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 OF THE THOMAS MORE SOCIETY AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The **Thomas More Society (TMS)** is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Based in Chicago, Illinois, the Thomas More Society defends and fosters support for these causes by providing high quality pro bono legal services from local trial courts to the United States Supreme Court. Throughout its history, the Thomas More Society has worked to eliminate discrimination against persons of faith, and this has included representation of clients in cases brought under Title VII of the Civil Rights Act of 1964.

The **Jewish Coalition for Religious Liberty** (JCRL) is a non-denominational organization of Jewish communal and lay leaders, seeking to protect the ability of Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square in which all supporters of freedom may flourish.

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[1] Pursuant to Supreme Court Rule 37.6, it is stated that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

As originally enacted and as subsequently amended in 1972, Title VII was intended to provide strong protections to workers against discrimination in employment due to an employee's religion. The history of Jewish immigrants to America provides a poignant example of why such protection is vital. The combination of a Monday-through-Saturday work week and "strictly enforced" Sunday closure laws had a particularly devastating effect on the lives of many newly arrived Jewish immigrants. Jonathan D. Sarna, *American Judaism: A History* 162 (2004). "[U]nsympathetic employers" told their Jewish employees, "if you don't come in on Saturday, don't bother coming in on Monday." *Id.* at 162-63; *see also* Jason Despain, *A Peculiar Clause of Political Compromise for California's Religious Minorities*, 21 Rutgers J. L. & Religion 390, 393-94 (2021) (describing how one rabbi's pleas to secure accommodations for Russian Jewish immigrants in West Hollywood "often fell on deaf ears"); *Jews in America: Shabbat as Social Reform (1925)*, Jewish Virtual Library, available at https://www.jewishvirtuallibrary.org/shabbat-as-social-reform-1925 (last visited Feb. 28, 2023) ("Almost no employers—even Jewish employers—honored Saturday as a day of rest.").

Though some Jewish workers "preserve[d] their Sabbath at all costs," many more succumbed to the need "to feed themselves and their families." Sarna, *supra*, at 163. "[T]he decline of Sabbath observance" indicated "spiritual collapse within the Jewish immigrant community." *Id.* at 162. It was, at that

point, unclear whether Judaism could thrive in America.

Title VII with its robust protections and mandatory accommodations seemed like the answer to the fervent prayers of those Jews and the prayers of other people of faith. Unfortunately, this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), caused religion to receive substantially less protection than other statutory bases protected by Title VII, such as race and sex. Indeed, the "*de minimis* standard" adopted in *Hardison* often provides little defense against religious discrimination; and, it has led to results that are inconsistent with the purpose of preventing workplace discrimination on the basis of religious belief and practice. Returning to an understanding of "undue hardship" based in Title VII's text would restore the balance that Congress intended to strike in this area upset by *Hardison*'s atextual and otherwise unsound approach. *Amici* therefore respectfully urge that *Hardison* be overturned.

ARGUMENT

I. RELIGION SHOULD NOT BE TREATED AS A "LESSER" CATEGORY OF PROTECTION UNDER TITLE VII.

The language of Title VII equally protects against discrimination on several bases: "race, color, *religion*, sex, [and] national origin." 42 U.S.C. § 2000e-2(a) (emphasis added). And yet, one of these categories—religion—is currently given less

protection than the others. The case currently before the Court presents an ideal opportunity to remedy this unjustifiable difference in treatment.

That religion was meant to be given the same level of protection as, for example, race or sex should have been obvious enough from the plain text of Title VII when it was enacted, given that all of its protected categories are listed in the very same sentence. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also* A. Scalia & B. Garner, READING LAW 167 (2012) ("The text must be construed as a whole"); *cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (2015) ("[A] word is known by the company it keeps (the doctrine of *noscitur a sociis*).").

In 1972, Congress made its intended scope of protections even clearer. It added definitional language making it indisputable that religious *practices* were protected as much as an employee's religious beliefs: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). By amending Title VII in this manner, Congress ensured that "religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated."

EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

Despite this legislative action to protect against religious discrimination, this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), reduced the level of protection for religion under Title VII. In *Hardison*, the Court clawed back the protections enacted by Congress and replaced them with the *de minimis* standard. *See Hardison*, 432 U.S. at 84 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.").

