No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

On 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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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.

- Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis.

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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.

CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals.

▪ 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.

The Court has granted certiorari to revisit the *de minimis* standard articulated in the majority opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The devastating effect of that *obiter dictum* on America's Jewish community is too obvious to require detailed documentation. Observance of the Sabbath and Jewish holidays is plainly discouraged by this stingy reading of a provision of law that was introduced by its Senate sponsor in order to eliminate employment discrimination against Sabbath-observers. In *amicus* briefs we have filed in earlier Terms of Court seeking Court review of this issue we have described how religiously observant Jews have been harmed.[2] We have cited deplorable judicial decisions that rejected requests for reasonable accommodation. Briefs of other Jewish, non-Jewish, and secular *amici* will surely cover the practical impact of the *Hardison* language on America's Jewish community.

SUMMARY OF ARGUMENT

We submit this *amicus* brief to make five points that may otherwise be overlooked.

(1) The *Hardison* case came to the Court in an era when the majority's primary concern in interpreting and applying the first 16 words of the First Amendment ("the Religion Clauses") was to prevent any possible infringement of the Establishment Clause.

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[2] Brief for the National Jewish Commission on Law and Public Affairs, *Patterson v. Walgreen Co*, No. 18-349; Brief for the National Jewish Commission on Law and Public Affairs, *Small v. Memphis Light, Gas & Water,* No. 19-1388.

Decisions of the Court rendered shortly before and shortly after the *Hardison* case applied the then-governing three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to strike down all imaginable benefits, no matter how remote or miniscule, for religious teaching and practice.

(a) On November 2, 1976 – less than five months before the oral argument of the *Hardison* case – the Court announced that it was evenly divided in *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976), a case that challenged Section 701(j) – the religious-accommodation provision enacted in 1972 – on Establishment Clause grounds.

(b) In May 1975 – less than two years before the Court heard argument in *Hardison* – the Court had in *Meek v. Pittenger*, 421 U.S. 349 (1975), voided a Pennsylvania law because it had "the potential for impermissible fostering of religion."

(c) In June 1977 – less than three months after the *Hardison* oral argument – the Court struck down in *Wolman v. Walter*, 433 U.S. 229 (1977), an Ohio law allocating public funds for instructional equipment and field trip services in nonpublic schools because it had "the primary effect of providing a direct and substantial advancement of the sectarian enterprise."

(d) The May 1975 and June 1977 decisions that had sandwiched *Hardison* were explicitly overruled in 2000 by a Court majority, with Justices O'Connor and Breyer concurring. See *Mitchell v. Helms,* 530 U.S. 793, 835, 837 (2000). This explicit repudiation proved that between 1977 and 2000 "Establishment Clause law has 'significant[ly] changed.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

(2) The transcript of the oral argument in *Hardison* proves that many of the 1977 Justices did not view accommodation for religious observance as a means of preventing religious discrimination but treated accommodation as a gift or benefit to religious employees. The Justices could not reconcile accommodation for religion with the standards the Court was then applying to laws or practices that provided even a minimal incidental benefit to religion. In colloquy with counsel the Justices raised highly improbable far-fetched concerns based on this mistaken perception

(3) Today's Court has categorically rejected the Establishment Clause misgivings expressed by Justices in 1977. The Court's most recent Establishment Clause decisions have sustained conduct protected by the Free Exercise Clause against challenges made under the Establishment Clause.

(4) Justice Marshall, joined by Justice Brennan, dissented in *Hardison* with an opinion that this Court should now endorse. Justice Marshall's opinion noted that the majority's construction of the reasonable accommodation provision in Section 701(j) "effectively nullif[ied]" it. He "seriously question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost."

(5) In 2020 the Court issued an opinion in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), that interpreted the word "sex" as enacted in 1964 to include sexual orientation and conduct attributable to an individual's sexual orientation. This was an expansive interpretation of a word that was indisputably limited in 1964 to "biological distinctions." It is now read more broadly than when originally enacted. By the same token contemporary construction of the word "religion," also enacted in 1964, should today be interpreted to protect religious observance and practice when it can be reasonably accommodated.

ARGUMENT

I.

