No. 19-1461

In the Supreme Court of the United States

MITCHE A. DALBERISTE, PETITIONER,
v.
GLE ASSOCIATES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent GLE does not dispute that, as multiple Justices and the United States have already recognized, the question presented warrants this Court's review. Pet.16-18; *Patterson* v. *Walgreen Co.*, 140 S. Ct. 685, 685 (2020) (Alito, J., concurring in denial of certiorari); *Patterson* U.S. Amicus Br. 19-22. Nor does GLE dispute that *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), has been devastating for people of faith, especially members of minority religions. Pet.25-31. Instead, GLE devotes nearly all of its opposition to a merits argument—that *Hardison* should be retained as a matter of stare decisis—and a discussion of contrived vehicle issues.

GLE is wrong on both the law and the facts. Even if merits arguments were relevant at this stage, GLE ignores that stare decisis does *not* apply to *Hardison*, which did not interpret the text of Title VII. GLE also ignores that factual disputes at this stage of this summary-judgment case—including the immaterial dispute about Dalberiste's truthfulness (which hinges on whether he was fully informed about GLE's job requirements)—must be resolved in his favor.

In short, *Hardison* was wrongly decided, and this case presents an excellent vehicle to resolve an undisputedly important question affecting countless workers of faith.

I. The Question Presented Is Important.

GLE does not dispute that the question presented is of exceptional, nationwide importance. And multiple *amicus* briefs underscore how *Hardison*'s anti-textual interpretation of "undue hardship" has harmed religious employees: The Jewish Coalition for Religious Liberty explains (at 18) that "[u]nless this Court intervenes, *Hardison* will continue to deny religious Americans from diverse religious communities their right to accommodation for trivial reasons." *Accord* Religious Liberty Scholars Br. 9. As Justice Marshall predicted, *Hardison* forces upon employees of faith the "cruel choice of surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

As the petition and *amici* explain in detail, Title VII itself mandates no such result. And in other settings, Congress has given the term "undue hardship" an interpretation consistent with its plain meaning. Pet.22-23; CLS Br. 9-10.

By contrast, the best GLE can say in defense of *Hardison* is that its interpretation of "undue hardship" is "plausible." BIO 17, 31. Yet GLE's attempt to manufacture plausibility merely confirms *Hardison*'s error: GLE concedes that "[i]n essence, the Court *replaced* one qualitative term ('undue') with another," "*de minimis*." *Id.* at 31 (initial emphasis added). But replacing Congress's term, which literally means "excessive" or "unwarranted," with a *different* term that means merely "trifling" or "insignificant," is gross alteration, not plausible interpretation. See Pet.19-20. *Hardison* was wrongly decided, and the Court should now correct that disastrous error.

II. Stare Decisis Is No Barrier To Reversing *Hardison*, Much Less Granting the Petition.

GLE (at 13-20) nevertheless argues at length that stare decisis counsels against revisiting *Hardison*. But GLE's arguments go to the merits and do not decrease the need to *ask*—and answer—the question presented.

1. GLE ignores that—as Justices Thomas, Alito, and Gorsuch have recognized—*Hardison*'s discussion of Title VII was *dicta*. *EEOC* v. *Abercrombie*, 135 S. Ct. 2028, 2040 n.* (2015) (Thomas, J., concurring in part); *Patterson*, 140 S. Ct. at 686 n.* (Alito, J., concurring in denial of certiorari); see Pet.31-32. That is because the events in *Hardison* occurred *before* the 1972 "undue hardship" amendment to Title VII took effect. *Hardison*, 432 U.S. at 66. And, although GLE relies (at 16 n.10) on *Hardison*'s discussion of the 1972 amendment in an attempt to stretch *Hardison*'s scope, this Court is not bound by comments made on issues unnecessary to its holding. Pet.31 (citing *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012)). GLE's understanding of stare decisis would turn the doctrine into an "inexorable command" against correcting *any* prior error, even errors in *dicta*—an idea this Court has consistently rejected. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020).

Contrary to GLE's arguments, this is a case in which circumstances *do* warrant revisiting precedent. First, GLE claims (at 17-18, 20-23) that the Court should not revisit *Hardison* because Congress has not overturned it. But even if one ignores that *Hardison* did not interpret Title VII itself, any enhanced weight stare decisis might have in other statutory cases would not apply in this civil-rights case. In this

setting, the Court has steadfastly refused to "place on the shoulders of Congress the burden of the Court's own error." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978) (citation omitted).