The "*de minimis* standard" is not found in Title VII, but it has nonetheless become the touchstone for resolving religious discrimination cases. Petitioner Groff has explained well the manner in which this approach deviates from the text and uses a flawed approach to statutory interpretation. These *amici* agree with that analysis.

Courts after *Hardison* embraced its articulation of the *de minimis* standard, even though the language was *dicta*. *See Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 787 n.* (2015) (Thomas, J., concurring in part and dissenting in part) ("Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline . . . *Hardison*'s comment about the effect of the 1972 amendment was thus entirely beside the point."); s*ee also Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting) ("The Court announced that standard in a single sentence

with little explanation or supporting analysis. Neither party before the Court had even argued for the rule."). Thus, even though the legal prohibitions under Title VII against other forms of discrimination in employment remain vigorous, the prohibition against discrimination on the basis of religion is quite literally *de minimis*.

II. THE *DE MINIMIS* STANDARD HAS UNDERMINED THE SCOPE OF RELIGIOUS LIBERTY PROTECTIONS UNDER TITLE VII BY PERMITTING THE MOST MINOR OF INCONVENIENCES TO QUALIFY AS AN "UNDUE HARDSHIP" FOR AN EMPLOYER.

Post-*Hardison* decisions are hard, if not impossible, to square with the idea that Title VII protects against religious discrimination in the workplace. *See, e.g., Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., with Thomas and Gorsuch, J.J., concurring in the denial of certiorari) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship[.]'"); *see also Hardison*, 432 U.S. at 92 n.6 (calling it "seriously question[able] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost'") (Marshall, J., dissenting). Examples of such cases are as follows:

- It has been held that requiring an employer to shift a meal break for Muslim employees during *Ramadan* would be an

undue hardship. *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018).

- It has been held that requiring an employer to provide an employee *any* space in an office building in which to pray would be an undue hardship. *Farah v. A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, 2013 U.S. Dist. LEXIS 164930, at *23-25 (D. Kan. Nov. 20, 2013).

- It has been held that a "*mere possibility* of adverse impact" from adjusting work schedules constitutes an undue hardship. *George v. Home Depot*, 2001 U.S. Dist. LEXIS 20627, at *28 (E.D. La. Dec. 6, 2001) (citations omitted).

- It has been held that an employer could reject outright, and not be required to explore at all, a female employee's proposed alternative of an ankle-fitting skirt rather than pants in a factory setting. *EEOC v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C H/G, 2001 U.S. Dist. LEXIS 15621, at *41-42 (S.D. Ind. Aug. 27, 2001).

- It has been held that the possibility an accommodation may create "hard feelings" among coworkers was sufficient justification to deny an accommodation. *Leonce v. Callahan*, No. 7:03-CV-110-KA, 2008 U.S. Dist. LEXIS 228, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008).

Such cases illustrate the extreme application given to the *de minimis* standard by many courts, which ultimately results in exclusion of a certain employees from the workplace because of their religious beliefs and which cannot be reconciled with Title VII's text or purpose.

Recognition by this Court of the proper textually-based "undue hardship" standard, rather than *Hardison*'s aberrant reading of Title VII, would restore prohibitions on religious discrimination to their proper place of equal station in the scope of Title VII's protections.

III. THIS COURT SHOULD RETURN TO A DEFINITION OF "UNDUE HARDSHIP" THAT IS FAITHFUL TO THE TEXT OF TITLE VII AND THUS SHOULD GIVE EFFECT TO THE BALANCE CONGRESS ATTEMPTED TO STRIKE FOR AMERICA'S DIVERSE AND PLURALISTIC SOCIETY.

A. *Hardison* Improperly Tips the Scales Against Employees of Faith.

In Title VII, Congress struck a legislative balance between the employer's business interests and the interests of an employee to be free of discrimination based on religion. *See* 42 U.S.C. § 2000e(j). "The ultimate tragedy . . . [of *Hardison* is that] one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded." *Hardison*, 432 U.S. at 96 (Marshall, J.,

dissenting). As such, that balance was, and continues to be, upset.

