No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

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

BRIEF AMICI CURIAE OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND OTHER JEWISH ORGANIZATIONS IN SUPPORT OF PETITIONER

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September, 2022

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INTEREST OF THE *AMICI CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first amicus brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 amicus briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this amicus brief:

- Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

- Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

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[1] *Amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Petitioner and Respondent were timely noticed of the filing of this amicus brief. Petition and Respondent have filed blanket consents.

▪ Coalition for Jewish Values ("CJV") is a national rabbinic public policy organization that represents more than 1,500 traditional Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy.

▪ National Council of Young Israel is a coordinating body for more than 125 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

▪ Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪ Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪ Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪ Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

INTRODUCTION AND SUMMARY OF ARGUMENT

In today's America employers must make legal accommodations for the needs and conditions of their employees based on factors such as age, gender, disability, sexual orientation, pregnancy and paternity. Religious observance is uniquely disfavored. Because of categorical *obiter dicta* language in the majority opinion in *Trans World Airlines, Inc. v. Hardison*,432 U.S. 63, 84 (1977), trial and appellate courts deciding cases since *Hardison* have directed employers to respect their employees' religious practices only if accommodation is *de minimis*. This rule was announced 45 years ago by a divided Court. Changes in American society and in the understanding of the Establishment Clause justify rejection and repudiation today of a legal rule that perpetrates great injustice and harm on Sunday-observing Christians like petitioner and on Jewish, Moslem, and Seventh-Day Adventist members of America's work force.

In past Terms of Court these *amici* have urged the Court to declare that the *Hardison* standard is no longer binding law in the United States. See Brief Amicus Curiae of COLPA, *Patterson v. Walgreen Co.,* No. 18-349, 2018 WL 5098485; Brief Amici Curiae of

COLPA, *Small v. Memphis Light, Gas & Water,* No. 19-1388, 2020 WL 4260327. In *Patterson* the Solicitor General – counsel for respondent in this case – said, as Justices Thomas, Alito, and Gorsuch noted, that "*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'" *Patterson v. Walgreen Co.,* 140 S. Ct. 685, 686 (2020). This case is the ideal vehicle for ending the callous treatment of employees who are totally law-abiding and whose only stigma is their dedicated adherence to practices sanctified by religious belief.

ARGUMENT

I.

THE CONSENSUS IS THAT "UNDUE HARDSHIP" SHOULD NOT BE DEFINED AS THE *HARDISON* OPINION DEFINED IT

In response to the Court's invitation the Solicitor General advised the Court in a brief filed on December 9, 2019, that "The Question Whether To Revisit *Hardison*'s *De Minimis* Standard Warrants Review." Brief for the United States as Amicus Curiae, *Patterson v. Walgreen Co.,* No. 18-349, p. 19. The Court rejected the Solicitor General's suggestion that certiorari be limited to this important legal issue. It presumably did so because a majority concluded that the *Patterson* case was not a suitable vehicle for considering this significant issue of statutory construction with constitutional overtones.

By contrast, this case does present the appropriate factual and procedural context for considering the issue and the Solicitor General, as

counsel for respondent, should adhere to the legal analysis expressed in the December 2019 filing.

II.

THE *HARDISON* STANDARD HAS SEVERELY IMPAIRED EMPLOYMENT OPPORTUNITIES OF JEWISH SABBATH -OBSERVING AMERICANS

The *amici* have decades of experience advising Jewish Americans who seek to reconcile life in America with the demands made by observance of traditional Jewish law. Into the 1960's private employers – including leading law firms – refused to accommodate Sabbath observers on the ground that all employees – regardless of their personal commitments – had to be available on all days of the week. The Sabbath-observing organized Jewish community, represented by several of the *amici*, lobbied for the amendment to the Civil Rights Act proposed on the floor of the Senate by Senator Jennings Randolph and approved unanimously. It is now 42 U.S.C. § 2000e(j).

The *Hardison* opinion gives a stingy interpretation to a civil-rights amendment designed to grant fair opportunities for devout adherents to religious principle. It has curtailed careers, closed avenues to success, and damaged the lives of many individuals who are unwilling to compromise their faith.

There are several reported cases in which Orthodox Jews were denied accommodations because an employer's claim of undue hardship was sustained

under the *Hardison* standard. *Brenner v. Diagnostic Ctr. Hosp.,* 671 F.2d 141 (5th Cir. 1982); *Miller v. Port Authority of N.Y. & N.J.,* 351 F. Supp. 3d 762 (D.N.J. 2018); *Waltzer v. Triumph Apparel Corp.*, 2010 WL 565428 (S.D.N.Y. Feb. 18, 2010); *Wagner v. Saint Joseph's/Candler Health Sys.*, 2022 WL 905551 (S.D. Ga. March 28, 2022). Observers of Sabbath restrictions identifying themselves as Jewish were also prejudiced in two reported judicial decisions by an employer's unwillingness to do more than make a *de minimis* accommodation. *Tepper v. Potter*, 505 F.3d 508 (6th Cir. 2007); *Christmon v. B&B Airparts, Inc.*, 735 Fed. Appx. 510 (10th Cir. 2018). And there have been administrative rulings rejecting religious accommodation claims of Orthodox Jewish employees on the ground that their requested accommodation imposed more than *de minimis* hardship. *E.g.*, *Joseph Bondar*, 82 F.E.O.R. (L.R.P.) 20289 (EEOC 1982); *Joseph Hammer,* 82 F.E.O.R. (L.R.P.) 20717 (EEOC 1982).

These *amici* can attest, however, to the fact that the reported litigated cases are a small tip of a huge iceberg. Never reaching the courts are many denials of employment opportunities to Jewish Americans whose religious practices collide with seemingly neutral employment conditions. Attempts by volunteer attorneys to persuade employers to make voluntary adjustments in work schedules or other employment conditions for Orthodox Jewish employees have frequently been rebuffed on the ground that the law prescribes only a *de minimis* accommodation. The *de minimis* standard has, in actual practice, done much greater damage to the lives of Orthodox Jewish

conscientious Americans than is shown by the decided and reported judicial decisions.

We respectfully ask this Court to grant this petition for a writ of certiorari and finally give those who actually practice what many others only preach the legal right that Congress intended when it amended the Civil Rights Act to define "religion" as including "all aspects of religious observance and practice."

CONCLUSION

For the foregoing reasons and those presented in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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September 23, 2022[2]

[2] The final date by which *amicus curiae* briefs supporting the petition in this case must be filed is September 26, 2022. That date is Rosh Hashana – a religious holiday on which secular labor is forbidden to observing Jews. *Amici* have accordingly chosen to file this brief early.