No. 19-1388

In the Supreme Court of the United States

JASON SMALL, PETITIONER

v.

MEMPHIS LIGHT, GAS & WATER, RESPONDENT

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

MLGW admits that *Hardison*'s "de minimis" reading of Title VII's "undue hardship" requirement "very likely is not the best possible gloss on the phrase." Opp. 23. That admitted misinterpretation of "an important civil rights law" (Opp. 24) has been acknowledged by the United States, decried by amici across the religious and academic spectrum, and questioned by three Justices. One might think it is certworthy.

Why not? MLGW says the main problem is forfeiture. But with all respect to MLGW and the court below, that view is plainly contradicted by the record—which MLGW either ignores or misrepresents. Small contested the district court's holding that the accommodations he seeks "would result in an undue hardship," calling it "erroneous" and explaining why the accommodations "would have at most caused MLGW a *de minim*[*i*]*s* burden." App. 59a, 57a. And without even hinting at forfeiture, MLGW spent three pages responding that "[f]urther accommodation of Plaintiffs' religious needs presented an undue hardship to MLGW" (C.A. Appellees Br. 42–45)—i.e., answering the point it now says Small never made.

The Sixth Circuit discussed the parties' positions on "undue hardship," analyzed whether "additional accommodations would have impeded the company's operations," and cited *Hardison* and circuit precedent embracing it before concluding: "Our court has found similar costs to be more than de minimis." App. 5a, 6a. That is a clear statement that the court regarded Small's requested accommodations as foreclosed by *Hardison*. Thus, the question presented was both pressed and passed on below.

MLGW alternatively says review is unwarranted because, even if *Hardison* is overruled, MLGW's "seniority system" provides an "absolute defense" to Small's claim. Opp. 17. But MLGW ignores the undisputed fact that one of Small's proposed accommodations—returning him to the reassignment pool—has nothing to do with seniority. That alone confirms that resolving the question presented in Small's favor would affect this case's "disposition." Opp. 11.

Moreover, the notion that "seniority" bars Small's other requested accommodation—being excused from certain overtime—lacks any record support. (MLGW cites *its own attorney argument below*. Opp. 5–7.) MLGW's Work Rules provide only that an employee "may be required to work overtime when the employee has the least number of cumulative overtime hours." App. 47a. This is not a "seniority system"; it assigns overtime based on *overtime previously worked*. As MLGW concedes (Opp. 19), sometimes a junior employee will have the least overtime. In short, MLGW's "seniority" argument is smoke and mirrors.

In reality, this case is an ideal vehicle to review the question presented. Small is a longstanding, honest, and hardworking employee with an exemplary track record. The conflict between his job duties and his faith arose only after he suffered an on-the-job injury that prevents him from serving as an electrician. He made extensive efforts—using vacation and trading shifts—to minimize that conflict. And MLGW, an employer with thousands of employees and extensive resources, has given the flimsiest of reasons for refusing to accommodate him—declining, for example, to treat him as well as those reassigned due to "performance deficiencies" that Small lacks. App. 22a n.7.

If Title VII is so toothless as to countenance such results, this Court should squarely so hold—but only after full merits review. Stare decisis cannot support continued application of a decision that gave no reason for gutting Title VII's text, is considered indefensible by the EEOC, and deprives thousands of religious minorities of their civil rights.

ARGUMENT

I. Small's "undue hardship" argument was not forfeited.

According to MLGW, "[t]he only argument Petitioner made in the Court of Appeals regarding his Title VII failure-to-accommodate claim had nothing to do with the *Hardison* equation or 'undue hardship.'" Opp. 13. Yet the court below did not so hold. Rather, it stated that Small made only "a passing assertion in his brief" on the question. App. 6a; see also App. 14a (Thapar, J., concurring).

Small's brief did far more than that. But even if it had not, the court ruled on the matter. As review is warranted when a question was "pressed or passed upon below" (*United States* v. *Williams*, 504 U.S. 36, 41 (1992)), the record doubly supports review here. Moreover, the petition raises a pure question of law—whether *Hardison*'s conclusion that "undue hardship" means anything "more than de minimis" cost misinterprets Title VII—not whether Small's requested accommodations satisfy the correct test. And MLGW took the opportunity to make its points—and a record.

