No. 19-1461

In the Supreme Court of the United States

MITCHE A. DALBERISTE, PETITIONER

v.

GLE ASSOCIATES, INC., RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should overrule *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

CORPORATE DISCLOSURE STATEMENT

GLE Associates, Inc., is a corporation. It does not have any parent corporations, and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

Start with a basic aspiration—if a person follows the law, he or she should be less likely to face a lawsuit than someone who does not. Certainly this aspiration will not always match reality. For example, more than one person has violated the law yet escaped unscathed, and more than one person has faced a meritless lawsuit for some reason or another. Still, most people likely would hope and assume that where someone undisputedly complies with the law, he or she should not face a lawsuit.

This case is the exception to that hope.

GLE Associates is a small business dedicated to offering its clients architectural, engineering, and environmental services. One of its major roles is workplace safety monitoring (primarily asbestos testing) at the Turkey Point nuclear plant in southern Florida, which involves extensive night and weekend work. When Mitche Dalberiste applied for a position with GLE, he misrepresented his ability to work weekends. Once it became apparent Dalberiste lied, GLE revoked its job offer to him. And *no one* disputes that GLE followed the law when it did so—Dalberiste wrote multiple briefs to the Eleventh Circuit acknowledging this fact.

Consider the setup. The parties agree that GLE complied with the law, yet Dalberiste insists on dragging it through litigation as a guinea pig in his crusade to change the law via judicial opinion rather than deliberative legislation. And more to the point, he appears to believe that GLE's compliance with

the law is somehow a point in his favor, arguing that it creates a "straightforward" case for this Court's review. The message is clear—follow the law and find yourself the target of a special-interest fueled lawsuit attempting to circumvent Congress with respect to a robust political debate.

Enough is enough; save the lawsuits for the wrongdoers.[1] There is considerable risk in gutting 40+ years of statutory interpretation precedent as requested by Dalberiste, and those risks are particularly acute when the question at issue is one of ongoing political deliberations. Moreover, GLE did nothing wrong, giving into Dalberiste's demands would create perverse incentives for litigants, and the facts of this case do not actually lend themselves to a "straightforward" holding on the question presented (aside from recognizing that GLE complied with the law). If *Hardison* is someday overturned, whether by this Court or the representatives in Congress, let it be under appropriate circumstances not found here. GLE requests the Court deny Dalberiste's petition.

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[1] Or those that are at least *arguably* wrongdoers.

STATEMENT

I. Background

A. GLE's Operations

GLE is an architectural, engineering, and environmental services firm headquartered in Tampa, Florida. Doc. 69:2. Its sole owner, Robert Greene, founded the company in 1989 and has overseen all areas of its operation in the thirty years since then. *Id.* The company has grown to the point where it now supports around eighty employees in different sites across the southeastern United States. *Id.* Still, GLE relies on the leadership of Greene, with his thirty years' experience and intimate knowledge of all the business's operations. *Id.* at 15–16.

One of GLE's primary services is worksite safety monitoring, which includes asbestos monitoring by its industrial hygienists. *Id.* at 2. And one of its major clients for asbestos testing is the Turkey Point Nuclear Generating Station in Homestead, Florida. *Id.*[2] The operations of the Turkey Point facility are split between two entities. *Id.* Florida Power & Light is the owner of the facility and serves as its chief operator, but it outsources necessary work (such as large portions of the maintenance work) to a third-party contractor. *Id.*; Doc. 30:4. The formal identity of the contractor changes every few years as

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[2] As discussed below in Section I.B of this statement, the specific office of GLE that handles the Turkey Point work is its Fort Lauderdale location.

new entities submit bids to Florida Power & Light, but the winning contractor's duties remain consistent. Doc. 30:4.

The Turkey Point facility has planned outages every fall and additional outages every other spring. Doc. 69:2. It also has occasional short-notice outages. These outages involve shutting down parts of the facility for maintenance and last anywhere from thirty to eighty days. Doc. 69:2. Given that the outages involve actually shutting down portions of the facility, and thus temporarily reducing its power output to the surrounding communities, the goal is to complete the maintenance as quickly as possible while still being safe. *Id.* at 5; Doc. 30:6.

An ever-present concern at the Turkey Point facility during these outages is the presence of asbestos insulation. *See id.* at 5. So for the past twenty years, GLE has had contracts with both Florida Power & Light and whichever contractor is handling the facility's operations at the time. *Id.* at 4; Doc. 69:2. Under these agreements, GLE serves as a subcontractor during the plant's outages, providing air monitoring and asbestos testing to ensure that other maintenance workers can safely perform their jobs. *See* Doc. 30:4; Doc. 69:2–3.

Of course, providing services to a nuclear facility is not as simple as showing up and walking through the door—these plants are subject to strict and extensive regulations designed to protect their operations and nuclear materials.[3] To that end,

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[3] Including Title 10 of the Code of Federal Regulations.

nuclear facilities like Turkey Point severely limit access by outsiders, including subcontractors. *See generally* Doc. 69:2–3 (describing the Turkey Point facility's badging system for outsider access). In fact, the Code of Federal Regulations explicitly requires nuclear facilities to use a system of photo identification badges to restrict access—any person requiring unescorted access to a plant's vital areas must display a badge confirming his or her identity. 10 C.F.R. § 73.55(g)(6)(ii).

