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* FOR THE CENTER FOR INQUIRY AND AMERICAN ATHEISTS, INC. IN SUPPORT OF RESPONDENTS

NICHOLAS J. LITTLE
CENTER FOR INQUIRY
1629 K. St NW, Suite 300
Washington, D.C. 20006
(202) 734-6494 ext 203
nlittle@centerforinquiry.org

GEOFFREY T. BLACKWELL
AMERICAN ATHEISTS, INC.
2001 Columbia Pike
Suite 212
Arlington, VA 22204
(908) 276-7300, ext. 310
legal@atheists.org

EDWARD TABASH
Counsel of Record
CENTER FOR INQUIRY
1500 West Olympic Boulevard
Suite 400
Los Angeles, CA 90064
(310) 279-5120
etabash@centerforinquiry.org

Counsel for Amici Curiae

March 30, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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STATEMENT OF INTEREST[1]

The Center for Inquiry (CFI) is a nonprofit educational organization dedicated to promoting and defending science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services, and other activities—including litigation—CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics. CFI advocates for public policy rooted in science, evidence, and objectivity and works to protect the freedom of inquiry that is vital to the maintenance of a free society that allows for reasoned exchange of ideas about public policy.

American Atheists, Inc., is a national 501(c)(3) civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected. American Atheists opposes religiously motivated discrimination and regularly advocates for equal application of the law and equal access to the courts.

Amici represent the rapidly growing population of atheists, agnostics, freethinkers, and other nonbelievers in the United States. If this Court overturns the ruling

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

of the 3rd Circuit and grants Sabbatarian religious believers priority in selecting work schedules, it is those represented by amici who will bear the burden and who will be forced to work less desirable weekend shifts.

SUMMARY OF ARGUMENT

Petitioner Gerald Groff comes to this Court asking for a reversal of the fundamental constitutional agreement that has served the United States well for more than two centuries. Groff, an employee of the United States Postal Service, asserts that his religion requires that he not work on Sundays. After his employer offered to allow him to exchange shifts to permit him to follow his religious preferences, Groff and his managers were unable to find colleagues who were willing to work his Sunday shifts. As a result, he repeatedly failed to show up for his scheduled shifts. He was then disciplined, resigned from the U.S.P.S., and brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, claiming religious discrimination.

First, Groff's claim seeks to place his religious beliefs over and above both the rights of his employer to organize an effective and efficient shift schedule to meet its staffing needs and, more importantly, the rights of his coworkers to have equal consideration for their interests. Groff insists that his religious needs preempt any and all reasons his coworkers may have to want to have Sundays off work. Were this Court to grant the requested relief, it would fundamentally undermine the basic principle of the Establishment Clause—that the government shall not favor one religion over another, nor shall it favor religion over nonreligion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Many religions followed in this pluralistic nation have no Sabbath. The nonreligious also have no special holy day. However, we all live in a world of weekends, involving days where children are not in school and where society operates at a different pace. Groff insists that his religious claim on those special days automatically prevails, and his colleagues must conform their lives and the lives of their families to accommodate him.

To grant such a preference for religious belief violates the First Amendment. Even if one were to permit religious-based exemptions, as this Court has sometimes allowed, to mandate exemptions where the cost of such differential treatment is born by third parties is unconstitutional. Permitting religious use of peyote, for example, represents a religious-based exemption that privileges followers of that religion, but the cost of that exemption falls on the government.[2] If employers are required to compel other employees to cover the Sabbath shifts of workers such as Groff, then the burden is not assumed by the government but instead transferred from the Sabbatarian workers to their colleagues.

To permit such favoritism runs contrary to the clear meaning of the First Amendment. It sends a clear message to both nonbelievers and to adherents of religions without Sabbaths that they are inferior under the law and that their families, desires, and activities must take second place to the religious beliefs of their colleagues. It does what this nation was

[2] Amici note that all privileges given to religion are unconstitutional. If peyote can be used for religious ceremonies, it should also be permitted to be used by the nonreligious.

founded to prevent. It creates a privileged caste based on religion.