There is no reason to depart from that practice here. By now it is clear that Congress—which has had over forty years to address *Hardison*'s error—will not fix it. While numerous bills to overturn *Hardison* have been introduced, we have found only three that even received a committee or subcommittee hearing,[1] and *none* that has received a vote on the floor of either House. Furthermore, GLE fails to explain why Congress should be expected to revise Title VII's accommodation provision when this Court has not yet directly ruled on the statutory text. *Abercrombie*, 135 S. Ct. at 2040 n.* (Thomas, J., concurring in part); *Patterson*, 140 S. Ct. at 686 n.* (Alito, J., concurring in denial of certiorari).

Second, GLE asserts (at 15) that *Hardison* was a "sound decision" that should be preserved. But *Hardison*'s dicta cannot be reconciled with the statute's text, legislative history, or basic principles of interpretation. GLE even concedes (at 16-17) that this Court interpreted "undue" using a "different, more focused term" than Congress used. The Court should not "methodically ignor[e] what everyone" "knows to be true," *Ramos*, 140 S. Ct. at 1405: *Hardison*'s "*de minimis*" rewrite of "undue hardship" was wrong.

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[1] See Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong. (2007); Workplace Religious Freedom Act of 2005, H.R. 1445, 109th Cong. (2005); Workplace Religious Freedom Act of 1997, S. 1124, 105th Cong. (1997) .

Third, contrary to GLE's assertion (at 18) that no "facts have changed since *Hardison*," this Court eroded *Hardison*'s doctrinal underpinnings in *Abercrombie*. Pet.6-7. *Abercrombie* recognized Congress' intent to give religious employees, not merely *equal* treatment, but "favored treatment." *Abercrombie*, 135 S. Ct. at 2034. That refuted *Hardison*'s concern about "unequal treatment of employees" because of "their religion." 432 U.S. at 84.

GLE also notes (at 17-18) that, in other laws, "undue hardship" has been explicitly defined. But GLE's cited statutes—all of which set a higher bar for such a finding—highlight that *Hardison*'s rewrite of "undue hardship" flouts the plain text. *Hardison* is thus an anomaly that richly warrants review. See *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2483 (2018).

Finally, GLE argues (at 13, 18) that overruling *Hardison* would upset employers' reliance interests. But there are no sunk costs or irretrievable investments that will be lost here, and no barrier to revising religious-accommodation policies going forward. The mere "fact that [employers] may view [*Hardison*'s interpretation] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [religious employees] share in having their [Title VII] rights fully protected." *Janus*, 138 S. Ct. at 2484. As in *Janus*, whatever reliance interest employers may have, it is "unconscionable" to allow those interests to override the civil rights of religious workers "in perpetuity." *Ibid.*

III. This Case Is An Excellent Vehicle.

Unable to escape the importance of the question presented or the error in *Hardison*'s interpretation, GLE argues that this case is not a good vehicle for deciding that question given (a) GLE's disputed factual claims and (b) this case's procedural history and posture. On both points, GLE misses the mark.

A. GLE ignores the settled rule that, on summary judgment, evidence must be construed in the light most favorable to the non-moving party.

In denigrating this case as a vehicle for reviewing the question presented, GLE repeatedly cites as "facts" its own specious take on disputed questions. In so doing, GLE violates the "axiom" that, at the summary-judgment stage, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan* v. *Cotton*, 572 U.S. 650, 651 (2014) (citation omitted; alteration in original). GLE never acknowledges that standard. Instead, it claims (at 23) that if this Court were to "fairly consider[]" the facts, Dalberiste would lose even under a higher substantive standard. But the only way to "fairly consider" the facts at summary judgment is to view them in the light most favorable to the nonmoving party: Dalberiste.