Florida Power & Light and the Turkey Point contractor dictate all terms of the work that GLE is to perform in a given outage. Doc. 69:2. For example, they tell GLE how many of its workers may receive photo identification badges to even enter the facility. *Id.* To be eligible for a badge, an employee must have previously had extensive asbestos and air monitoring training. *Id.* at 3. This training occurs over several weeks at an out-of-state facility. *Id.* Additionally, the employees who will work the outage must complete extensive background checks, urinalyses, and psychological exams, all of which take several weeks. *Id.* Finally, the employees must attend training classes at the Turkey Point facility itself, which last about one week. *Id.* In sum, GLE cannot simply hire somebody to handle an outage a week before it is set to occur; the process takes a substantial period of time. *See generally id.*

The work performed by GLE's industrial hygienists at the Turkey Point facility is both

difficult and dirty. *Id.* at 3, 14.[4] Florida Power & Light and the Turkey Point contractor issue an even number of entry badges to GLE—ordinarily the number is two badges, though they sometimes will issue four badges for particularly large outages. Doc. 30:6; *see* Doc. 69:3. These employees must work rotating twelve-hour shifts (twelve hours on, twelve hours off) over the entire thirty-to-eighty-day outage. Doc. 30:6; Doc. 69:3–4. Florida Power & Light and the Turkey Point contractor dictate this breakneck schedule because of their immense need to reopen the plant quickly; GLE has no say in either the number of badges issued or the lengthy working hours. Doc. 30:6; Doc. 69:4.

In sum, being a subcontractor for the Turkey Point nuclear plant involves playing by its rules. Any threatened deviations risk the efficiency of the outage operations and could jeopardize GLE's subcontracting relationship with Florida Power & Light and the contractor.[5] For example, GLE almost lost the contracts years ago after an employee unexpectedly quit right before he was scheduled to work the outage. Doc. 30:7; Doc. 31:4. GLE managed to salvage the situation at great expense, but that disaster caused it to be highly cautious

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[4] In fact, all the work performed by industrial hygienists is demanding in this regard. It is mostly field work that requires them to be on job sites during evenings and weekends when they will cause the least interference with GLE's clients. Doc. 69:3.

[5] Even employees who become sick during the outage must simply work through it. Doc. 30:6.

when hiring for the Turkey Point outages in the future. Doc. 30:7; Doc. 31:4; Doc. 34-1:18.

B. Dalberiste's Application to GLE

In 2016, GLE was facing a staffing shortage at its Fort Lauderdale office, which is the location that services the Turkey Point contracts. Doc. 30:2. At the time, the Fort Lauderdale office had four industrial hygienists, all of whom were assigned to other projects that would be happening during the fall outage. *Id.* at 2, 7–8. Although the outages at Turkey Point are demanding work, they are entry-level and not as complex as the other types of projects GLE handles. *Id.*; Doc. 69:3.

During times with normal workloads, GLE tries to send one experienced employee and one entry-level employee to each outage; the outage work helps train the new employee to handle the Fort Lauderdale office's other work. Doc. 30:5.[6] But 2016 was not an ordinary time with ordinary workloads. The potential worker shortage and pending outage demanded a creative solution. So Greene and the director of GLE's South Florida operations, John Simmons, crafted a plan to hire two new employees who would be badged to work the fall outage. Doc. 31:5; Doc. 69:4.

Although GLE could not get a full third badge for the fall outage, it would cover all expenses

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[6] It takes about two or three years before an employee can work on his or her own without needing to be paired with a senior employee or project manager. Doc. 69:4 n.2.

associated with sending an experienced worker such as Simmons to the Turkey Point facility during the first few days of the outage. Doc. 30:8; Doc. 69:4. Importantly, this third person would not have a badge, so he or she could only be present in the facility with the two badged employees serving as escorts. *See* Doc. 31:4 (explaining that the badges are necessary for *unescorted* access); Doc. 34-1:12 (noting that Simmons might have done the training, but he would have needed one of the badged employees to escort him). This solution would provide at least some training of the two new employees as they began their work while enabling the Fort Lauderdale office to continue handling its other projects, all of which required a higher proficiency than the Turkey Point work. *Id.* at 5–6; Doc. 69:4. As such, working the Turkey Point outage was an essential function of the two roles for which GLE was hiring. Doc. 30:8.

Dalberiste's first interview with GLE was in April 2016. Doc. 69:5. He spoke with one of its human resources representatives, Amber Ward, via phone. *Id.* at 4–5. During the phone interview, Dalberiste represented that he had no problems travelling or working nights and weekends. *Id.* at 5; Doc. 35-1:18.[7] Shortly after the interview with Ward, Dalberiste had an in-person interview with several members of GLE's Fort Lauderdale office.

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[7] GLE's employees are careful to describe the Turkey Point work in detail during these interviews, given the past concerns about staffing the outages. If they were to hide the realities of working the Turkey Point job, it could easily lead to employee retention problems. Doc. 30:7; Doc. 31:4.

Doc. 69:5. The interviewers emphasized the working hours of the Turkey Point facility. *Id.* Dalberiste also admitted to seeing information in the job application about night and weekend work. *Id.*

Importantly, Dalberiste explicitly represented during the interview process that he was able to work nights and weekends. *Id.* at 17. But he is in fact unwilling to work from Friday sundown to Saturday sundown because of his religious beliefs. Pet. 7. Dalberiste felt his scheduling restrictions were not "information that needed to be discussed," and GLE was legally required to accommodate him after hiring him regardless of the costs. Doc. 35-1:19–20, 35; Doc. 69:6. Since this litigation began, Dalberiste has attempted to justify his deception by portraying it as more or less a half-truth; he apparently does not believe it was dishonest for him to represent to GLE that he could work weekends, because he did not say "he could work the *entire* weekend." Pet. 8. Predictably, GLE's interviewers took Dalberiste at his word when he represented his night and weekend availability. *See* Doc. 30:9.

