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NOTE

ALMOST ONLY COUNTS IN HORSESHOES, HAND GRENADES … AND *HARDISON*? THE 45-YEAR REIGN CONTINUES

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INTRODUCTION

Recently, Oklahoma Senator James Lankford declared that, "[i]n America, every person has the right to have any faith of their choosing—or to have no faith at all—and you are still a great American . . . . You don't have to take off your faith when you leave your house."[1] For members of religious and non-religious communities alike, there is comfort knowing that in America, they have a right to worship who, how, and when they want—if they want to worship at all. But what about when

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2022. I would like to thank my family and friends for enduring the countless times I told them I needed to "work on my Note" and for continuing to encourage me. I would also like to thank my faculty sponsor, Professor Andrew C. Spiropoulos, for his helpful input and constructive feedback. The idea for this Note began while interning at First Liberty Institute; I owe a great deal of gratitude to the attorneys there for encouraging my passion to see a restoration of religious liberty in this country.

1. James Lankford, *Senator James Lankford Discusses Religious Freedom at CPAC*, YOUTUBE, (Jan. 26, 2021), https://www.youtube.com/watch?v=M11BEJAKenQ.

they step inside their workplaces? For many of these same Americans that work in the private sector, they are forced to shove their faiths to the side so that they can keep their job. This seems to run counter to everything America stands for: freedom. And more specifically, religious freedom—something sought out by many of the first colonists, one of the more notable groups being the pilgrims who landed at Plymouth Rock. Congress has tried to do its part to protect religious freedom in the American workplace with the passage of Title VII of the Civil Rights Act of 1964 and its subsequent amendments. Title VII of the Civil Rights Act of 1964 reads in relevant part:

> (a) It shall be an unlawful employment practice for an employer--
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . .[2]

Continuing, Title VII provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business."[3]

Currently, however, it may come as a surprise to learn that the United States Supreme Court, in *Trans World Airlines, Inc. v. Hardison*, later interpreted Title VII's "undue hardship" to mean anything more than a "de minimis cost."[4] Judge Easterbrook of the Seventh Circuit described "*Hardison*'s definition of undue hardship as a slight burden."[5] To the

2. 42 U.S.C. § 2000e-2(a).
3. 42 U.S.C. § 2000e(j) (emphasis added).
4. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
5. Equal Opportunity Emp't Comm'n v. Walmart Stores East, L.P., 992 F.3d 656, 660

average reader, this does not make much common sense; in fact, this oxymoronic definition from the *Hardison* Court is not a stranger to challenges. However, claims being made under *Hardison*'s strict *de minimis* rule in the Circuit Courts of Appeal are easily being tossed aside for reasons of reasonable accommodation, making it hard to appeal the problematic holding of the case.[6] Another reason challengers struggle with *Hardison* is religious accommodations' typical relation to—and interference with—union contracts and collective bargaining agreements.[7]

In Part One, this Note examines the underpinnings of *Hardison*, the Court's reasoning and its reinterpretation of Title VII's "undue hardship" as setting a *de minimis* standard for employers, and Justice Marshall's dissent in defense of religious pluralism in America. Part Two addresses the Religious Freedom Restoration Act (RFRA), its birth, purpose, and how the Court's RFRA jurisprudence is entirely inconsistent with Title VII's present religious accommodation requirements according to the Court. Finally, Part Three looks at three recent cases that have challenged *Hardison*, only to be denied certiorari by the Court; it also seeks to explain why the Court may have passed on the best challenger *Hardison* has seen yet.

PART ONE – *HARDISON* SETS THE STAGE

A. Factual and Procedural History

Mr. Hardison was employed by Trans World Airlines (TWA) in the summer of 1967.[8] Later, during the spring of 1968, Hardison embraced the religion of the Worldwide Church of God and became a member of that

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(7th Cir. 2021).

6. *See* Miller v. Port Auth. of N.Y. & N.J., 788 F. App'x. 886, 891 n.20 (3rd Cir. 2019) ("Because we find that the Port Authority offered Miller a reasonable accommodation, we need not reach the question of whether Miller's preferred accommodation would have imposed an undue hardship."); Jean-Pierre v. Naples Community Hosp., Inc., 817 F .App'x. 822, 828 (11th Cir. 2020) ("Because NCH demonstrated that it reasonably accommodated Mr. Jean-Pierre's needs, we need not address whether an accommodation would impose an undue hardship."); Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1277 (11th Cir. 2021) ("AMR offered Bailey a reasonable accommodation.").

7. Discussions of the union and the holdings as related to the union are beyond the scope of this Note. The focus is on employers and their duties under the Court's 'undue burden' standard.