A. In district court, Small argued both that the accommodations that MLGW made were hollow, and that his proposed accommodations would cost little and not impose an "undue hardship." D.I. 63 at 3, 15–

18. Expressly applying *Hardison*, the court held that accommodating Small "would result in an undue hardship." App. 33a. Specifically, the court stated that "shifting all of the relevant mandatory overtime obligations to other employees or placing Mr. Small back in the reassignment pool on reduced pay to wait for a job with hours more in line with Mr. Small's religious obligations would, as a matter of law, place more than a de minimis burden on MLGW." App. 35a.

On appeal, Small cited the district court's holding that his requested accommodations "would result in an undue hardship," calling it "erroneous." App. 59a. He quoted *Hardison* (App. 58a), described accommodations that courts have "deemed to place an undue hardship on employers" (*ibid.*), and explained *why* his requested accommodations would impose little cost on MLGW—without again reiterating the *Hardison* standard (App. 59a–60a). He explained, for example, that under company policy MLGW had granted overtime exemptions to "similarly-situated employees, who were not seeking religious accommodations" (App. 60a) and reassigned "trainees [who] have discovered that this is not the right job for them." App. 59a. If MLGW's rules are that flexible, it cannot be an undue hardship to accord Small equal treatment. As his brief put it, accommodating him "would have at most caused MLGW a *de minim*[*i*]*s* burden." App. 57a.

Could Small have said more? Sure. But his somewhat "limited" argument "does not suggest a waiver; it merely reflects counsel's sound assessment that [it] would [have] be[en] futile"—both in light of *Hardison* and in terms of notifying MLGW of Small's position—to say more. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). Indeed, without suggesting forfeiture, MLGW spent three pages arguing "undue

hardship," addressing Small's points and defending the district court. C.A. Appellee's Br. 42–45. MLGW's actions below speak louder than its words now.

B. Beyond Small's own arguments, the Sixth Circuit passed on the issue. As MLGW "admit[s]" (Opp. 15), the court below acknowledged both Small's argument and MLGW's response, cited *Hardison* and circuit precedent, and concluded that "[o]ur court has found similar costs to be more than de minimis." App. 5a–6a; Pet. 35–36 (quoting the entire passage).

C. Finally, even if the undue hardship issue were somehow forfeited, MLGW cannot claim any prejudice. The record is fully developed on both the nature of Small's proposed accommodations and the extent of hardship that they would impose on MLGW; the district court resolved the case by applying *Hardison*; the Sixth Circuit recited the *Hardison* standard in affirming; and two judges advocated reconsidering *Hardison*.

Forfeiture doctrine is designed to enable parties to "offer all the evidence they believe relevant" and make "whatever legal arguments" they wish to make. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). MLGW did exactly that here. Thus, the Court is free to address this "important, recurring issue" before more damage is done. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).

II. Accommodating Small would not contravene any seniority system.

MLGW's reliance on Title VII's protection for "seniority or merit system[s]" (42 U.S.C. § 2000e–2(h)) likewise poses no vehicle problem.

A. First, it is undisputed that Small sought to be "'put back into the reassignment pool'" (Opp. 9), and

that MLGW refused because reassignment is restricted to employees with "performance deficiencies" —which Small lacked. App. 22a n.7. Seniority has nothing to do with that accommodation. Thus, the Court can answer the question presented regardless of whether an overtime exemption somehow conflicts with a seniority or merit system. But it does not.

B. Although MLGW assigns "*shifts*" based on seniority (App. 23a; D.I. 54–1 at 38, 2 (emphasis added)), it assigns *mandatory overtime* to "the employee ha[ving] the least number of cumulative overtime hours [after] all other available employees have passed the overtime" (App. 47a). A rule based on "least number of cumulative hours" is not a seniority system. See *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 606 (1980) (seniority is based on "some measure of time served in employment"). As MLGW admits, any employee—junior or senior—might have the lowest cumulative hours. Opp. 19 ("an employee who has turned down voluntary overtime relentlessly since the beginning of the year cannot avoid eventually being the 'employee [who] has the least number of cumulative overtime hours'"). Indeed, the union here supported Small's grievance without suggesting that it violated any collectively bargained seniority protections. D.I. 62 at 28 (the grievance was "filed by the Union"); D.I. 62–12 at 7–9; cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 68 (1977) ("the union was not willing to violate the seniority provisions set out in the collective-bargaining contract"). Thus, this case presents no conflict between religious accommodation and seniority.