GLE did not initially offer Dalberiste the job in April 2016, but he reapplied in June 2016. Doc. 69:6. At the time, GLE had not found a second new employee who could perform the Turkey Point work, so it opted to hire Dalberiste. *Id.*; Doc. 30:9. As the outage was set to begin in a few short months, and GLE needed time to finalize the employee on-boarding process, provide initial training, and complete the badging process, it extended Dalberiste a job offer on June 21. Doc. 30:9; Doc. 69:6. With the offer in hand, Dalberiste finally revealed to GLE

that he was in fact unable to perform the weekend work at Turkey Point during his Sabbath. Doc. 69:6.

Dalberiste's eleventh-hour revelation came as a shock to GLE's interviewers. Doc. 30:9. Simmons informed Dalberiste that he would need to discuss the matter with management. *Id.* When Greene learned of Dalberiste's inability to perform the required Turkey Point shifts, he knew it would be impossible to perform a last-minute scramble to accommodate Dalberiste's scheduling restrictions. *Id.*; Doc. 31:7. Greene knew it was impossible to simply "substitute" employees at the nuclear facility, and he was uncomfortable with the idea of assigning Dalberiste to a job site requiring more complex work than the entry-level tasks at Turkey Point. *Id.*; Doc. 30:10. Therefore, Greene decided to revoke Dalberiste's offer so GLE could try to hire someone in time to handle the outage work. Doc. 31:7–8. Greene based his decision on his intimate knowledge of the business's operations as its sole owner, along with his decades of experience in the industry and prior experiences with the Turkey Point work. *Id.*

Unfortunately, the damage was done. Despite quickly making an effort to hire a replacement for Dalberiste, GLE was unable to find a qualified candidate. *Id.* at 8; Doc. 69:6. And as discussed before, all the remaining Fort Lauderdale employees were already assigned to other job sites, and it was not possible to send one of them to Turkey Point. Doc. 31:8, 10. As a result, GLE ultimately had to send an employee from over 300 miles away in its Tampa office to receive the badge and work the outage, resulting in substantial costs. *Id.* at 10.

II. Proceedings Below

Dalberiste filed this lawsuit in September 2018. *See generally* Doc. 1. His complaint included counts under both Title VII and the Florida Civil Rights Act for purported disparate treatment based on religion, retaliation, and failure to accommodate religious beliefs. *Id.* at 5–9. Although the lower court ultimately granted summary judgment with respect to all six of Dalberiste's claims, this appeal focuses solely on his failure-to-accommodate theory, as Dalberiste did not appeal from his losses on the disparate treatment or retaliation theories.

Following months of discovery confirming the facts described above in Section I of this statement, GLE moved for summary judgment. *See generally* Doc. 29; Doc. 30.[8] Dalberiste filed a brief in opposition, though he has since admitted that GLE complied with the law. *Compare* Doc. 39:3–7 (arguing that GLE violated the *Hardison* standard), *with* Pet. 14 (acknowledging GLE complied with the *Hardison* standard). Judge Rodney Smith of the Southern District of Florida granted complete summary judgment to GLE. Doc. 69. The nineteen-page order addressed Dalberiste's claims in full, including each of his theoretical accommodations that were supposedly available to GLE.

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[8] Parties moving for summary judgment in the Southern District of Florida must file a separate statement of material facts. S.D. Fla. L.R. 56.1(a).

On appeal to the Eleventh Circuit, Dalberiste admitted that the Southern District's summary judgment analysis was correct:

- "Mitche Dalberiste concedes and stipulates that this case is controlled by Supreme Court caselaw as construed and applied by [the Eleventh Circuit], and that, under that precedent, the decision below must be affirmed." Doc. 84-1:4.

- "[T]he district court correctly applied current binding caselaw when it granted summary judgment to GLE." *Id.* at 9.

- "[G]iven Dalberiste's concession about the burden an accommodation would impose on GLE, *Hardison* requires affirmance." *Id.* at 13.

- "If [Dalberiste] were to file a brief in this [appeal], he would take the same position as he has in the summary-affirmance motion, namely that Supreme Court case law, as interpreted in this Circuit, dictates that he does not prevail." Doc. 84-2:2.

REASONS TO DENY THE PETITION

At its core, Dalberiste's petition is a request that this Court issue an advisory opinion regarding an imaginary set of facts. Worse, it is an invitation to prolong litigation for a small business that—by Dalberiste's own admission—did nothing wrong under longstanding case law. And because GLE did

nothing wrong, any consideration of this appeal on the merits would necessarily be restricted to a zero-sum affirmation or rejection of *Hardison*; there is no room to elaborate on what the qualitative words "*de minimis*" might mean. If this Court is inclined to revisit *Hardison*, let it be in a meritorious case in which all options are possible.