8. *Hardison*, 432 U.S. at 66.

church.[9] This religion requires that its members "observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday."[10] Hardison thus informed his employer of his newfound religious conviction regarding the Sabbath and requested accommodation so that he would be able to practice his faith.[11] Hardison's employer passed his requests to the union steward so that the religious accommodations could be made.[12] At first, Hardison's requests for his Sabbath off posed no issue; he was "transferred to the 11 p.m. – 7 a.m. shift."[13] This all changed when Hardison was transferred—per his desire—to a day shift.[14] The night shift position had been in TWA's Building 1, which had a completely different seniority list from Building 2, where he transferred to work the day shift.[15] TWA had agreed to let the union seek work swaps for Hardison, however the union refused to "violate the seniority provisions set out in the collective-bargaining contract."[16] The union's refusal had not been an issue before because Hardison previously had the seniority in Building 1 to bid for Saturdays off.[17] Thus, rather than take Saturday off, Hardison proposed that he only work four days a week.[18] TWA rebuffed this proposal, citing multiple reasons why this would not work.[19] TWA deemed Hardison's job "essential" and:

> [O]n weekends he was the only available person on his shift to perform it[,] . . . to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation[,] and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.[20]

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9. *Id.* at 67.
10. *Id.*
11. *Id.*
12. *Id.* at 67-68.
13. *Id.* at 68.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See id.*
20. *Id.* at 68-69.

An agreement about accommodations was not reached; Hardison stopped reporting for work on Saturdays.[21] He had been transferred to the twilight shift, but this did not matter because he still had to work past sundown on Friday for this shift as well.[22] Hardison was fired for insubordination after a hearing "for refusing to work during his designated shift."[23]

Hardison brought an action in a United States district court against the union and TWA, alleging that "his discharge by TWA constituted religious discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1)" and "the union had discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs."[24] Mr. Hardison's religious discrimination claim relied on the 1967 EEOC guidelines, which required "employers 'to make reasonable accommodations to the religious needs of employees' whenever such accommodation would not work an 'undue hardship.'"[25] The district court ruled that the union had a duty to accommodate but was not required to ignore its seniority system.[26] Turning to TWA, the district court rejected any notion that requiring accommodation of religion by TWA would be an unlawful establishment of religion.[27] However, the court did rule that TWA had met its obligations and that "any further accommodation would have worked an undue hardship on the company."[28]

On appeal, the Eighth Circuit reversed the judgment for TWA, even though in agreeance with the lower court's constitutional ruling, and held that "TWA had not satisfied its duty to accommodate."[29] The United States Supreme Court granted certiorari and reversed the Eighth Circuit on the grounds "that TWA made reasonable efforts to accommodate and that each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines."[30]

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21. *Id.* at 69.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* (quoting 29 C.F.R. § 1605.1 (1968)).
26. *Id.*
27. *Id.* at 70.
28. *Id.*
29. *Id.*
30. *Id.* at 77.

B. Birth of the De Minimis *Burden*

When the EEOC amended its guidelines in 1967, it "did not suggest what sort of accommodations [were] 'reasonable' or when hardship to an employer becomes 'undue.'"[31] In addition to the EEOC's amendment, Congress had amended the term "religion" during its 1972 changes to Title VII.[32] The Court determined that the purpose of this congressional amendment was to require employers to "make reasonable accommodations, short of undue hardship, for the religious practices of [their] employees and prospective employees."[33] However, the Court noted Congress, just like the EEOC, had given no guidance on *how much* accommodation the employer must provide.[34] This task was now before the Court.[35]

The Court brushed aside the Eighth Circuit's holdings that TWA could have replaced Hardison with "supervisory personnel[,]" "qualified personnel from other departments[,]" or "other available employees through the payment of premium wages" because any of "these alternatives would involve costs to TWA . . . [and t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[36] The Court concluded that this must be the case because Title VII's primary purpose was to eliminate employment discrimination.[37] It further reasoned that if the law were to require an employer "to bear additional costs when no such costs are incurred to give other employees the days off that they would want[,]" then this could become a mandate to treat employees unequally "on the basis of their

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31. *Id.* at 72. Post-amendment, 29 C.F.R. § 1605.1 required employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without *undue hardship* on the conduct of the employer's business." (29 C.F.R. § 1605.1) (emphasis added).

32. *Id.* at 73-74 (quoting 42 U.S.C. § 2000e(j)) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

33. *Id.* at 74.

34. *Id.* at 74-75.

35. *See id.* at 75-76.

36. *Id.* at 84 (describing the unacceptable costs to TWA as "lost efficiency in other jobs" or "higher wages") (emphasis added).