HARDISON WAS ARGUED AND DECIDED DURING A PERIOD WHEN THE COURT'S PARAMOUNT CONCERN WAS PREVENTING ANY GOVERNMENT BENEFIT TO RELIGION

The *Hardison* case was briefed, heard, and decided at a time when most Justices treated the Establishment Clause as a constitutional barrier against the slightest form of governmental benefit to a church or to any religious institution.

(1) In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court applied the three-part Establishment Clause test that had been articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that had been reaffirmed in *Public Education & Liberty v. Nyquist*, 413 U.S. 756 (1973), to invalidate the loan of instructional materials to nonpublic schools because of the "predominantly religious character" of the beneficiary schools.

(2) On November 2, 1976, the Court affirmed by equal division (Justice Stevens not participating) a decision of the Sixth Circuit that had sustained the constitutionality of Section 701(j) – the 1972 religious accommodation provision – against a challenge under the Establishment Clause. *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976), *affirming Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). This indicated that four unidentified Justices had concluded that the statutory duty to make a reasonable accommodation for employees' religious

observance impermissibly advanced religion in violation of the Establishment Clause.

(3) Trans World Airlines filed an amicus brief supporting Parker Seal's constitutional challenge and noting the pendency of its own litigation with Hardison. Certiorari was granted in the *Hardison* case (429 U.S. 958) on November 15, 1976, two weeks after the order in *Parker Seal* was announced.

(4) A majority of the 1977 Court was preoccupied with the Establishment Clause. *Hardison* was sandwiched between *Meek v. Pittenger* decided in 1975 and *Wolman v. Walter*, 433 U.S. 229 (1977), which was decided one week after *Hardison.* The *Wolman* decision prioritized the Establishment Clause. Again applying the *Lemon v. Kurtzman* standards, Justice Blackmun's majority opinion in *Wolman* held that government funding of instructional materials and equipment to be loaned to students in nonpublic schools was an impermissible "grant in kind of goods furthering the religious enterprise." 433 U.S. at 251.

(5) Both *Meek v. Pittenger* and *Wolman v. Walter* were definitively and explicitly overruled in *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), with Justices O'Connor and Breyer joining in the repudiation of these decisions. 530 U.S. at 837. This amounted to a total rejection of the attitude that controlled the Court's skeptical view in 1977 of the reasonable religious-accommodation obligation of Section 701(j). The Court's paramount concern almost half a century ago with preventing government from

conceivably benefiting religion is demonstrably obsolete today.

II.

DURING THE ORAL ARGUMENT IN *HARDISON* MANY JUSTICES PORTRAYED RELIGIOUS ACCOMMODATION AS A BENEFIT TO RELIGION

The transcript of the *Hardison* oral argument proves that the Court's Justices in March 1977 believed that the Establishment Clause was violated if religious practice was afforded any benefit, no matter how slight, that was not enjoyed by others.[3] At the very outset of the argument TWA's attorney described the first issue in the case as "the extent of the protection under the Establishment Clause, in so far as whether a person can, in effect, be taxed or forced to spend money or be deprived of work coverage or nondiscriminatory work rules so that another may practice his religion." *Transcript* 4.

Justice Lewis Powell revealed his view that accommodation amounted to unconstitutional preferential treatment of religion with his question to Hardison's counsel (*Transcript* 45):

> What's your answer to – what is the employer supposed to say to the – say ten people come in and say, "We don't want

[3] We quote in this brief from the official 66-page transcript of the argument available from the Supreme Court Library. OYEZ also provides a transcript which identifies speaking Justices. We rely in this brief on those identifications. The Court's oral argument transcript is hereinafter referred to as "*Transcript* __."

> to work on Saturday, we want to go to the football game and watch our children play, but we'll work on Sunday; and you let these religious practitioners off on Saturday, now let us off". What is he supposed to say to them?

Hardison's counsel responded that "they are not covered by this statute." Justice Byron White, the author of the *Hardison* majority opinion and its *de minimis* dictum, then said:

> So you do say that the employer – that Congress is perfectly justified in requiring the employer to give benefits to the religious practitioner that he will not give to others?