I. There is significant risk in upending over four decades of precedent as requested by Dalberiste.

For numerous reasons, such as Dalberiste lying to GLE during his job interview, this specific lawsuit is a distinctly terrible option for revisiting *Hardison*. *Infra* Section II. But even if Dalberiste were a different appellant with a potentially meritorious case, there would be significant risk in gutting *Hardison* via judicial opinion rather than deliberative legislation. *Hardison* is the status quo, and it has been the status quo for forty-three years.

Beyond the obvious reliance interests by small businesses such as GLE, religious accommodations in the workplace are a controversial subject that deserve public input and carefully tailored laws that balance competing interests between numerous stakeholders. Replacing one qualitative standard (*de minimis*) with a yet-undefined amorphous standard would risk shortchanging those considerations and causing the public to view the Court as an overtly political body.

A. The question presented by Dalberiste represents *stare decisis* at its pinnacle.

This Court's past decisions leave no doubt regarding the importance of *stare decisis*, describing it as "a foundation stone of the rule of law" and explaining that "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)). The language in these opinions goes further, explaining that *stare decisis* requires upholding even some decisions the Court might believe were incorrectly decided—"[i]ndeed, *stare decisis* has consequence only to the extent is sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Id.*; *accord Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2189 (2019) (Kagan, J., dissenting) ("[I]t is not enough that five Justices believe a precedent wrong."). *See generally June Med'l Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring) (emphasizing the importance of *stare decisis* even where a Justice disagrees with the precedent at issue).

Although seemingly harsh at times, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827

(1991). As multiple Justices of this Court recently emphasized:

> The people of this Nation rely upon stability in the law. Legal stability allows lawyers to give clients sound advice and allows ordinary citizens to plan their lives.[9] Each time the Court overrules a case, the Court produces increased uncertainty. To overrule a sound decision . . . is to encourage litigants to seek to overrule other cases; it is to make it more difficult for lawyers to refrain from challenging settled law; and it is to cause the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay.

Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting); *see also* THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .").

Against that backdrop, Dalberiste is asking the Court to take the extraordinary step of overruling a 43-year-old statutory interpretation case. In *Trans World Airlines, Inc. v. Hardison*, the Court considered the extent to which a religious accommodation under Title VII would impose an

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9 *Cf.* Doc. 57:3–4 (noting that GLE sought legal advice before withdrawing Dalberiste's offer).

"undue hardship" on an employer. 432 U.S. 63, 72–77, 84 (1977). The *undue hardship* language arose from a 1967 regulation by the Equal Employment Opportunity Commission, 29 C.F.R. § 1605.1. In 1972, Congress amended Title VII to incorporate the EEOC's regulation, using the same *undue hardship* language without attempting to further define it. 42 U.S.C. § 2000e(j); *see, e.g.*, *Reid v. Memphis Publ'g Co.*, 468 F.2d 346, 350–51 (6th Cir. 1972) (recognizing that the 1972 Title VII amendment "incorporate[d] the substance of EEOC Regulation 1605.1").[10]

And so in *Hardison*, which addressed both the EEOC regulation and the statute that formally ratified it, the court faced as a matter of first impression the meaning of "undue" as found in the phrase "undue hardship." It ultimately found that a hardship would be *undue* in the context of Title VII if it imposed more than a *de minimis* cost. 432 U.S. at 84. Essentially, the Court elaborated on the meaning of a broad, qualitative term ("undue") by

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[10] Dalberiste suggests that the language from *Hardison* analyzing the phrase "undue hardship" as found in Title VII is mere dicta. But the Court explicitly referred to the statutory provision multiple times in its holding. *E.g.*, 432 U.S. at 74. It also recognized that the 1972 Act "ratified" the EEOC's guidance as it existed in 1967. *Id.* at 76 n.11. The EEOC regulation's language was the same as the language found in the final statute. *Id.* at 72, 74. And in any event, the Court has since approved the holding of *Hardison* as being an analysis of Title VII's ongoing statutory mandate. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986); *see US Airways, Inc. v. Barnett*, 535 U.S. 391, 422 (2002).

describing it with a different, more focused term ("*de minimis*"). And although some feel that *Hardison's* holding is disagreeable, that does not make it wrong; the Court's explanation of the adjective *undue* was certainly a plausible one.

Even if the Court were convinced that *Hardison* is erroneous rather than merely controversial, the special justifications necessary to overrule it are not present. To the contrary:

- *Hardison* is a statutory case, and "*stare decisis* carries enhanced force when a decision . . . interprets a statute." *Kimble*, 576 U.S. at 456; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring). If a person disagrees with the Court's holding in a statutory case, he or she has the obligation to take those concerns directly to Congress.

- Additional Congressional action since *Hardison* supports leaving it in place. For example, every Congress from 1994 through 2013 considered bills that would have overruled *Hardison*, and each of those bills failed.[11] And where Congress has created

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[11] S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

other acts that require employment accommodations, it has taken care to distinguish Title VII by explicitly defining the phrase "undue hardship," all while never amending Title VII to do the same. 29 U.S.C. § 207(r)(3); 38 U.S.C. § 4303(15); 42 U.S.C. § 12111(10)(A). If Congress wishes to amend Title VII, it certainly can do so.

- No facts have changed since *Hardison* that call its holding into question. And as described above, the legal developments by Congress since *Hardison* support affirming it.

- No evidence suggests *Hardison* is unworkable.

- *Hardison* is forty-three years old (and counting); overruling it would upset longstanding reliance interests by employers and others who depend on consistency and predictability in the law.[12] GLE certainly relied on *Hardison* in this matter, and even Dalberiste acknowledges that GLE complied with the *Hardison* standard. Pet. 13.