37. *Id.* at 85.

religion."[38] In its interpretation of Title VII, then, the Court decided it would "not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[39]

C. Justice Marshall's Dissent

Justice Marshall used his dissent to emphasize the value of religious pluralism in American society and Congress's role in attempting to protect and perpetuate the same.[40] He predicted that the Court's decision—which, in his mind, was in direct contradiction with Congress's intentions and actions—would allow employers to "not grant even the most minor special privilege to religious observers to enable them to follow their faith."[41] In his dissent, Justice Marshall accused the Court of turning the religious accommodation language of Title VII into meaningless words and focused on two issues that he had with the Court's decision.[42] First, he dealt with the Court's interpretation of Title VII and concluded that it was inconsistent with both the text and legislative history of the statute.[43] Second, he worked through the reasonable accommodation prong and concluded that TWA had reasonable accommodation options that would not have imposed an undue burden, and therefore would not rise to the level of more than *de minimis*.[44]

To begin his disapproval of the Court's decision, Justice Marshall explained that the Court's "unequal treatment" premise was fundamentally flawed. He stated that "if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with sound and fury, ultimately signif(y) nothing."[45] Elaborating further, he utilized a "not altogether hypothetical example" that would later play out in front of the Court.[46] Justice Marshall

38. *Id.* at 84.
39. *Id.* at 85.
40. *Id.* at 97 (Marshall, J., dissenting) ("The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength our hospitality to religious diversity has been seriously eroded.").
41. *Id.* at 87.
42. *Id.* at 86-87 ("The Court holds, in essence, that . . . the regulation and Act do not really mean what they say.").
43. *Id.* at 85-91.
44. *Id.* at 91-97.
45. *Id.* at 87 (internal quotations omitted).
46. *Id.* at 88; *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015).

spelled it out for the majority. The only time that an accommodation would be necessary would be when there was a rule that applied to everyone ("a neutral rule of general applicability") that conflicted with an employee's religious convictions—thus, the only way that the employee could follow the rule would be to "violat[e] what the employee view[ed] as a religious commandment."[47] So, it would follow that there would be two choices for the employer: either rescind the rule for everyone, or exempt this specific employee from the rule.[48] The latter option necessarily means that the privilege is being "allocated according to religious beliefs," just like the majority had explained, unless the former action is taken by the employer.[49] Therefore, Justice Marshall demonstrated that the text of the statute *requires* the allocation of accommodations on the basis of religion, barring the imposition of undue hardship on the employer.[50] In the alternative, if the text of the statute followed the majority's analysis, then "accommodation would not be required because it would afford . . . privilege . . . to a select few based on their religious beliefs. The employee thus would have to give up either the religious practice or the job[,]" which Justice Marshall posited as ridiculous.[51]

He next took the time to explain that the Court's interpretation ran contrary to the intent of Congress, not only as found in the text of the statute, but also in the legislative history of Title VII's 1972 amendments.[52] During Senator Jennings Randolph's introduction of the amendment at issue, he explained that the amendment's primary purpose "was to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.'"[53] The amendment, Congress hoped, would "make clear that Title VII requires religious accommodation, even though unequal treatment would result."[54] Justice Marshall exposed the majority's decision as one "in direct contravention of congressional intent."[55] The majority's "interpretation of the statute[] [had] effectively nullif[ied] it,"

47. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).
48. *Id.* at 88.
49. *Id.* (quoting the majority at 85).
50. *Id.* (emphasis added).
51. *Id.* ("This, I submit, makes a mockery of the statute.").
52. *Id.*
53. *Id.* at 89 (quoting 118 CONG. REC. 705 (1972)).
54. *Id.*
55. *Id.*

by "rejecting any accommodation that involves preferential treatment."[56] Justice Marshall then proceeded to sarcastically applaud the majority's interpretation, since it had allowed the Court to avoid the constitutional challenge made by Mr. Hardison.[57] However, he concluded that even if the constitutionality of the statute were considered, it would not be contrary to what the First Amendment requires: "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer."[58]

Finally, Justice Marshall determined that the accommodations available to TWA would not have imposed an undue burden at all, as opposed to the finding of the majority.[59] He pointed out that the Court's rejection of the Eighth Circuit's decision that there was no imposition of undue hardship on TWA, meant that the Court had the duty to "decide whether any other alternatives were available that would not have involved such hardship."[60] Justice Marshall found that the record did not support the majority's assertion that there was nothing TWA could have done without incurring undue hardship. He explained that "the burden under the EEOC regulation is on TWA to establish that a reasonable accommodation was not possible" and that TWA had failed to meet this burden.[61] He continued on to reveal three options available to TWA that the Court had ignored. First, TWA could have requested that the Union Relief Committee make an exception and allow for voluntary shift trades when Hardison was scheduled to work during his Sabbath.[62] Second, "TWA could have paid overtime to a voluntary replacement for [Hardison]

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56. *Id.*

57. *Id.*

58. *Id.* at 90-91. In footnote 4, Marshall dispelled any worry that the allocation of accommodations would violate the Establishment Clause, explaining that "[t]he purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions. And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of sponsorship, financial support, and active involvement of the sovereign in religious activity, against which the Establishment Clause is principally aimed." *Id.* at 90-91 n.4.