Justice White followed up (*Transcript* 46):

> Well, why isn't it a benefit? They are getting off on Saturday to practice their religion.

Justice William Rehnquist then noted that the statute was not "neutral," and Justice White added:

> Well, at least there are some people that the employer is required to let off on Saturday and other people that he is not required to let off on Saturday?

Justice White continued along the same line (T*ranscript* 47):

> Well, there isn't any circumstances as I understand your position, no

> circumstances at all. He must (emphasis original) let the people off on Saturday.
>
> * * * * *
>
> So if it costs them a little bit, it's all right; but if it costs them a lot, it's not all right?
>
> So it's just a reasonable thing.

At the conclusion of the argument of Hardison's counsel, Justice Powell asked a manifestly unreal hypothetical question that revealed his paramount concern that accommodation for religious observance was a prohibited benefit to religion (*Transcript* 47-49):

> May I put a hypothetical: let's assume that the Worldwide Church of God – and this is a hypothetical – it does use the radio extensively, as I understand it; let's assume that in addition to its basically religious emphasis, that it sought to persuade people to become converts by emphasizing the advantage of not having to work on Saturday, and the protection afforded by Title VII in that respect.
>
> If you had a case with extensive emphasis on that advantage, would you view it differently from the way you view your case today?
>
> * * * * *
>
> [I]f the church membership were very substantially augmented by the popular appeal that its members would not have to work on Saturday, do you think there

> would be any advancing of religion in those circumstances?
>
> * * * * *
>
> Even if memberships, say, were increased by significant numbers, a million people responded to an intensive radio campaign, "Join our church, you won't have to work on Saturday"?

These excerpts demonstrate that Justices White, Powell, and Rehnquist, viewed the religious accommodation provision as a breach of the Establishment Clause because it benefited religionists. That concern was rejected in 2000 when *Meek v. Pittenger* and *Wolman v. Walter* were explicitly overruled. It conflicts squarely with the view of a majority of the current Court as expressed in its most recent Religion Clause decisions.

III.

THE COURT'S RECENT RELIGION CLAUSE DECISIONS CATEGORICALLY REJECT THE 1977 PERCEPTION THAT ANY BENEFIT TO RELIGION IS BARRED BY THE ESTABLISHMENT CLAUSE

In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Court compellingly rejected the concept that the Establishment Clause overrides the free exercise of religion. Both *Kennedy* and *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), demonstrate that the current Court will not approve the once-prevailing rule that the Establishment Clause is violated by "anything an objective observer could

reasonably infer endorses or 'partakes of the religious.'" *Kennedy, supra,* 142 S. Ct. at 2427, quoting from *Van Orden v. Perry*, 545 U.S.677, 699 (2005) (Breyer, J.) That was, however, the guiding principle in 1977. It explains why a majority of the 1977 Justices cautioned in the *Hardison* dictum against any accommodation for religious observance that was more than *de minimis*. Justice Gorsuch noted this consequence of the obsolete emphasis on prohibiting any benefit to religion when he observed: "To avoid Establishment Clause liability, [government officials] sometimes felt they had to discriminate against religious speech and suppress religious exercises." *Shurtleff, supra,* 142 S. Ct. at 1605.

The transcript of the oral argument in *Hardison* demonstrates that many of the Court's Justices in 1977 accepted a notion that is now decisively repudiated – *i.e.,* that "a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy, supra,* 142 S. Ct. at 2432. "Phantom constitutional violations" were hypothetically suffered by TWA's non-religious employees who preferred to avoid Saturday employment for wholly secular reasons (illustrated by Justice Powell's improbable hypothetical question). A majority of the 1977 Court chose to allay these "phantom violations" by nullifying Section 701(j).

Moreover, this Court's conclusive burial of the *Lemon v. Kurtzman* three-part Establishment Clause criterion in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427-2428 (2022), confirms that there has

been a major transformation of constitutional doctrine.

IV.