A return to a textually faithful interpretation would hardly open up the floodgates of litigation. First, Title VII itself only applies to employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Moreover, to trigger protection, an employee's religious beliefs must be "sincere." *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65-66 (1986). Claims of discrimination under Title VII generally must be administratively exhausted through the EEOC, and the time for filing with the EEOC is as brief as 180 days in some instances. *See* 42 U.S.C. § 2000e-5(b), (e)(1). The total amount of compensatory and punitive damages available under Title VII is also capped based on the number of individuals employed. 42 U.S.C. § 1981a(b)(3).

The *de minimis* standard from *Hardison*, however, places too much control in the hands of employers. Compared to the employee, an employer has superior knowledge of how its business runs, and so employers are all too able to proffer ostensibly reasonable sounding, but pretextual justifications, for their rejection of proposed accommodations. *Cf. Davis v. Fort Bend Cnty.*, 765 F.3d 480, 488 (5th Cir. 2014) (reversing District Court grant of summary judgment on issue of undue hardship). Courts have come close to saying as much: "[Employer] was in a better position than [Employee] to know whether [an accommodation could be made and] . . . the Court does not substitute the speculation of an employee for the judgment of an employer." *Farah*, 2013 U.S. Dist. LEXIS 164930, at *24.

The sting of *Hardison* is particularly painful to working-class Americans who belong to minority religious groups. Petitioners in recent cases asking this Court to overrule *Hardison* have included a Jehovah's Witness service dispatcher; a Sabbatarian industrial hygienist; a Sabbatarian trainer at Walgreens; and a Sabbatarian who hoped to become an assistant manager at Walmart.[2] Calls to overrule *Hardison* have come from Jews, Sikhs, Hindus, Adventists, and Lutherans, among others. *See generally, e.g.*, Br. for Jewish Coalition for Religious Liberty; The Coalition for Jewish Values; The Sikh Coalition; The International Society for Krishna Consciousness; Ethics & Religious Liberty Commission of the Southern Baptist Convention; The Lutheran Church-Missouri Synod; and Church Of God In Christ, Inc. as *Amici Curiae* Supporting Petitioner, *Dalberiste v. GLE Assocs., Inc.*, No. 19-1461 (July 31, 2020).

One can also look to the lower courts for examples of *Hardison*'s pernicious effect on the lives of working class Americans including: Muslim factory production workers, *Mohamed v. 1st Class Staffing, LLC*, 286 F. Supp. 3d 884 (S.D. Ohio 2017); a Pentecostal juvenile detention officer, *Finnie v. Lee*

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[2] *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (Apr. 5, 2021) (No. 19-1388); *Dalberiste v. GLE Assocs., Inc.*, 814 Fed. App'x 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (Apr. 5, 2021) (No. 19-1461); *Patterson v. Walgreen Co.*, 727 F. App'x 581 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (Feb. 24, 2020) (No. 18-349); *EEOC v. Walmart Stores East, L.P.*, No. 20-1419, 2021 U.S. App. LEXIS 33263 (7th Cir. June 4, 2021), *cert. granted, vacated, and remanded for further consideration by Hedican v. Walmart Stores East, L.P.*, 142 S. Ct. 1357 (2022)

Cty., Miss., 907 F. Supp. 2d 750 (N.D. Miss. 2012); a Jewish dump truck driver, *E.E.O.C. v. Thompson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d 738 (E.D.N.C. 2011); a Russian Orthodox Christian hotel kitchen mechanic, *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010); and an Adventist part-time grocery store clerk, *Prach v. Hollywood Supermarket, Inc.*, No. 09-13756, 2010 U.S. Dist. LEXIS 88738 (E.D. Mich. Aug. 27, 2010). The list goes on.

And this list excludes the untold number of Americans who—understanding, or informed by counsel, that *Hardison* has stacked the deck against them—capitulate rather than challenge a discriminatory practice. *See, e.g.,* Br. for Appellant at 13, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (No. 85-993) (arguing that an Adventist fired for keeping her Sabbath should not be denied unemployment benefits because *Hardison* already foreclosed an employment discrimination claim).