59. *Id.* at 91 ("To conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense.").

60. *Id.* at 92 n.5.

61. *Id.* at 95 (citing 29 C.F.R. § 1605.1(c) (1976)).

62. *Id.* at 93-95.

assuming that someone would have been willing to work Saturdays for premium pay and passed on the cost to [Hardison]."[63] Third, Hardison could have been transferred back to his previous job where his seniority would allow him to not be scheduled during his Sabbath.[64] After walking through TWA's options, Justice Marshall concluded that it could not "be even seriously argued that TWA would have suffered 'undue hardship' to its business had it required respondent to pay the extra costs of his replacement, or had it transferred respondent to his former department."[65]

It is important to note that Justice Marshall took issue with the Court's holding that "undue hardship" be interpreted as "more than de minimis cost" and predicted—rightly it would seem—"that in the appropriate case [the Court] would be compelled to confront the constitutionality of requiring employers to bear more than de minimis costs[,]" but that since in Hardison's case, there was "an almost cost-free accommodation" available, the issue did not need to be addressed here.[66]

PART TWO – THE COURT'S RFRA JURISPRUDENCE

A. RFRA

In *Employment Division v. Smith*,[67] the Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[68] In response to this holding, Congress enacted the Religious Freedom Restoration Act (RFRA).[69] Congress's goal was to return to the Court's pre-*Smith* religious exercise jurisprudence.[70] RFRA provides:

63. *Id.* at 95. A suggestion similar to this one was made by Hardison. It would have required that Hardison be paid only regular pay when he would have gotten overtime in order to make up for the lost wages when he could not work. *Id.*

64. *Id.* at 95-96. This was another option suggested by Hardison and was rejected by TWA since it violated the collective-bargaining agreement that "prohibited employees from transferring departments more than once every six months." *Id.*

65. *Id.* at 96.

66. *Id.* at 92 n.6. Marshall's grievance with the Court's interpretation was founded on what he viewed as "simple English usage." *Id.*

67. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

68. City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (stating the holding of *Smith*).

69. *See* Holly M. Randall, Note, *From Peyote to Parenthood: Why Employment Division v. Smith Must (and Might) Go*, 45 OKLA. CITY U. L. REV. 66, 84-85 (2020).

70. 42 U.S.C. § 2000bb(b)(1) (explaining that one of the purposes of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases

> (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>> (1) is in furtherance of a compelling governmental interest; and
>> (2) is the least restrictive means of furthering that compelling government interest.[71]

While RFRA is no longer actionable against the states, it is still available for use against the federal government.[72] In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, Chief Justice Roberts restated the requirements of RFRA smoothly, explaining that it "prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest."[73] In that case, the Court held that the government could not generally apply the Controlled Substance Act (CSA) to prohibit the O Centro Espírita Beneficente Uniã do Vegetal (UDV) from receiving communion through a sacramental tea that contained a hallucinogenic, dimethyltryptamine (DMT).[74] The Court explained that RFRA requires an individualized inquiry: "application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[75] In other words, the government's enforcement of the Controlled Substance Act generally was not enough of a compelling interest to overcome the UDV's right to sincerely exercise its religion.[76]

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where free exercise of religion is substantially burdened").

71. § 2000bb-1.
72. *See Flores*, 521 U.S. 507.
73. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (quoting 42 U.S.C. § 2000bb-1(b)).
74. *Id.* at 438.
75. *Id.* at 430-31.
76. *See id.* at 432.