JUSTICE MARSHALL, JOINED BY JUSTICE BRENNAN, DISSENTED IN *HARDISON* WITH AN OPINION THAT THIS COURT SHOULD NOW ENDORSE

Justice Thurgood Marshall, joined by Justice William Brennan dissented vigorously from the majority's conclusion in *Hardison* and expressed particularly severe criticism of the *de minimis* dictum. Justice Marshall prophetically said in his 1977 dissent that the *Hardison* decision "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86. The distressing line of judicial decisions cited by petitioner and by the *amici* in this case and in the many past efforts to have the Court revisit the *Hardison* dictum prove the accuracy of the Marshall-Brennan prediction.

Justice Marshall reviewed the legislative history of Section 701(j) which was explicitly intended "to protect Saturday Sabbatarians like [Senator Randolph] from employers who refuse 'to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.'" Justice Marshall observed that the Court had recognized that there were "no Establishment Clause problems in exempting religious observers from state-imposed duties," and that the same constitutional principle should control if private employers must "do the same

with respect to obligations owed the employer." 432 U.S. at 91.

Justice Marshall reserved particularly harsh condemnation for the *de minimis* dictum. He said, "I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost,' . . ." 432 U.S. at 92, n. 6.

Today's Court should approve and adopt the Marshall-Brennan dissent and repudiate the *Hardison* opinion and its *de minimis* dictum.

V.

THE 1977 *HARDISON* DICTUM HAS BEEN SUPERSEDED AND EFFECTIVELY OVERRULED BY THE 2020 DECISION IN *BOSTOCK v. CLAYTON COUNTY*

This Court's June 2020 decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), held that the word "sex" in Title VII of the Civil Rights Act as enacted and signed in 1964 includes "norms concerning gender identity and sexual orientation" and not merely – as universally believed in 1964 – "biological distinctions between male and female."

Just as "sex" was expansively construed in 2020 to encompass sexual orientation and conduct attributable to sexual orientation, the word "religion" in Title VII, as enacted and signed in 1964, should now be held to include (as Section 701(j) explicitly provides) all aspects of religious observance and practice.

The *de minimis* standard articulated in the *Hardison* majority opinion does not apply to the

prohibition against employment discrimination on account of "race, color, ..., sex, or national origin." By the same token, it should not govern discrimination on account of "religion."

Before Section 701(j) was proposed as an amendment to the Civil Rights Act in 1972, the Court accepted briefing and argument on the question whether an employer's refusal to make a reasonable accommodation for an employee's religious observance violated the prohibition against discrimination on account of "religion." The National Jewish Commission on Law and Public Affairs, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith submitted an *amicus curiae* brief in which the first argument was "Petitioner's Observance of a Weekly Day of Rest Is 'Religion' Within the Meaning of the Civil Rights Act of 1964." The United States and the American Jewish Congress supported this position in an *amicus* brief.

Following oral argument in *Dewey v. Reynolds Metals Co.*, the Court issued the following order on June 1, 1971: "The judgment is affirmed by an equally divided Court." *Dewey v. Reynolds Metals Co.,*402 U.S. 689 (1971). The equal division of the Justices on this issue prompted Sabbath-observers to lobby successfully for the amendment offered by Senator Jennings Randolph and adopted as Section 701(j). See Lewin, "A Battle Won on Purim," The Jewish Press. April 7, 1972, pp. 17-26.[4]

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[4] https://www.jewishpress.com/sections/features/a-battle-won-on-purim/2023/02/27/

The view of four Justices of the Court in 1971 that the word "religion" – even if not further defined – must be construed, even without the additional definition of Section 701(j), as including all aspects of religious observance and practice so as to require employers to make reasonable accommodation for religious observance of employees now has the added approval of the Justices who joined the majority in the 2020 *Bostock* decision Consequently, this Court should overrule the *Hardison* decision and repudiate finally and conclusively its *de minimis* dictum.

CONCLUSION

For the foregoing reasons the Court should reverse the decision of the Court of Appeals for the Third Circuit, explicitly overrule the decision in *Trans World Airlines, Inc. v. Hardison*, and repudiate the *de minimis* standard articulated in the majority opinion.

Respectfully submitted,

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[5] Mr. Lewin presented oral argument in this Court in the *Hardison* case as *amicus curiae* representing the National Jewish Commission on Law and Public Affairs ("COLPA").