MLGW's theory that mandatory overtime assignments are a "merit system" (Opp. 19 n.11) is even further afield. The Work Rules have nothing to do with

"merit." Rather than assigning benefits to higher-performing employees or burdens to lower-performing ones, they spread overtime work and pay around.

C. Finally, even if accommodating Small would implicate MLGW's "seniority" system, that would at most be an issue for remand. The ruling below rested on application of *Hardison*'s "de minimis" hardship standard, not § 2000e–2(h)—which the court never mentioned.[1] If this Court overrules *Hardison*'s "de minimis cost" standard, it should remand for application of the correct standard. If MLGW has preserved a § 2000e–2(h) argument, it can raise it then.

III. MLGW's other legal arguments only underscore the need for review.

Aware that *Hardison*'s reading of Title VII's "undue hardship" term "very likely" is not correct (Opp. 23), MLGW is reduced to advancing statutory and constitutional arguments not pressed below. It will be time enough to consider these points if certiorari is granted, but if anything they support review.

A. According to MLGW, accommodating Small's mandatory-overtime objection would require "segregat[ing]" employees "into Sabbatarians and non-Sabbatarians," in violation of 42 U.S.C. § 2000e–2(a)(2), which prohibits "segregat[ing] or classify[ing]" employees "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."

[1] MLGW says the district court applied § 2000e–2(h) (Opp. 17), but neither court below even *cited* § 2000e–2(h).

Opp. 20. Because accommodations are not "reasonable" if "prohibited by law," MLGW argues, § 2000e–2(a)(2) supports affirmance. Opp. 20, 19. But this argument lacks textual or precedential support, is wrong as applied, and would eviscerate the statute.

Accommodating Small does not require MLGW to "segregate, or classify" employees (§ 2000e–2(a)(2)); it simply requires recognizing the conflict between *his* faith and job duties and determining whether ameliorating that conflict would impose an "undue hardship." Insofar as other employees may occasionally work an additional overtime shift, that neither "deprive[s]" them of an "employment opportunity," nor "adversely affect[s]" their "status." *Ibid.* Such employees retain their prior status and eligibility for employment opportunities. Further, finding a violation of § 2000e–2(a)(2) "require[s] case-specific proof" of the prohibited "effects" (*United States EEOC* v. *AutoZone, Inc.*, 860 F.3d 564, 568 (7th Cir. 2017)), but MLGW cites no such proof, let alone "uncontested facts." Opp. 20.

More fundamentally, MLGW's position would invalidate every accommodation of Sabbath observers, making nonsense of the statute. See National Jewish Commission on Law and Public Affairs *Amicus* Br. 3 (overruling *Hardison* is "critically important" for the "Sabbath observant"). Indeed, the "primary purpose of the [1972] amendment * * * was to protect [] Sabbatarians," even if "unequal treatment would result." *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting); see Pet. 20. This Court itself has treated Sabbath accommodations as textbook examples of appropriate Title VII accommodations. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (opining that refusing to hire "an orthodox Jew who

will observe the Sabbath * * * violates Title VII"). MLGW's argument is thus an attack on Title VII itself.

Finally, even if MLGW's far-fetched interpretation were correct, it would not pose any vehicle problem. Here again, MLGW ignores that placing Small back into the reassignment pool would not "adversely affect" other employees. 42 U.S.C. § 2000e–2(a)(2). It would simply require MLGW to pay Small the "reduced pay" (App. 35a) it willingly pays employees with "performance deficiencies" that Small lacks (App. 22a n.7).

B. Lacking statutory support, MLGW resorts to arguing that requiring employers to bear more than a *de minimis* cost would "cross[] the line drawn by the First Amendment." Opp. 21. That argument failed to convince even Justice Marshall, a strict separationist, in *Hardison* (see 433 U.S. at 89–90 (dissenting op.)), and it finds no support in history or this Court's precedents. Yet MLGW's position echoes certain fashionable academic theories, and the opportunity to clarify whether the First Amendment bars religious accommodations that shift more-than-*de-minimis* burdens onto third parties only confirms this case's importance.