Second, while the notion of weekends may have emerged as a result of religion, they have become equally vital to the secular aspects of life. From shopping with one's partner or coaching soccer practice for the children, to attendance at an NFL game, the weekends are when, by and large, recreational and family activities are enjoyed by the nonreligious as well as the religiously devout.

Third, contemporary research points to the rapid growth of the nonreligious in American society and to increased diversity among religious believers. As the percentage of nonbelievers grows in the workforce, so does the number of workers who may be willing to work others' scheduled Sabbath shifts. But such coverage for a coworker must be voluntary. Otherwise it is both unconstitutional and unfair. Discrimination against the nonreligious is already rife in the American workplace. What Groff seeks is to magnify this discrimination to benefit himself.

Fourth, not only is such discrimination in favor of a religious subset unfair and unconstitutional, it is unworkable given the structure of society and the decisions of this Court. A ruling for Groff will erode the authority of employers to set work schedules as needed for their businesses and will set aside long-negotiated seniority rules and other collectively bargained accords. Moreover, it singles out for lesser treatment those nonbelievers who are honest about their lack of religious faith. As this Court made clear in its decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014), it is not the state's role to second guess religious beliefs. Where an employee claims a religious requirement to avoid a particular shift, the employer

can neither legally nor practically investigate whether that employee does, in fact, have such a religious requirement. The nonreligious who refuse to lie, and thereby refuse to claim an equivalent religious need for time off, will be compelled to sacrifice their time with family and friends.

If this Court grants such a privilege to religious claimants, it will not only be abandoning decades of jurisprudence prohibiting the shifting of burdens onto third parties, it will also be abandoning the core of the First Amendment.

ARGUMENT

I. THE RELIEF SOUGHT BY PETITIONER IS CONSTITUTIONALLY FORBIDDEN

A. The Constitution Forbids Favoring Particular and All Religions

While the case before the Court focuses on the specific interpretation of the "undue burden" standard in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, it sits within a wider question of great importance: the protection given to religious expression and the required equality of treatment for all points of view on matters of religion, which are central to the Constitution. The constitutional protection of religious *belief* is an absolute one, but this Court has long recognized that it does not mandate absolute protection of the *actions* of an individual. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022) ("While individuals are certainly free *to think* and *to say* what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to act* in accordance with those thoughts.") (emphasis in original). It is the function of our constitutional system of government to balance

our personal rights with the rights of third parties whose own rights may be harmed by our actions. *Id.* ("Ordered liberty sets limits and defines the boundary between competing interests.")

Constitutionally protected religious freedom rights do not, as this Court has acknowledged, extend to prevent the government's enacting and enforcing "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a plaintiff's] religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), *citing United States v. Lee*, 455 U.S. 252, 263 n.3 (1982). Such inadvertent conflict between a law that applies to all, and an individual's religious beliefs, is an unavoidable part of living in a modern, diverse society with a functioning government. *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires.")

Title VII, 42 U.S.C. § 2000e *et seq.*, requires employers to grant accommodations to employees so they can follow the requirements of their religious beliefs as long as those accommodations do not create an "undue burden" for the employer.[3] These legislatively created rights to accommodations are distinct from those required by the Free Exercise Clause of the First Amendment. As such, accommodations sought under Title VII are subject to Establishment Clause review by this Court. Congress does not have the authority to violate the Constitution. *Marbury v. Madison*, 5 U.S.

[3] Even absent a third party burden, amici note that Title VII cannot constitutionally grant privilege on the basis of religion over what is available to the nonreligious.

137, 177 (1803) (the Constitution is "superior, paramount law, unchangeable by ordinary means . . . [It is not] alterable when the legislature shall please to alter it.")

The scope of the government-mandated accommodations required by Title VII must not violate the Establishment Clause. This Court has held this constitutional provision to "mandate[] government neutrality between religion and religion, and between religion and non-religion." *Epperson*, 393 U.S. at 104. Just as the government cannot play favorites between religions, or between religion in general and the absence of belief, it cannot require employers to provide favorable treatment to members of some religions over other religious employees or atheists.