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court reiterated that RFRA "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[77] In that case, the Court had to determine whether the Federal Government could force closely held corporations to offer methods of contraception that violated the religious beliefs of the corporations' owners.[78] The Court, like in *Gonzales*, found that RFRA requires "a 'more focused' inquiry," meaning that it "requires [the Court] to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants.'"[79] Finding the exercise of religion substantially burdened, the Court assumed that the government's interest was compelling and proceeded to the "least restrictive" portion of the test.[80] Justice Alito stated that "[t]he least-restrictive-means standard is exceptionally demanding."[81] He explained that the "most straightforward" means for the government to satisfy this standard "would be for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[82] The Court noted, however, that it did not need to rely on this to declare the mandate violative of RFRA; "[Health and Human Services (HHS)] ha[d] already established an accommodation for nonprofit organizations with religious objections."[83] In concluding its analysis, the Court refused to make a judgment about the wisdom of Congress in passing RFRA and held that the HHS contraceptive mandate under the Affordable Care Act was unlawful.[84]

B. Inconsistencies with Title VII

Denying an employee any accommodation if it imposes tangible costs on employers seems utterly inconsistent with how the Court (in cases like *Gonzales* or *Hobby Lobby*) interprets claims for exemption under RFRA.

77. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690-91 (2014).
78. *Id.* at 689-90.
79. *Id.* at 726-27 (quoting *Gonzales*, 546 U.S. at 430-31 (2006)).
80. *Id.* at 728.
81. *Id.*
82. *Id.*
83. *Id.* at 730.
84. *Id.* at 736.

The government is required to meet a compelling interest, least restrictive means bar, and yet private employers are seemingly allowed to discriminate against religious employees as long as they can show that accommodations cause even a minor inconvenience to the business. Compare how the Court in *Hardison* worked through the employment discrimination claim to how the Court might have reacted to a RFRA claim in a case with facts just like the ones found in *Hardison*. The analysis completely changes—along with the result. Mr. Hardison would have needed to show that his sincerely held religious beliefs were being substantially burdened. That is easily satisfied since he was eventually forced to choose between remaining employed or following his religious convictions. Next, TWA would have had to show that it had a compelling interest in not accommodating Hardison's request to not work on his Sabbath. The Court, like in *Hobby Lobby*, could assume that having enough employees to work is compelling enough. However, TWA would still need to show that not accommodating Hardison is the *least* restrictive means available. Here is where Justice Marshall's three alternative suggestions would likely win out. If the Court, under RFRA, is willing to require the government to make exceptions to the Controlled Substance Act (like in *Gonzales*) or to bear the cost of providing contraceptives to women whose employers have religious objections to a Health and Human Services mandate (like in *Hobby Lobby*), then it is inconceivable that Title VII would only require an employer to show that it costs anything beyond "de minimis" and allow employers to fire employees that stand firm in their religious convictions.

To further belabor the point, imagine if the claims made in *Gonzales* or *Hobby Lobby* were evaluated under the framework from *Hardison*. All that the government would need to do in either of those cases would be to show that in order to accommodate the UDV or stores like Hobby Lobby it would have to do something that would either cause loss of money or efficiency. The tables are immediately flipped. In *Gonzales*, the simplest claim is that it adds a burden to the government to not be able to uniformly enforce the CSA. In *Hobby Lobby*, Justice Alito specifically contemplates the government shouldering *monetary cost*. In both of these instances, the Court would find that the undue hardship threshold was met and send the plaintiffs packing. However, mere inconsistencies between RFRA and Title VII (while needing to be addressed and remedied) do not appear to be enough to move the Court to action.

PART THREE – ALMOST ONLY COUNTS IN HORSESHOES AND HAND GRENADES

A. Patterson v. Walgreen Co.

Darrell Patterson was hired by Walgreens in 2005 to be a customer care representative.[85] When he was hired, Patterson made Walgreens aware that he would need a religious accommodation; Patterson is a Seventh-Day Adventist whose beliefs proscribe work on his Sabbath.[86] Upon his hiring, Walgreens made these accommodations.[87] Over time, Patterson was promoted multiple times and became a training instructor, where his supervisor would schedule the regular training classes to accommodate Patterson's Saturday Sabbath observance.[88] Occasionally, however, Walgreens would need to schedule emergency training sessions.[89] When these emergency sessions took place on Patterson's Sabbath, his supervisor would allow him to do a shift swap with other employees.[90] Patterson utilized this option multiple times.[91] Despite this option, there were times when Patterson's accommodation "requests could not be accommodated due to business demands."[92] When this would happen, Patterson would refuse to attend even mandatory trainings and his absences would "result[] in progressive discipline for each occurrence."[93]

On August 19, 2011, another emergency training session was scheduled for August 20, a Saturday; Patterson was informed of this, and his supervisor instructed that if Patterson did not find someone to cover for him, his attendance on Saturday would be required.[94] Patterson contacted the only other training instructor at the Orlando facility, but she was unable to cover for him.[95] Rather than contacting any other non-trainer employees to see if they could take his shift, Patterson informed his

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

86. *Id.* at 583. For Patterson, this Sabbath "occurs from sundown on Friday to sundown on Saturday." *Id.*

87. *Id.*

88. *Id.*

89. *Id.* These sessions were scheduled on a case-by-case basis and could include Friday nights or Saturdays.