1. Nowhere is GLE's failure to appreciate the summary-judgment standard more striking than in its repeated attempt to paint Dalberiste as "deceptive" or even "lying" in his interview. BIO 13, 26-27. As the petition showed (at 9 n.5), such allegations are irrelevant to Dalberiste's ability to prevail on a Title

VII claim. And in any event, GLE does not dispute the petition's showing, *ibid.*, that neither EEOC guidance nor sound employment practice requires an employee to disclose, at the application stage, a potential need for an accommodation—not for disability, pregnancy, religion or any other protected characteristic.[2]

Still, without citing any underlying evidence, GLE asserts that it fully and "deliberately explained the night and weekend work" before obtaining Dalberiste's agreement to that arrangement. BIO 26. Yet Dalberiste squarely denies GLE's assertion, testifying that he was "never told" that he "would be working a 12-hour shift" on weekends—which, if the shift had been on Saturday, would have required him to violate his faith. Doc.35-1:30. Indeed, the district court acknowledged a "dispute" about "what aspects of the job requirements * * * were discussed prior to Plaintiff's acceptance of the job offer." Pet.13a. At this stage, even if it were relevant, any dispute about whether Dalberiste acted deceptively in failing to highlight his need for an accommodation when he accepted the position must be resolved in his favor. *Tolan*, 572 U.S. at 651; see also Pet.8-9.[3]

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[2] It is well known that requiring workers to disclose needs for accommodation before hiring would open the door for employers to give pretextual reasons for refusing to hire them. See, *e.g.*, *LaPoint* v. *Family Orthodontics, P.A.*, 892 N.W.2d 506, 517 (Minn. 2017) (failure to disclose pregnancy).

[3] As another example of GLE's violating the light-most-favorable rule, GLE refers (at 8) to the district court's recounting of Dalberiste's statement that he would have "no problem" with "nights and weekends." But GLE omits the district court's crucial

GLE also ignores that Title VII applies fully *before* hiring. 42 U.S.C. 2000e-2(a). Thus, even if Dalberiste had requested an accommodation in the initial interview, GLE could not have rejected him on that basis absent an undue hardship. Pet.9 n.5. Thus, whether Dalberiste "lied" or "misrepresent[ed]" his availability (BIO 1, 23, 26) in the application process is immaterial to whether he can assert a Title VII failure-to-accommodate claim. GLE cannot claim prejudice for lack of an opportunity to violate Title VII sooner rather than later. Its only real prejudice was being deprived of an opportunity to invent *fictitious* reasons for not employing Dalberiste.

In any event, Dalberiste maintains and would maintain at trial that he responded to GLE's offer honestly. See, *e.g.*, Pet.8-9 (citing deposition transcripts). And credibility determinations are for the trier of fact, not a reviewing court.

2. As the petition demonstrated, moreover, if the Court were to reconsider *Hardison*'s *de minimis* standard, Dalberiste's claim would almost certainly survive summary judgment on remand, and Dalberiste likely would prevail before a jury. Pet.23 n.12. In response, GLE cites (at 27) its *own* summary-judgment motion, arguing that Dalberiste's claim

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modifier: "as those issues were discussed by him and Ward," the interviewer. Pet.13a. The deposition transcript explains the dispute about *how* "those issues were discussed," and a reasonable factfinder could agree that Dalberiste stated accurately that *in general* he had "no problem" working nights and weekends, but that the interview did not address the specific issue of whether he could work from sundown Friday to Saturday. Doc.35-1:18.

would fail even under a more stringent undue-hardship standard. But GLE ignores evidence that Dalberiste could readily have been accommodated by using GLE employees who were already "badged" when Dalberiste was offered the job: (1) Although the spring-outage employee's badge had been physically "pulled" after the spring outage, "when the fall outage occurred" he "still *** had badge *access*" that was "good for a year" (*i.e.*, he could have had his badge restored). And (2) with "some training," GLE employees with badge access at another station "could use [those badges] at the nuclear plant." Doc.34-1:9-10; Pet.11-12. Either piece of evidence is enough for the "undue hardship" issue to go to a jury, if this Court remands for application of a new, text-based standard.

Under such a standard, GLE's size would also be relevant. GLE paints itself (at 1, 12-13, 29) as a "small business." But a jury could reject that characterization based on GLE's acknowledgment that it is a "leading" firm with offices throughout "Florida and the Southeastern United States,"[4] and that it expects soon to have a staff of "over 500 employees" and to be the "largest company in the U.S. specializing in building sciences."[5] Thus, even putting aside GLE's insurance coverage for this litigation, see Doc.23; Doc.24, GLE's attempt to escape review by understating its size is belied by the facts.