- In any event, this case would be an especially poor vehicle for upsetting *stare decisis* principles, as the Court cannot even consider all options that should be on the table.

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[12] For example, organizations such as the Society of Human Resources Professionals—not to mention employment lawyers—advise employers on the *Hardison* standard and have done so for decades.

> Specifically, Dalberiste's admission that GLE complied fully with the law means that the Court could not elaborate on the meaning of *de minimis* as prescribed by *Hardison*. *Infra* Section II.B. All the Court could do here is replace a long-existing qualitative standard with some other amorphous standard, thus confusing the law.

Dalberiste's petition does not address the potential unintended consequences his sought-after relief invites. One does not simply re-seal Pandora's Box after cracking it open for a moment; Dalberiste's efforts today might easily become a weapon *against* the religious tomorrow. For example, consider this Court's decision in *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412 (1978), decided less than one year after *Hardison*. There, the Court held that even though the text of Title VII's attorney fee-shifting provision does not distinguish between victorious plaintiffs and defendants, 42 U.S.C. § 2000e-5(k), a winning defendant has a greater burden to recover fees than a winning plaintiff. 434 U.S. at 417, 421.

Now imagine if employers were to follow Dalberiste's game plan from this case in future efforts to overrule *Christiansburg*. Every employer that successfully defeats a Title VII claim could move for fees. If unsuccessful, those employers could then bypass the relevant circuit courts—just as Dalberiste did here—by conceding that the denials of fees were proper under *Christiansburg*, but arguing that *Christiansburg* was improperly decided and the Supreme Court should revisit it.

And *Christiansburg* is not the only case that could be subject to this type of legislation through litigation. Accepting Dalberiste's case here would only incentivize this type of litigation, disincentivize people from attempting to change laws through the legislative branch, and encourage Congress to punt to the Court on controversial statutory issues.

B. The question presented by Dalberiste is the center of a robust political debate with numerous stakeholders.

Possibly the most important reason to not judicially overrule *Hardison* is that it would upset the ongoing political deliberations of what religious accommodations in the workplace should look like. Congress's major advantage over this Court is that it can craft tailored policies that can be broad where necessary and focused where important. This Court could not, for example, issue a holding that addresses both the issue at hand *and* potential issues that might arise without wading heavily into dicta. In contrast, Congress could issue a statute that proactively distinguishes between multiple types of accommodation situations, or that has a general rule and then carves out narrow, bright-line exceptions to that rule to account for common scenarios.[13]

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[13] For example, Congress could amend Title VII to require employers to accommodate Sabbaths, but only for their locations that have at least fifteen other workers who could readily take the employee's place. A comparable holding from the Court would appear to be judicial legislating.

Aside from the obvious differences in statutory text (chiefly that Congress sought to distinguish later acts from Title VII by affirmatively defining "undue hardship"), there are numerous reasons that treating religious accommodations as an extension of other accommodation types would be overly simplistic. For example, religious beliefs are unlike disabilities. First, they are mutable and potentially infinite in variety—a person might hold a belief that nobody else in the world holds, and a person might always convert to a different religion.[14] Second, religious beliefs are not as readily verifiable as disabilities, particularly where a person's beliefs do not fit within a commonly recognized religious denomination.

Additionally, these religious accommodations directly affect multiple stakeholders beyond just the employers and the specific employees requesting accommodations. For example, scheduling is a zero-sum game; other employees might want to enjoy weekends away from work even for non-religious reasons. Or consider potential tensions between people of different religions, or even tensions between members of the LGBT community and employees who believe same-sex relationships or transgender identities are sinful—one person's requested accommodation to proselytize is another person's potential harassment claim. And numerous potential accommodations directly impact customers or the general public. *See, e.g.*, *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998)

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[14] Otherwise, there would be no point to proselytizing.

(involving a police officer who refused to guard an abortion clinic).[15] These are the type of nuanced issues that Congress can proactively address, but a single opinion from this Court in this case could not.

A final, brief observation on Dalberiste's petition—the sense he conveys is that Congress is incapable of changing what the Court did in *Hardison*, and religious Americans are incapable of seeking change outside of this court. But even the events of this appeal show that religious organizations have substantial power and mobilization, as Dalberiste has more than a dozen groups filing amici briefs on his behalf. These amici represent a vast array of religious and secular organizations, from mainstream Christian denominations all the way to minority religions. And a recent poll by the Pew Research Center recognized that the *vast* majority of Congressional members and the general public identify as religious.[16] In sum, religious people are not helpless,

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[15] In a 2004 letter, the American Civil Liberties Union described several of these concerns involving clashes between religious accommodations and other workplace stakeholders. *See* Laura W. Murphy & Christopher E. Anders, *ACLU Letter on the Harmful Effect of S. 893, the Workplace Religious Freedom Act, on Critical Personal and Civil Rights*, June 2, 2004, https://web.archive.org/web/20200828095638/https://www.aclu.org/letter/aclu-letter-harmful-effect-s-893-workplace-religious-freedom-act-critical-personal-and-civil.

[16] *Faith on the Hill*, PEW RES. CTR. (Jan. 3, 2019), https://web.archive.org/web/20200828135818/https://www.pewforum.org/2019/01/03/faith-on-the-hill-116/.

and neither is Congress; they do not need this Court to play the apparent role of savior by abandoning its longstanding precedent.