Groff's claimed accommodation does precisely that. It would insist that his justification for seeking Sundays off, his Sunday Sabbatarian beliefs held as part of his particular denomination of Christianity, supersedes all other nonreligious reasons employees might have to wish not to work on Sundays.

B. Favoring Religious Employees Violates the Establishment Clause By Imposing Burdens Directly on Third Parties.

This Court has permitted preferential treatment for religious individuals only in situations where such preference comprises the removal of a burden imposed by law, rather than the shifting of that burden to other individuals. For example, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, was held to require that members of a Brazilian church located in New Mexico be granted permission to use a tea brewed from plants unique to the Amazon Rainforest as part of their worship, despite the tea's

containing a hallucinogen controlled under federal law. *Gonzales v. O Centro Espirita Beneficiente União do Vegetal*, 546 U.S. 418, 423 (2006).[4] The ingestion of the drug by the worshippers harmed no third parties. The burden was imposed by the government. It could be lifted by the government without harming others.

Similarly, permitting a Muslim employee to wear a head covering at work, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015), or allowing a Muslim prisoner to wear a short beard, *Holt v. Hobbs*, 574 U.S. 352, 356 (2015), does not shift any burden to a third party.[5] Under the clothing store's "No Hats" policy, other Abercrombie employees could not wear head coverings before the ruling, nor could they after. Likewise, other prisoners required to be clean shaven under the Arkansas Department of Corrections Grooming policy also saw no change to their situation. The religious individual, under Title VII in *Abercrombie & Fitch*, 575 U.S. 768, and under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc, can be accommodated without making others worse off. *Holt*, 574 U.S. at 370 (Ginsburg, J., concurring) ("[A]ccomodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief.")

Groff's employer, the U.S.P.S., sought to accommodate his religious concerns within the framework faced by all employers in our diverse society. It sought to

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[4] Amici do not accept the constitutionality of RFRA, noting that if, for example, a hallucinogenic drug is deemed acceptable for use in religious ceremonies, the constitutionally mandated equal treatment would deem it acceptable for nonreligious purposes.

[5] The absence of third party burdens does not make such preference for religious claims constitutional. *Supra.* n.3.

find other workers willing to cover those shifts Groff felt he could not in good conscience work. But these shifts, being Sunday ones, were seen as less desirable by all workers, religious or not. Such coverage was provided until the coworker who agreed to cover those shifts was injured. Despite the absence of a stand-in, Groff refused to show up on Sundays when scheduled, resulting in progressive discipline. In his stead, Groff's uninjured colleague and the Postmaster were required to work all Sunday shifts during the peak season. *Groff v.* DeJoy, 35 F. 4th 162, 166 (3rd Cir. 2022). After repeated discipline, Groff resigned. *Id.* at 167.

Groff's refusal to work Sunday shifts was far from without cost, both to his coworkers and his employer. As noted above, another worker and a member of management were compelled to work all the Sunday shifts in the peak season against their wishes. The efforts to find coverage imposed a cost, being described by the Postmaster as "not always easy . . . time consuming, and . . . add[ing] to [his] workload." *Id.* at 166. Groff's refusal to work his assigned shifts not only imposed hardship on his coworkers to cover for him, regardless of their plans and wishes, it also "created a 'tense atmosphere'" among his coworkers. *Id.* at 167. Satisfying Groff's religious demands also significantly burdened other workers. Granting his religious-based claim for time off on Sundays "detrimentally affect[ed] others who d[id] not share petitioner's belief." *Holt*, 574 U.S. at 370 (Ginsburg, J., concurring).

Where preferential treatment for the religious is sought, whether under Title VII, RFRA, RLUIPA, or in other situations, and the granting of such preference will leave other individuals who don't share the same belief system in a worse position, this Court has

repeatedly rejected religious claims. It should continue to do so here.