90. *Id.* at 584.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

supervisor that he would not be in attendance due to the Sabbath and subsequently did not show up to lead the emergency training session.[96] The next week, Patterson reaffirmed his religious objections to working on the Sabbath during a meeting with his supervisor and human resources.[97] It was also during this meeting that the HR representative suggested that Patterson move jobs within Walgreens either back to his previous job or a job where there would be a larger employee pool (thus increasing the chances someone could switch shifts with him if Patterson was scheduled to work on his Sabbath).[98] Upon these suggestions, Patterson asked if he would be guaranteed to never have to work on his Sabbath and they told him that they could not make that guarantee.[99] "Because of his refusal to ever work on his Sabbath and his refusal to look for another position at Walgreens that would make it more likely that his unavailability could be accommodated, he was suspended and then terminated a couple of days later."[100] Walgreens justified this action, stating that "it could not rely on Patterson if an urgent business need arose that required emergency training on a Friday night or a Saturday."[101]

Patterson subsequently sued Walgreens for failure to accommodate, religious discrimination, and retaliation. The district court granted Walgreens's motion for summary judgment, concluding that "Walgreens had reasonably accommodated Patterson[]" with the allowance that he swap shifts as needed or transfer jobs, and that "Walgreens would suffer an undue hardship if required to guarantee that Patterson never worked during Sabbath hours given Walgreens' shifting and urgent business needs."[102] Patterson appealed this decision to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed the judgment of the district court without considering the undue hardship argument.[103] However, the court did go further and stated that "even assuming the accommodations offered by Walgreens were not reasonable, allowing him to retain his training instructor position with a guarantee that he would never have to work on

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 585.
101. *Id.*
102. *Id.*
103. *Id.* at 588 ("Because Walgreens reasonably accommodated Patterson's religious practice, we need not consider the issue of undue hardship.").

Friday nights or Saturdays, which is what he insisted on, would have posed an undue hardship [on Walgreens]."[104] The Eleventh Circuit based this upon the district court's finding that "delaying emergency training or scheduling other employees to cover all of Patterson's shifts during the Sabbath would require Walgreens to bear a greater than *de minimis* cost and thus would be an undue hardship."[105] The Circuit determined that the situation Walgreens was in was similar to that of the employer in *Hardison* and that these circumstances in Patterson's case meant that an accommodation of Patterson would "impose[] an undue hardship on Walgreens just as it would have for the employer in *Hardison*."[106]

B. Small v. Memphis Light, Gas & Water

Jason Small was an electrician at Memphis Light, Gas and Water for over a decade.[107] An injury on the job led to a change in position at the company.[108] When this change was made, Small raised the concern that this new position would "conflict with the practice of his religion."[109] Small is a Jehovah's Witness.[110] He requested that Memphis Light change his position or switch his shifts, but the company declined to do either, "explaining that the accommodations would impose an undue hardship on the company and that its union required shifts to be assigned based on seniority."[111] The company then suggested shift swapping or the use of paid time off.[112] Small renewed his accommodation request to no avail.[113] Then, Memphis Light shifted its position and allowed Small to "blanket swap" with other employees, meaning that he could "swap his shifts with another employee for an entire quarter."[114] It is still disputed "whether [Small's] schedule still conflicts with his religious commitments."[115]

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104. *Id.*
105. *Id.* at 588 n.3.
106. *Id.* at 589.
107. Small v. Memphis Light, Gas & Water, 952 F.3d 821, 823 (6th Cir. 2020).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 824.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

Because Memphis Light refused to accommodate, Small sued in 2017 for religious discrimination.[116] Right before trial, summary judgment was granted to Memphis Light.[117] Small appealed that judgment to the Court of Appeals for the Sixth Circuit.[118] His argument was that the company's failure "to accommodate his religion" was discriminatory.[119] However, the Sixth Circuit reasoned that "the company did not have to offer any accommodation that would have imposed an 'undue hardship' on its business—meaning (apparently) anything more than a 'de minimis cost.'"[120] Since Memphis Light argued that any "additional accommodation" would "impede[] the company's operations, burden[] other employees, and violate[] its seniority system," the de minimis burden requirement was satisfied.[121] Further, it reasoned, "Small has not challenged whether the accommodations would have imposed an undue hardship on the company—beyond a passing assertion in his brief."[122] After these determinations, the Sixth Circuit panel declared that "this claim cannot proceed."[123]