II. This particular case would be a poor vehicle for reconsidering *Hardison*.

Having said all that, GLE is not blind to the recent concurrence in *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020). As Dalberiste notes, three justices there indicated a willingness to grant certiorari on a Title VII religious accommodation case someday. But this is not that case. Dalberiste's "straightforward" case is a reimagining of the actual facts of this litigation. And the fact that GLE complied with existing law makes this appeal particularly unsuitable for revisiting *Hardison*.

A. Dalberiste misrepresents the facts of this case and the necessary issues it would present.

Facts matter. At its roots, the facts of this case are (1) GLE was hiring in 2016 for the upcoming Turkey Point outage, (2) Dalberiste lied to GLE about his availability to perform the job, and (3) GLE revoked Dalberiste's offer when he admitted to the lie. Fairly considered, none of the facts of this litigation are helpful to Dalberiste. So Dalberiste's gambit is that he can focus entirely on the legal aspect of this case (whether the Court should overturn *Hardison*) while downplaying all the important factual elements of it.

Case in point—this litigation involves Dalberiste's inability to work the outage shifts at the Turkey Point nuclear plant for which GLE was hiring. Yet throughout dozens of pages of briefing, Dalberiste never once acknowledges that nuclear facilities are on par with military bases in terms of restrictive security measures. Rather, his framing of the case makes it seem as though he is proposing that a generic retailer swap one cashier with another for a shift.[17] But GLE could not dictate the terms of its relationship with the Turkey Point plant any more than the plant's operators could dictate their relationship with the Nuclear Regulatory Commission; it could not demand the plant issue more access badges. *See* 10 C.F.R. § 73.55(g)(6)(ii) (placing the burden on plant operators to restrict access). Only by ignoring that underlying reality can Dalberiste claim this case is "straightforward" in some way that purportedly helps his cause. If Dalberiste were to confront the realities of nuclear regulations, he could not credibly argue for any of the accommodations he proposes.

More troubling are the "facts" that Dalberiste outright misrepresents. For example, Dalberiste claims "in the past, GLE had allowed qualified

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[17] To put it in perspective, the word "nuclear" appears only once in Dalberiste's 37-page petition—on page seven in the context of naming the "Turkey Point *Nuclear* Generating Station." And Dalberiste attempts to couch the information about the strict badging requirements by describing them with qualifiers like, "[a]ccording to GLE . . . ." *See, e.g.*, Pet. 10. *But see* 10 C.F.R. § 73.55(g)(6)(ii) (implementing strict badging requirements for nuclear facilities as a matter of law).

managers to 'work weekends and work nights' to cover another employee's shift if necessary." Pet. 11. The suggestion is that GLE could simply have had a manager substitute for Dalberiste on days he could not work at the Turkey Point plant. How incredibly dishonest—a review of the deposition he quotes reveals that he takes the "work weekends and work nights" statement entirely out of context. *See* Doc. 34-1:6. The question to which the witness (director John Simmons) was responding had nothing to do with work at the Turkey Point plant. Rather, it was a generalized question about whether management could ever cover for employees on any job sites. Later, in response to questions actually about the Turkey Point work, the witness explained that he had no ability to enter the plant at will to cover an employee's shift, but rather would need a badged escort at all times he was present at the facility. *Id.* at 12. Again, Dalberiste asks the Court to ignore the realities of working a nuclear outage.

Or consider Dalberiste's repeated suggestion that GLE "in other *instances* had asked employees to work double shifts for a longer period of time than would have been required here." Pet. 27 (emphasis added). This claim is false. In the past, GLE faced a *single* instance in which an employee unexpectedly quit immediately before he was set to work an outage at Turkey Point. Doc. 30:7. The result was a nearly unmitigated disaster in which one employee faced severely unpleasant extended shifts,[18] GLE

[18] An extended shift at the Turkey Point facility is hardly akin to asking, for example, a clerk to remain at a cash register for a few extra hours in an air-conditioned retail

incurred substantial costs to bring in an out-of-town employee, and GLE nearly lost the Turkey Point contracts (which are some of its biggest contracts out of the Fort Lauderdale office). *Id.*; Doc. 34-1:18. The manner in which an employer responds to an unprecedented emergency does not dictate how it must respond to an accommodation request under any law. Whatever its bounds, Title VII does not require an employer to set fire to a break room to test whether the sprinklers are working.

Another myth that Dalberiste needs abandon is his insistence that he did not misrepresent his availability during GLE's interview process. *See* Pet. 8–9 ("Dalberiste [n]ever represented that he could work the *entire* weekend."). GLE deliberately explained the night and weekend work, and Dalberiste unequivocally stated that he could perform it. Doc. 69:17.[19] As the Yiddish proverb

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store. The twelve-hour shifts are already brutal enough, requiring the employees to spend long periods in hot, dirty, and bug-filled environments while actively testing for dangerous airborne substances. Doc. 33-1:12 ("It's very physical down there, so you're climbing up and down ladders, you're crawling in and out of complex pipe configurations, it's hot, there's bugs, it's noisy. You know, it's very—very physical and dirty . . . .").