Regardless, the idea that reading "undue hardship" correctly would produce "a faith-based caste system" in which religion "always would trump" other considerations (Opp. 21) caricatures the statute. Granted, Title VII extends "favored treatment" to employees' religious exercise. *Abercrombie*, 135 S. Ct. at 2034. But it "calls for reasonable rather than absolute accommodation" (*Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 711–712 (1985) (O'Connor, J., concurring)), not an "unqualified right" to override workplace demands (*id.* at 709 (majority op.)). Such a modest and

"appropriately balanced" mandate is plainly constitutional. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005); see Pet. 21; Religious Liberty Scholars *Amicus* Br. 13–25. And if not, the Court should say so expressly, rather than resting on *Hardison*'s strained reading, so Congress can benefit from the Court's views.

IV. Stare decisis does not require adhering to *Hardison*.

MLGW also invokes stare decisis. But the force of stare decisis is especially weak here. As MLGW itself admits, *Hardison*'s de minimis test is "sub-optimal[]." Opp. 23–24. That interpretation was not briefed in *Hardison*, and the Court gave no reason for adopting it. Pet. 28–29. Nor is that surprising. The interpretation is semantically bankrupt, was rightly panned from the start, and has only become more of an outlier with time—a point powerfully confirmed by the United States' call to revisit it. Pet. 16–19.

MLGW's "'[a]rguments based on subsequent legislative history,'" such as Congress's passage of RFRA and failures to amend Title VII, "'should not be taken seriously.'" *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1747 (2020) (citations omitted). "[S]peculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law." *Ibid*. (citations omitted).

Notably, despite invoking stare decisis, MLGW studiously refuses to describe *Hardison*'s "de minimis" interpretation as a *holding*—bizarrely calling it "the *Hardison* equation." Opp. 4. Of course, if the "de minimis" language was dictum, stare decisis is irrelevant. Indeed, if MLGW is correct, workers of faith are in a

strange never-never land, where this Court's statement is uniformly treated as binding by all eleven regional circuits (Pet. 6 n.1), but is not "holding" enough to warrant review. However the statement is read, the Court should intervene.

V. Review is urgent, and this case is an ideal vehicle to revisit *Hardison*.

In a last-gasp attempt to defeat certiorari, MLGW say review is not "urgent." Opp. 23. That depends on where one sits. For thousands of adherents to minority religions whose claims are doomed by *Hardison*, the matter is indeed urgent.

By MLGW's lights, there have been no "intolerable results"—"not one" case that "excuse[s] an employer from accommodating an employee's religious observances" based on "a trivial or insignificant cost." Opp. 25. But MLGW outright ignores our cited cases (*e.g.*, Pet. 26), which barely scratch the surface. See also Muslim Advocates *Amicus* Br. 11–20; Religious Liberty Scholars *Amicus* Br. 11–12; Christian Legal Society *Amicus* Br. 15–17, Appendix; *Adams* v. *Retail Ventures, Inc.*, 325 F. App'x 440, 443 (7th Cir. 2009) (allowing the Sabbath off was an undue hardship); *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 134–137 (1st Cir. 2004) (allowing facial piercing was an undue hardship); *Daniels* v. *City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001) (allowing a cross pin was an undue hardship). The "federal report[s]" are indeed "awash" with troubling cases (Opp. 25), if only MLGW would bother to look.

MLGW dismisses the statistical evidence of *Hardison*'s impact as "speculation." Opp. 26. But the consistent findings of scholars spanning four decades—not to mention EEOC data, DOJ reports, and *amici*'s

firsthand experiences—cannot be casually dismissed. Presumably the United States would not support revisiting *Hardison* if its practical impact were trivial. As MLGW acknowledges, Title VII is "an important civil rights law" (Opp. 24), and three Justices of this Court have called for the Court to "reconsider" *Hardison* "in an appropriate case." *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari).

This is such a case. Jason Small is an exemplary employee who was injured on the job, but MLGW refused to grant reasonable accommodations that would have enabled him to keep working while worshipping at times specified by his Jehovah's Witness faith. As the diverse amici attest, Small exemplifies the plight of all too many religious minorities. MLGW tells them to wait. This Court should not.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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