C. Dalberiste v. GLE Associates, Inc.

Mitche Dalberiste is a Seventh-day Adventist who had applied for a job at GLE, "a company that provides worksite engineering, architectural, and environmental services."[124] After applying, being turned down, and then reapplying, Dalberiste was finally extended a job offer from GLE.[125] The offer "stated that he might be required to work nights and weekends."[126] Dalberiste subsequently accepted the offer and informed GLE of his need for a religious accommodation from sundown Friday to sundown Saturday.[127] "GLE did not offer to accommodate Dalberiste's religious observance and rescinded its job offer in July 2016."[128]

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116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 825.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Dalberiste v. GLE Assocs., Inc., 814 F. App'x 495, 496 (11th Cir. 2020).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

Dalberiste then filed a charge of discrimination with the EEOC.[129] "Dalberiste sued GLE and alleged that the company engaged in religious discrimination, retaliated against him based on his religion, and failed to accommodate his religious observance in violation of Title VII and the Florida Civil Rights Act."[130] The district court relied on *Hardison* and found that even the suggested accommodations "would force GLE to bear more than a de minimis cost."[131]

"In March 2020, Dalberiste filed an unopposed motion for summary affirmance and asked [the Eleventh Circuit] to summarily affirm the district court's decision."[132] Dalberiste conceded that the district court had correctly applied *Hardison*'s *de minimis* burden and raised "for the first time on appeal" "that *Hardison* was wrongly decided."[133] The Eleventh Circuit decided that "summary affirmance [was] appropriate" and granted the motion.[134]

D. Denial of Petitions

On February 24, 2020, the Court denied certiorari to *Patterson v. Walgreen Co.*[135] In the memo, Justices Alito, Thomas, and Gorsuch wrote about the need to reconsider the *de minimis* burden requirement from *Hardison*: "[W]e should grant review in an appropriate case to consider whether *Hardison*'s interpretation should be overruled."[136] Justice Alito wrote that *Patterson* was "not . . . a good vehicle for revisiting *Hardison*[,]" but that a review should be granted when an appropriate case presents itself.[137] When Justices write things like this, it should perk the ear of anyone looking to overturn Supreme Court precedent. This signaled that with three votes dissenting from the denial, there must have just been one small thing wrong with the *Patterson* case and when better facts or better procedural history present, at least a fourth vote would join and

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 496-97.
133. *Id.* at 497.
134. *Id.*
135. Patterson v. Walgreen Co., 727 F. App'x 581 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (2020).
136. Patterson v. Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari).
137. *Id.*

certiorari could be granted to the next *Hardison* challenge. Unfortunately, though this is what might have been signaled, it was not exactly what happened.

On April 5, 2021, the Court denied writs of certiorari to the parties in both *Dalberiste* and *Small*. The Court flatly denied cert to *Dalberiste*,[138] but Justice Gorsuch, joined by Justice Alito, wrote dissenting from the denial of certiorari to *Small*.[139] Notably missing from the dissent was Justice Thomas, who had joined Alito's concurrence in *Patterson*'s denial of certiorari memo. Justice Gorsuch did not have kind words for the *Hardison* Court, or the current Court's refusal to grant certiorari. He accused the *Hardison* Court of "und[oing]" the undue hardship test required by Title VII.[140] He also stated that there was "no one else to blame" but the current Court for failure to correct the *de minimis* rule from *Hardison*.[141] He explained that what the *de minimis* interpretation has done is allow employers to avoid granting religious accommodations if they can show that it would "cost the company something (anything) more than a trivial amount."[142] Further, Justice Gorsuch echoed a previous complaint of Justice Marshall, who originally dissented from *Hardison*: "*Hardison*'s *de minimis* cost test does not appear in the statute."[143]

In order to understand why the Court may have denied *Small*'s petition, it might be instructive to look at Judge Thapar's concurrence from the Sixth Circuit. In his concurrence, Judge Thapar took the time to reinterpret Title VII's "undue hardship" from a textualist point of view.[144] He additionally looked at the way this phrase has been interpreted in other areas of the law, like the Americans with Disabilities Act, Fair Labor Standards Act, and Bankruptcy Code.[145] After doing this, he concluded

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138. Dalberiste v. GLE Associates, Inc., 814 F. App'x 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (2021).

139. Small v. Memphis Light, Gas, & Water, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (2021) (Gorsuch, J., dissenting from the denial of certiorari).

140. Small v. Memphis Light, Gas, & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from the denial of certiorari).

141. *Id.* at 1229.