[19] The regulatory materials Dalberiste cites on page nine of his petition hardly suggest an employee can affirmatively lie about his or her ability to perform essential job functions during an interview, only to later spring the truth on the employer after receiving an offer. *See, e.g.*, EEOC COMPLIANCE MANUAL § 12-4, at 65–66 (2008). No authority supports Dalberiste's efforts to treat legalistic half-truths as good-faith participation in an interactive accommodation process.

goes, "a half truth is a whole lie." Dalberiste's attempt to pretend his statements were not deceptive is nothing more than willful blindness.

Dalberiste specifically omits those fuller discussions from his briefing in an effort to disguise the nuanced facts at issue here. He asks the Court to issue a major ruling upending more than four decades of precedent, all on grossly simplified "facts" that do not exist in reality. If Dalberiste were interested in litigating rather than legislating, his petition would have confronted the realities of working at the Turkey Point nuclear facility. Instead, silence—a tacit admission that granting certiorari on this matter would force the Court to wade into a fact-intensive discussion on GLE's services, Turkey Point's operations, and Dalberiste's deception. Realistically, there is no plausible standard that would enable Dalberiste to succeed under the actual facts. Doc. 29:14–15 (explaining that Dalberiste's claim would fail even under the Americans with Disabilities Act's different, statutorily-defined standard for "undue hardships").

In essence, Dalberiste wishes for the Court to issue the functional equivalent of an advisory opinion. He effectively states as much on page thirty-six of his petition: "Any residual factual disputes between the parties are irrelevant to the resolution of the *legal* question presented here—and can be resolved on remand if this Court repudiates *Hardison* and adopts a stricter standard." The impression is that Dalberiste wants this Court to draft a few sentences as an obituary to *Hardison*, replace it with some new amorphous standard, and

then delegate the actual legal analysis to the lower courts. Hence his efforts to minimize the facts of this litigation. But courts do not simply make sweeping changes to the law in a vacuum; their constitutional role is to develop the law by applying it to legitimate cases or controversies brought before them.

B. Dalberiste's tactics rob the Court of the ability to fairly consider all possibilities for addressing *Hardison*.

This petition does not involve a case or controversy in which one party claims the other party violated the law. Rather, it involves an appellee that complied with the law, an appellant who fully acknowledges that the appellee complied with the law, and an academic question of whether the Court should revisit a 43-year-old standard. Dalberiste believes this setup presents a great opportunity for the Court to eliminate *Hardison*, at least in the two brief pages of his analysis he spares for this case. Pet. 35–36; *see supra* Section II.A. But that belief is mistaken; the fact that GLE undisputedly complied with the law makes this case particularly unsuitable for review.

First, the parties' agreement that GLE complied with its legal obligations means the question before the Court is essentially academic. Dalberiste's position is clear: He thinks the Court should gut *Hardison* but leave the messy legal analysis for the lower courts on remand. Pet. 36; *supra* Section II.A. Functionally, he is asking for an advisory opinion that operates as a legislative decree rather than a judicial analysis. *See generally Campbell-Ewald Co.*

v. Gomez, 136 S. Ct. 663, 678–79 (2016) (Roberts, C.J., dissenting) (outlining the principles of the Court's prohibition on issuing advisory opinions); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (same).[20] This result is the exact type of situation that principles of *stare decisis* seek to avoid in these types of statutory interpretation cases, directing parties instead to take their desires for change to Congress.

Second, a decision eliminating *Hardison* would be inherently controversial because of the *stare decisis* principles at stake. That decision would be particularly controversial here, where the defendant undisputedly complied with the law and the plaintiff unapologetically deceived the defendant during the job application process. *See supra* Section II.A. The implicit message would be that a small business could do everything correctly, yet still find itself the target of a hit-and-run lawsuit by an activist attempting to change the law via litigation. In fact, it would effectively *endorse* the tactic of suing people that try to comply with the law, because those cases supposedly present "cleaner" questions of whether the Court should change the law. *See* Pet. 36. Accordingly, sue someone who follows longstanding

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[20] To establish an interest in a lawsuit, a plaintiff must allege a "personal injury fairly traceable to the defendant's *allegedly unlawful conduct* . . . ." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 333 (2006) (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). There is no purportedly unlawful conduct here; Dalberiste acknowledges that GLE complied fully with the law. Pet. 13.

precedent and receive fast-track treatment to bring the issue to the Supreme Court.

Third and most importantly, granting certiorari in this case would artificially stunt the Court's ability to fully consider *Hardison*. The Court should have three options available when it reconsiders a precedent:

1. The Court can uphold the precedent without further elaboration.

2. The Court can overrule the precedent and replace it with something new.

3. The Court can evolve the public's understanding of the precedent by elaborating on its meaning.

The third option is particularly important with respect to issues like the one at issue here. In *Hardison*, the Court was analyzing the meaning of a qualitative term: *undue*. 432 U.S. 63, 66, 84 (1977). The word "undue" does not convey a black-and-white standard. For example, a dictionary definition of them offers only two other qualitative words in its place: "[e]xcessive or unwarranted." *Undue*, BLACK'S LAW DICTIONARY (11th ed. 2019). Yet one person's "excessive" might not match another person's, just as an identical cost might be "warranted" under one set of facts but "unwarranted" under another set.

And so, as a matter of first impression, the Court found that "undue" in the Title VII context means

any burden that results in more than a "*de minimis* cost." *Hardison*, 432 U.S. at 84; *accord Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). Whether a person agrees or disagrees with the Court's holding, there is no denying that the Court's opinion was a plausible interpretation of the word "undue," and "*de minimis*" provides at least somewhat greater clarity to the standard with which employers must comply. *Supra* Section I.A. In essence, the Court replaced one qualitative term ("undue") with another, slightly clearer qualitative term ("*de minimis*").