Hardison permits employers to "compel" workers from minority religions "to make the cruel choice of surrendering their religion or their job." 432 U.S. at 87 (Marshall, J., dissenting). And it permits them to do so over relatively small matters. That is, *Hardison* allows the employer to turn its molehill into the employee's mountain. For example, employers may discriminate against religious employees for requesting minor departures from a dress and appearance policy, *e.g., Cloutier v. Costco Wholesale Corp.,* 390 F.3d 126, 134-37 (1st Cir. 2004), for requesting time off before completing the

new-hire probationary period, *Thomson Contracting, Grading, Paving, & Utils., Inc.*, 793 F. Supp. 2d at 741, or for requesting an accommodation that might create "hard feelings" among coworkers if granted, *Leonce*, No. 7:03-CV-110-KA, 2008 WL 58892, at *5 (N.D. Tex. Jan. 3, 2008). *Hardison* itself presents a prime example of this: a global airliner fired the respondent over an accommodation request that would have cost $150 over three months. 432 U.S. at 92 n.6 (Marshall, J., dissenting).

Each of these situations creates a minor inconvenience for the employer. But for an employee, her very conscience and relationship with her creator is at stake. Small wonder that many employees decide to honor their faith despite the financial hardships that result. *E.g., Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138 (1987) ("[T]he general manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company. When Hobbie refused to do either, [the company] discharged her."); *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (explaining that Adell Sherbert was fired for keeping her Sabbath and could not find work because of her Sabbath observance); *cf.* James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in 5 *The Founders' Constitution* 82, 82 (arguing that the demands of faith are "precedent, both in order of time and in degree of obligation, to the claims of Civil Society").

Consider Sabbath observance. The Torah and Oral Law forbid Orthodox Jews working on the

Jewish *Sabbath* (sundown on Friday to nightfall on Saturday) and designated Jewish holy days. *See generally* 3 Rabbi Yosef Karo, *Shulchan Aruch Orach Chayim* 242-365 (1977) (Sabbath prohibitions); *id.* at 495-529 (holy day prohibitions); *see also* Aryeh Kaplan, *Sabbath: Day of Eternity*, in 2 The Aryeh Kaplan Anthology 107, 128 (1998). These restrictions extend beyond paid employment to encompass thirty-nine categories of prohibited activity. *See The 39 Categories of Sabbath Work Prohibited by Law*, Orthodox Union (July 17, 2006), *available at* https://www.ou.org/holidays/shabbat/the thirty_nine_categories_of_sabbath_work_prohibited_ by_law/ (last visited Feb. 28, 2023). "The Sabbath is the most important institution of Judaism. It is the primary ritual, the very touchstone of our faith." Why the Sabbath?, Orthodox Union (July 17, 2006), *available at* https://www.ou.org/holidays/why_the sabbath/ (last visited Feb. 28, 2023). The Torah commands severe punishment for those who violate the Sabbath. *See Exodus* 31:14 ("You shall keep the Sabbath, for it is holy to you; anyone who profanes it shall be put to death. For whoever does any work on that day shall be cut off from his people."). The gravity of this obligation commands that half measures cannot reasonably accommodate Sabbath observance. It is no accommodation at all to relieve the Jewish worker of only some types of prohibited work or give her the day off on alternating Saturdays. The choice between employment and the Sabbath for that person is illusory—the Jewish employee must be willing to lose her job rather than violate the Sabbath. *See* 3 Karo, *supra*, at 308.

This is precisely the dilemma the amendment to Title VII sought to avoid. Though Sabbath accommodation claims arise most frequently, Orthodox Jewish employees may also require accommodation from dress codes and grooming policies. Jewish men and married women wear head coverings, Aron Moss, *Why Do Jewish Women Cover Their Hair*, Chabbad.org, *available at* https://www.chabad.org/theJewishWoman/article_cdo/aid/336035/jewish/Why-Do-Jewish-Women-Cover-Their-Hair.htm (last visited Feb. 28, 2023), in the case of a *yarmulke* or *kippah*, to express submission to the Almighty, Sampson Raphael Hirsch, *Hirsch Siddur* 14 (1969). Orthodox and Hasidic Jewish males also let their sideburns grow to a certain length, and some wear beards to honor the commandment of *Leviticus* 19:27: "You shall not round off the edge of your scalp and you shall not destroy the edge of your beard."