142. *Id.*

143. *Id.*

144. Small v. Memphis Light, Gas & Water, 952 F.3d 821, 826-27 (6th Cir. 2020) (Thapar, J., concurring).

145. *Id.* at 827 (explaining that in both the ADA and the FLSA, Congress gave definitions for "undue hardship." This is different from Title VII, which is like the Bankruptcy Code where Congress did not provide a definition—courts have defined "undue hardship" in the Bankruptcy Code as "intolerable difficulties[,]" "unusual

that *Hardison* is "[t]he source of the problem" since *de minimis*, according to *Black's Law Dictionary*, "means a 'very small or trifling matter.'"[146] This interpretation of "undue hardship" by the *Hardison* Court stands opposite to the way "undue hardship" has been defined in any other area of the law. In concluding his concurrence, he noted (akin to Justice Marshall decades before) that "none" of the "parties in *Hardison*" "proposed the 'de minimis' test[,]" "the doctrine of constitutional avoidance doesn't give courts license to rewrite a statute[,]" and "decisions like *Hardison* . . . most often harm religious minorities."[147]

Ultimately, however, Judge Thapar explained in his concurrence that "this case doesn't involve a challenge to the 'de minimis' test. Indeed, Jason Small hasn't even contested—at least in a meaningful way—his employer's claim of 'undue hardship.'"[148] It appears that the Justices have taken their cue from him. Thus, an optimistic view of the Court's continued denial of certiorari to cases challenging *Hardison* is that the Court is merely biding its time until the perfect facts come along.

CONCLUSION

After denying certiorari to not just one, but two cases directly challenging the *de minimis* standard set forth in Hardison, it is evident that there will be continued objections made until the Court fixes its religious accommodation jurisprudence under Title VII. At the time of this Note's writing, First Liberty Institute is raising another one of these stated challenges in the Third Circuit.[149] This time, it is from a United States Postal Service employee named Gerald Groff that requested a religious accommodation so he could observe his Sabbath. From arguments made in this appeal, it appears that challengers are learning from the mistake made in *Small*. In his appeal, more than passing reference was made to *Hardison*, even though it was admitted that the "argument is precluded by Supreme Court precedent."[150]

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expense[,]" "garden-variety hardship as . . . insufficient[,]" and that it "requires 'significant mitigating circumstances.'").

146. *Id.* at 828.

147. *Id.* at 828-29.

148. *Id.* at 829.

149. Opening Brief for Plaintiff-Appellant, Groff v. DeJoy, No. 5:19-cv-01879-JLS, (3d. Cir. July, 28, 2021), 2021 WL 3285579.

150. Opening Brief for Plaintiff-Appellant, *Groff*, No. 5:19-cv-01879-JLS, (3d. Cir. July, 28, 2021).

The denial of certiorari to *Small* was surely disheartening, but encouragement should be taken in light of the fact that the current Court does not appear to shy away from considering controversial cases. It has granted certiorari to hear cases over the Second Amendment,[151] vaccine mandates,[152] special state-created rights of action,[153] abortion laws,[154] continued existence of and jurisdiction over Indian Country,[155] and others. This means that there is hope yet that the Court is merely awaiting a perfect set of facts, free from any other solution besides ditching the oxymoronic holding from *Hardison*. With the right facts, there would be no chance to rely on judicial restraint or legitimacy of the Court arguments as have been made in cases where the solution was easier than tossing a precedent—here, one that is rapidly approaching fifty years of age.

In a law review article published in the *Fordham Law Review* in 1985, Sara Silbiger wrote on the judicial interpretation of Title VII's religious accommodation requirement.[156] There, she proposed three different models courts could use to work through religious accommodation cases and concluded that the best model is one that "balances religious interests against business interests."[157] While it remains unclear whether this is the best model in practice (a proponent of judicial restraint would note that balancing tests allow for too much judicial activism), it is clear that something has got to give—the original standard set out in *Hardison*. Justices Marshall and Gorsuch combine to say it best: "All Americans will be a little poorer until [*Hardison*] is erased"[158] "and it is past time for the Court to correct it."[159]

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151. N.Y. State Rifle & Pistol Ass'n v. Bruen, 818 F. App'x 99 (2d Cir. 2020), *cert. granted sub nom.*, N.Y. State Rifle & Pistol Ass'n v. Corlett, *motion granted sub nom.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 90 U.S.L.W 3105 (U.S. Oct. 18, 2021) (No. 20-843).

152. Biden v. Missouri, 142 S. Ct. 647 (2022).

153. United States v. Texas, 142 S. Ct. 14 (2021).

154. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 89 U.S.L.W. 3388 (U.S. May 17, 2021) (no. 19-1392).

155. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

156. Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 FORDHAM L. REV. 839 (1985).

157. *Id.* at 861.

158. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 (1977) (Marshall, J., dissenting).

159. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1229 (2021) (Gorsuch, J., dissenting from the denial of certiorari).