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[4] See *About GLE*, https://www.gleassociates.com/about/ [https://perma.cc/6TRB-GCJ7] (last visited Sept. 14, 2020).

[5] See *Meet the President*, https://www.gleassociates.com/meet-the-president/ [https://perma.cc/H273-47KU] (last visited Sept. 14, 2020)

B. The procedural posture of this case—especially the absence of any confounding issues—makes it an excellent vehicle for review.

GLE next mistakenly attacks the procedural mechanism that brought this case to the Court: Citing Dalberiste's summary-affirmance motion in the court of appeals, GLE falsely claims (at 1, 2, 28) that Dalberiste conceded GLE "complied with the law" and "did nothing wrong." That is absurd. Dalberiste consistently asserted that GLE violated Title VII when it "refused to provide" him "a reasonable accommodation for his religious beliefs." Doc.1:6; Pet.35-36.

1. The summary-affirmance motion did not alter that position. Although Dalberiste conceded on appeal that *Hardison* controlled, that was *not* because the case was correctly decided—Dalberiste explicitly asserted it was not—but because the *Eleventh Circuit* had previously held, in a precedential opinion, that *Hardison* controls the interpretation of Title VII. Pet.4a-5a, 7a. Faced with binding circuit precedent, there was no reason to go through a futile full appeal. Only this Court can remedy *Hardison*.

2. GLE's attempts (at 28-29 & n.20) to turn Dalberiste's summary-affirmance motion into a standing issue make the same mistake as its stare decisis arguments: If acknowledging binding precedent can kill a live controversy, then all petitions asking this Court to reconsider a prior holding are dead on arrival.

This Court, moreover, has granted certiorari in other cases in the same procedural posture. See Pet.13 n.6 (collecting cases). And that is undoubtedly why none of the judges below was in the least troubled by Dalberiste's summary-affirmance approach. See Pet.14 n.7.

Nor would resolution of the question presented result in an "academic" or "advisory opinion." BIO 28-29. If this Court reconsiders *Hardison* and interprets the "undue hardship" standard according to its ordinary meaning, it can choose whether to apply the new standard itself or remand for the lower courts to apply it in the first instance. That is what the Court frequently does when it overturns a prior precedent. *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019); *Janus*, 138 S. Ct. at 2486; *Franchise Tax Bd. of California* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019).

Contrary to GLE's claims, moreover, if the Court grants the petition and ultimately decides *not* to overrule *Hardison*, it could still, as GLE puts it (at 30), "elaborat[e] on [*Hardison*'s] meaning," while remanding for the lower courts to apply the elaborated standard in the first instance. *E.g.*, *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2423-2424 (2019) (remanding for a "redo" after providing more guidance on *Auer* deference); *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1018 n.* (2020). Contrary to GLE's claims, in seeking summary affirmance, Dalberiste did *not* concede that summary judgment was warranted under any conceivable understanding of *Hardison*, just the understanding reflected in controlling Eleventh Circuit precedent. Pet.4a, 7a; see CA11 Mot. Summ. Affirmance 1 (only "stipulat[ing]"

that *Hardison* "as construed and applied by" the Eleventh Circuit supported summary judgment).

In short, the multiple ways this Court could use this case to resolve the question presented make it an exceptionally good vehicle.

3. Finally, GLE is wrong in suggesting that, if the Court wants to revisit *Hardison*, it would be better to await a case that "involve[s] a few additional questions beyond whether *Hardison* should remain the law." BIO 32. That, of course, was the problem identified by the respondent in *Patterson* (*Patterson* BIO 31), and apparently the reason the Court denied review there. See *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring in denial of certiorari)

Unlike *Patterson*, this case does not require the Court to resolve a preliminary issue to reach the question whether to repudiate *Hardison*. Nor does it require the Court to resolve a serious argument that the petitioner waived or forfeited its challenge to *Hardison*: Neither of the courts below advanced such an argument, and GLE, for all the vigor of its opposition, has not done so.

For all these reasons, it is difficult to imagine a cleaner or better vehicle with which to resolve the question presented.

CONCLUSION

GLE's refusal to accommodate Dalberiste's legitimate religious need violated Title VII under a proper interpretation of the statutory text. This Court should grant the petition and restore that statutory protection to Dalberiste and the many other workers of faith who will continue to suffer a similar fate for however long *Hardison* stands.

Respectfully submitted.

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