But the key to qualitative terms like *undue* or *de minimis* is that they are not bright-line rules. Just as a burden might be undue in one context but not another, a cost might be *de mimimis* to one business yet perfectly reasonable to another. Dalberiste, however, appears to suggest *de minimis* is an impenetrable burden for plaintiffs in religious accommodation cases. Pet. 20. *But see* Pet. 28 (providing statistics showing that some plaintiffs in fact win these cases at the circuit court level). Dalberiste is so insistent on affirmatively *overruling* the *de minimis* standard that he has ignored all possibilities of *developing* it. *Cf. Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (emphasis added) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991)) (explaining that *stare decisis* enables "the evenhanded, predictable, and consistent *development* of legal principles").

In the forty-three years since deciding *Hardison*, the Court has not yet chosen to elaborate on the meaning of *de minimis* in the context of Title VII. If

the Court is concerned that lower courts have set the bar for *de minimis* too low, then merely elaborating on its meaning without eliminating it could rectify that issue while preserving the goals of *stare decisis*. And that option is always on the table—at least in cases other than this one. Dalberiste eliminated the possibility by admitting that GLE complied fully with the *Hardison* standard. Pet. 13–14. As such, any efforts by the Court to elaborate on the meaning of *de minimis* in this case would be nothing more than dicta.

The result is that granting certiorari in this case would be the equivalent of the Court handcuffing itself. Dalberiste's procedural gamesmanship boxes the Court into a "take it or leave it" approach with respect to *Hardison*; this case offers zero flexibility to develop or evolve the public's understanding of the existing law. Therefore, the Court should decline Dalberiste's petition. The Court might someday revisit *Hardison*, and the case in which it does so might involve a few additional questions beyond whether *Hardison* should remain the law. But the need to perform a bit of extra analysis is far preferable to accepting the artificially limited options here.

C. Unrelated decisions from across the country have no bearing on Dalberiste's particular case.

Lastly, as a substitute for analyzing the facts of *this case*, *see supra* Section II.A, Dalberiste focuses large portions of his brief on *other cases* and statistics from around the country. Pet. 25–31. He

even includes a twenty-page appendix purporting to outline every religious accommodation case to reach the circuit courts since 2000. Pet. 31a–51a. But these efforts to misdirect from the facts of this case undermine Dalberiste's own cause. Notwithstanding the fact that supposed statistical evidence is often prone to skewing and multiple fair interpretations.[21] consider what Dalberiste's statistics and references to other cases *indisputably* show:

- He is far from the only plaintiff purporting to bring this type of religious accommodation case. *See* Pet. 27. This Court will have future opportunities to reconsider *Hardison* if it desires to do so.

- In fact, the Court will have better opportunities to reconsider *Hardison* because some of these other cases are not artificially stunted like this one is. *See supra* Section II.B. For example, Dalberiste describes *Tagore v. United States*, in which a Sikh employee wished to wear a ceremonial knife to work. *See* 735 F.3d 324 (5th Cir. 2013). The Fifth Circuit determined that checking whether the blade was dull on a daily basis would impose more than a *de minimis* cost, as would allowing the plaintiff to work remotely from home or another building. *Id.* at 330. Regardless of the merits

[21] For example, meritorious lawsuits might result in fair settlements that never reach the circuit courts, thus skewing the sample pool.

of the Fifth Circuit's decision, the case could have gone either way, and an appeal to this Court would have preserved the ability to elaborate on the meaning of "*de minimis*."

- The victory rate for employers on appeal in religious accommodation cases is unremarkable; it is entirely consistent with the employer win rate on appeal in other types of Title VII cases. *Id.* at 28 n.16.

- Relatedly, *employees actually win meritorious religious accommodation cases*. *Id.* at 28 n.16, 32a; *see, e.g.*, *Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018) (granting a victory to a Seventh-day Adventist like Dalberiste who sought an accommodation regarding scheduling). *Hardison* is not an insurmountable obstacle; it is a decades-old standard that courts apply on a case-by-case basis, as is their role.

As described above, the appropriate case for reconsidering *Hardison* will offer three possible outcomes: (1) uphold *Hardison* and what the lower courts have done with it, (2) replace *Hardison's* standard with something new, or (3) preserve *Hardison* while elaborating on the meaning of *de minimis*. *Supra* Section II.B. This is not that case. Around 550 people file religious accommodation charges with the EEOC every year. Pet. 27. If this Court wishes to revisit *Hardison*, there will be other, better cases—cases on the margin that do not involve undisputedly innocent defendants and deceptive plaintiffs.

CONCLUSION

In today's political climate, it is all but guaranteed that regardless of what this Court rules on a given issue, someone will dislike its decision. The question is whether that someone gets red-carpet treatment to retread those grievances with this Court immediately, bypassing the federal circuit courts and dragging an undisputedly innocent defendant in the process. Dalberiste is certainly unhappy with four decades of precedent, and he certainly will not be the last person to dislike some interpretation of a statute. But that unhappiness is not a license to continue this litigation against GLE. If this Court is inclined to revisit *Hardison*—even if only to reaffirm its longstanding principles of *stare decisis*—then let that decision arise from an actual controversy where the defendant might have been in the wrong and the Court can fully and fairly consider all options.

Respectfully submitted,

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