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[6] https://www.ou.org/holidays/shabbat/the_thirty_nine_categories_of_sabbath_work_prohibited_by_law/

[7] https://www.ou.org/holidays/why_the_sabbath/

Dec. 14, 2021),[8] in the case of a *yarmulke* or *kippah*, to express submission to the Almighty, Sampson Raphael Hirsch, *Hirsch Siddur* 14 (1969). Orthodox and Hasidic Jewish males also let their sideburns grow to a certain length, and some wear beards to honor the commandment of *Leviticus* 19:27: "You shall not round off the edge of your scalp and you shall not destroy the edge of your beard."

C. *Hardison*'s error also imposes terrible dilemmas upon other religious minorities.

Of course, Sabbath observance is not unique to the Jewish faith. Muslims and some Christian denominations require similar weekly accommodations. *Jumu'ah* is "a weekly Muslim congregational service . . . commanded by the Koran and . . . held every Friday after the sun reaches its zenith." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 345 (1987) (citing *Koran* 62:9–10). Believers are commanded to "leave trade" and attend these weekly services. *Koran* 62:9. Seventh-day Adventists observe the Sabbath from sundown Friday until sundown Saturday and cannot work during that time. *What Adventists Believe About the Sabbath*, Seventh-day Adventist Church (last visited Dec. 15, 2021).[9]

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[8] https://www.chabad.org/theJewishWoman/article_cdo/aid/336035/jewish/Why-Do-Jewish-Women-Cover-Their-Hair.htm

[9] https://www.adventist.org/the-sabbath/

As with Sabbath observance, other religious traditions also command certain forms of dress and grooming. Many Muslims believe men must grow beards if they are able, *see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (explaining that refusal to grow a beard "is a major sin" in that religious tradition), and don a *taqiyya* to symbolize that the "wearer is in constant prayer," *see In re Palmer*, 386 A.2d 1112, 1113 (R.I. 1978). Sikhs must maintain five articles of faith that represent the fundamental tenets of their religion. *Identity*, Sikh Coal. (last visited Dec. 15, 2021).[10] One of these articles of faith is unshorn hair, or *kesh*. *Ibid.* Many Sikhs wear a turban as well to "assert[ ] a public commitment to maintaining the values and ethics of the tradition, including service, compassion, and honesty." *Ibid.*

These practices can be accommodated, often with little cost to the employer. But under *Hardison*, employers need not take on that minor inconvenience or risk offending customers. Until Title VII is afforded its plain meaning, Jews, Muslims, Sikhs, Adventists, Witnesses, and many others will continue to face irreconcilable conflicts in the workplace.

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[10] https://www.sikhcoalition.org/about-sikhs/identity/

III. This Court Should Not Rely On Congress To Correct *Hardison*'s Error.

A. *Stare decisis* does not counsel this Court to preserve *Hardison*.

As faith-inspired employees challenge *Hardison*'s atextual gloss on "undue hardship," employers recite a unified defense: this Court should leave any changes to Congress. *Dalberiste* Br. in Opp'n at 17–18; *Small* Br. in Opp'n at 27–28; *Patterson* Br. in Opp'n at 28–29. True, *stare decisis* is generally stronger when reconsidering statutory interpretations. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). But that stronger *stare decisis* is not absolute. "[E]nacting new legislation is difficult—and far more difficult than the Court's cases sometimes seem to assume." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part).

That's particularly true when the subject of the legislation is religious liberty. Much has changed since the Senate approved RFRA by a vote of 97 to 3 and that same law received "such broad support it was adopted on a voice vote in the House." *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993). Today, some view "religious liberty" and "religious freedom" as "code words for discrimination, intolerance, racism, [and] sexism." U.S. Comm'n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination*

Principles with Civil Liberties 29 (2016).[11] And diverse Americans who want merely to consecrate the Sabbath or adorn themselves with an outward manifestation of their faith are caught in the crossfire.

For almost two decades after RFRA's passage, members of Congress have introduced legislation to reverse *Hardison*. Some of these attempts have garnered impressive bipartisan rosters of cosponsors. E.g., H.R. 1431, 110th Cong. (2007); S. 893, 108th Cong. (2003). Nevertheless, these bills have failed to gain much traction, struggling to "find[ ] room in a crowded legislative docket." *See Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring in part). Any such proposal seems destined to fail in our present political climate, which may explain why no similar bill has been filed in nearly a decade. Continued reliance on Congress to correct *Hardison*'s error will almost certainly leave countless Jews, Muslims, Sikhs, and Hindus as collateral damage in the religious liberty culture-wars.

This suffering is unnecessary. Congress has already acted to protect the rights of such religious employees. Given the plain text of Title VII, employers cannot claim a legitimate reliance interest in the right to discriminate against religious employees and prospective employees. "[*S*]*tare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Id.* at 1405 (opinion of the Court).

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[11] Available at https://www.usccr.gov/files/pubs/docs/Peaceful-Coexistence-09-07-16.PDF.

Hardison is wrong. And it wrongly breaks a fundamental American promise and places impossible burdens on religious minorities. This Court should not rely on Congress to correct this Court's own demonstrably erroneous case law.

B. Mr. Hedican's petition offers an excellent vehicle to revisit *Hardison*.

This case provides the opportunity the Court has been waiting for to reconsider *Hardison*. One can hardly argue that accommodating Mr. Hedican would impose an undue hardship on his employer. Walmart is one of the largest employers in America. It hired Mr. Hedican as an assistant manager in its Hayward, Wisconsin branch. App.102a. Mr. Hedican asked for time off to observe his Sabbath from Friday evening to Saturday evening. And he volunteered to work *any* schedule that accommodated this request. App.110a.

Walmart's policies provide guidelines for granting accommodations, and they encourage managers "to work collaboratively" and to "be flexible, supportive and positive" in accommodating their colleagues' religious beliefs. App.98a-99a. But these guidelines amounted to lip service in this case. Walmart made no effort to accommodate Mr. Hedican beyond inviting him to apply for a lower-paying job. App.113a, 132-133a. The message was clear: if you want the assistant-manager position we offered you, either come in on Saturday or don't bother coming in on Monday.

This petition cleanly presents a legal question of national significance: the scope of an employer's duty to accommodate its employee's religious practice

under Title VII. There are no material factual disputes. This petition offers a straightforward vehicle to revisit and correct *Hardison*'s tragic mistake.

CONCLUSION

This Court should grant the petition for certiorari and correct this long-festering error.

Respectfully submitted,

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