Of course, Sabbath observance is not unique to the Jewish faith. Muslims and some Christian denominations require similar weekly accommodations. *Jumu'ah* is "a weekly Muslim congregational service . . . commanded by the Koran and . . . held every Friday after the sun reaches its zenith." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 345 (1987) (citing Koran 62:9-10). Believers are commanded to "leave trade" and attend these weekly services. Koran 62:9. Seventh Day Adventists observe the Sabbath from sundown Friday until sundown Saturday and cannot work during that time. *What Adventists Believe About the Sabbath*, Seventh-day Adventist Church, *available at*

https://www.adventist.org/the-sabbath/ (last visited Feb. 28, 2023).

As with Sabbath observance, other religious traditions also command certain forms of dress and grooming. Many Muslims believe men must grow beards if they are able, *see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (explaining that refusal to grow a beard "is a major sin" in that religious tradition), and don a *takia* to symbolize that the "wearer is in constant prayer," *see In re Palmer*, 386 A.2d 1112, 1113 (R.I. 1978). Sikhs must maintain five articles of faith that represent the fundamental tenets of their religion. *Identity*, Sikh Coal., *available at* https://www.sikhcoalition.org/about-sikhs/identity/ (last visited Feb. 28, 2023). One of these articles of faith is unshorn hair, or *kesh*. *Id.* Many Sikhs wear a turban as well to "assert[ ] a public commitment to maintaining the values and ethics of the tradition, including service, compassion, and honesty." *Id.* These practices can be accommodated, often with little cost to the employer. But under *Hardison*, employers need not take on that minor inconvenience or risk offending customers. Until Title VII is afforded its plain meaning, Jews, Muslims, Sikhs, Adventists, Witnesses, and many others will continue to endure religious discrimination that forces them to choose between irreconcilable conflicts with their faith and their ability to earn a living.

B. Societal Changes Make the Need for Title VII's Protections All the More Necessary.

At one time, it was easy for this Court to remark that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Two decades ago, though, one historian observed: "Although the United States is far more religious than most European countries, it is also less religious than it once was." Gertrude Himmelfarb, *One Nation, Two Cultures* 96 (2001). That trend brought a host of other societal changes. *Id.* at 96-98. Recent polls confirm that this move away from religion continues. *See, e.g.,* "In U.S., Decline of Christianity Continues at Rapid Pace," Pew Research Center (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ ("[T]he religiously unaffiliated share of the population, consisting of people who describe their religious identity as atheist, agnostic or 'nothing in particular,' now stands at 26% [in 2019], up from 17% in 2009."); *see also* Scott Neuman, "Fewer Than Half of U.S. Adults Belong to a Religious Congregation, New Poll Shows," NPR.org (Mar. 30, 2021), https://www.npr.org/2021/03/30/982671783/fewer-than-half-of-u-s-adults-belong-to-a-religious-congregation-new-poll-shows ("Fewer than half of U.S. adults say they belong to a church, synagogue or mosque, according to a new Gallup survey that highlights a dramatic trend away from religious affiliation in recent years among all age groups.").

With changes in the views of the population at large, the risk that religious practices will be excluded from the workplace increases, and in the

process marginalization of people of faith becomes more likely. *Cf. Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2269-71 (2019) (Alito, J., concurring) (discussing history of Blaine Amendments enacted in waive of animus toward Catholic immigrants). Ultimately, the *de minimis* standard effectively casts aside a central purpose of Title VII—the goal of protecting persons based on religion. As the nation's population becomes more pluralistic and generally less religious, there arise more and more opportunities for religious beliefs to conflict with an employer's requirements. When that happens, employees will be faced with a choice of adhering to their religious beliefs, but losing their jobs, versus keeping their jobs at the expense of violating their religious beliefs. Overturning *Hardison* can help alleviate that tension by adhering to the will of Congress, as expressed in Title VII.

CONCLUSION

Hardison has become an excuse for employers to evade their obligations under Title VII and for reviewing Courts to adopt a position of judicial inertia. Overturning *Hardison*, however, would facilitate the protection of religion as was intended by Congress in enacting Title VII.

For the above-stated reasons, these *amici* respectively submit that *Hardison* should be overruled. Therefore, the Court should reverse the grant of summary judgment for Respondent and direct entry of summary judgment for Petitioner.

Respectfully submitted,

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