Cases dealing with Sabbath observance have been before this Court before. When presented with a Connecticut law requiring businesses to honor requests from their employees not to work on the Sabbath day of their religion, this Court held that the law violated the Establishment Clause. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In particular, this Court noted that it was the failure to consider the impact on others that made the law unconstitutional, as it took "no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath*." *Id*. at 709 (emphasis added). Accommodating the religious interests of those who sought to take their Sabbath off would create a burden on those who did not share those religious beliefs. Such a rule could not stand, as it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 709-10.

This Court has reached the same conclusion in Title VII employment discrimination cases. 42 U.S.C. § 2000e *et seq*. When a Sabbatarian airline employee claimed the right to an accommodation of his religious requirement for Saturdays off work, this Court rejected his claim. *T.W.A. v. Hardison*, 432 U.S. 63, 85 (1977). While this Court, as here, did not dispute the sincerity of the employee's religious convictions, it noted that there was no requirement to provide such an accommodation, as the effect would have been to "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Id.* at 81.

In a prisoner's case decided under RLUIPA, this Court confirmed that permissive accommodations will be held to be unconstitutional if they create burdens on third parties. When incarcerated members of minority religions sued the Ohio Department of Corrections, claiming a right to accommodations, the court noted that while they were permitted to make such a claim, in analyzing it, "courts must take adequate notice of the burdens a requested accommodation may impose on non-beneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

In *Lee*, 455 U.S.at 254, this Court unqualifiedly enforced the rule that religious accommodations that impose burdens on third parties would not be permitted. In *Lee*, an Amish employer sought an exemption permitting him to avoid paying required social security contributions on behalf of his employees. This Court refused, noting that granting such an accommodation "operates to impose the employer's religious faith on the employees." *Id.* at 261. This Court acknowledged that Congress had exempted self-employed Amish from paying social security contributions for themselves but refused to extend the accommodation to contributions for employees, who might not share the same religious convictions. *Id.*

Similarly, this Court has refused to extend to religious organizations exemptions from complying with minimum wage laws, stating that their religious character does not justify imposing the burden of losing minimum wage protection on their employees. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 306 (1985). When producers of religious publications tried to defend an exemption from sales tax, this Court noted that it would increase the tax burden on secular publications, and thus would violate the

requirement of neutrality central to the Establishment Clause. *Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989) ("Texas' sales tax exemption for periodicals published or distributed by a religious faith . . . lacks sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious 'donors.'") (internal citations omitted).

Federal courts at multiple levels and across a swath of situations where such a question arises, from RFRA and RLUIPA to state laws to Title VII cases, have upheld this basic principle. **Harms may not be imposed upon third parties in an attempt to lessen a burden on an individual's religious practices.** To do so would violate the Establishment Clause and its guarantee of government neutrality between religions and between religion and the absence of religious belief. *Epperson*, 393 U.S. at 104.

Accepting, *arguendo*, that working on Sundays imposes a religious burden on petitioner, as he is unable to follow the precepts of his religion forbidding work on the Sabbath, it is indisputable that exempting him from Sunday work imposes burdens on both his employer and his fellow employees. As the Third Circuit noted, at a minimum, Groff's refusal to work Sundays during the peak package season meant that his coworkers "had to bear the burden of Amazon Sundays alone." *Groff*, 35 F.4th at 166. Despite management's best efforts to find voluntary coverage, "other carriers were called to work at the hub more frequently, which resulted in other employees 'do[ing] more than their share of burdensome work.'" *Id.* at 167 (internal citations omitted). This caused "morale problems" among U.S.P.S. employees. *Id.* Groff's unapproved

absence on Sundays imposed a physical burden on his fellow workers, as it "required the other carriers to deliver more mail than they otherwise would have on Sundays." *Id.* It created discontent in the workforce and sullied relationships between employees and management. *Id.* ("Groff's refusal to report on Sundays created a 'tense atmosphere' among the other RCAs . . . and resentment toward management.") (internal citations omitted). The burden created for his coworkers by Groff's actions was real and significant.

If the U.S.P.S. is required by Title VII to permit Groff, and others like him, to determine their own schedules based on their religious beliefs, regardless of seniority rules and collectively bargained agreements, other employees will suffer a burden. The reason for that burden will be that they are of a different religious persuasion than Groff. This kind of religious favoritism on a small scale causes disruption and sows distrust in the workplace. On a large scale, it leads to exactly the evils of sectarianism that the nation's Founders sought to prevent. Thomas Jefferson, *An Act for Establishing Religious Freedom* (1786) ("Our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry"); James Madison, *Memorial and Remonstrance against Religious Assessments* (1785) ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.") The goal of protecting religious freedom cannot justify imposition of burdens on atheists or those of other religions.

II. SATURDAYS AND SUNDAYS ARE SECULAR TIMES

As noted *supra*, there was an absence of other workers willing to voluntarily cover Groff's Sunday shifts. *Groff*, 35 F.4th at 166. Similarly, the airline employer permitted the union steward to seek volunteers to cover Hardison's Saturday shifts but found no one willing to exchange days. *T.W.A.*, 432 U.S. at 78. There is nothing to suggest that this unwillingness to work on weekends was a result of antipathy toward either petitioners or their religious beliefs. It stemmed from a basic fact: people don't generally want to work on the weekend.

The traditional work week has developed alongside changes in the economic system. In agrarian societies, there was no set number of hours worked and no time clock to punch in and out of work. Indeed, the very notion of time broken up in hours and minutes for most people is one that is tied to the concept of selling not the product of one's work but, rather, the actual work itself.[6] For preindustrial workers, from hunter gathers to subsistence farmers to peasants, work was defined by tasks and followed the rhythm of the weather and the sun, not the ticking of a clock. When work needed to be done, and the environment permitted it to be done, the preindustrial worker worked.

Even as commerce and small scale industry developed, work remained task oriented rather than time oriented. The potter, weaver, and blacksmith threw clay, made cloth, and shod horses in exchange for other necessary goods and services. Where employment as

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[6] E.P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, Past & Present No. 38, 56, 58-60 (Dec. 1967), http://www.jstor.org/stable/649749.

we view it in a modern sense occurred, it happened on a piece rate rather than an hourly rate basis.[7] Workers were paid for what they produced, not how long they worked. This form of production and compensation continued much longer than many would imagine, with variants such as the "butty" system in British coal mines being common in the 1930s.[8] However, with industrialization came the shift from home and workshop production to factories and mechanization. Work was no longer, in many cases, controlled by the environment. Rain did not stop the cotton mills, nor did night once there was artificial lighting. Production could occur all day and year. Workers, who were no longer responsible for producing a particular product worked instead on production lines and machines, contributing a small part to a much larger number of finished products. Their pace was controlled by the employer and the machinery, not by themselves. As such, they were hired to work for set periods of time, or shifts.[9] Industrial workers were not summoned to work by the sun but rather the factory whistle. They did not work until the work was done (for there is no end to mass production work) or until they no longer

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[7] *Id.* at 75.

[8] Under this system, mine owners would contract with individuals for a particular part of the coal seam. The contractor, or buttyman, would be paid by the amount of coal extracted and would hire individuals to mine for him. *Voices in the Coalshed: Butty System*, National Coal Mining Museum, https://www.ncm.org.uk/news/voices-in-the-coalshed-butty-system/ (last visited March 28, 2023).

[9] Thompson, *supra* n.6 at 61. ("Those who are employed experience a distinction between their employer's time and their 'own' time. And the employer must use the time of his labour and see that it is not wasted: not the task, but the value of time when reduced to money is dominant. Time is now currency; it is not passed by spent.")

had light to see but instead until they were sent home by the employer who had purchased a set amount of their time. Unfinished work did not wait for their return but instead was taken over by other workers on another shift.

Even prior to this shift to industrial production, work was not equally distributed through the week. People need time off, and even slaves on American plantations were granted rest, both at the end of a day's work and on a weekly basis.[10] In a Europe of largely established Christian churches, the weekly rest day was Sunday, the Sabbath for most Christians. While Sundays free from work (to the extent that this was possible, as certain agricultural tasks have always needed to be tended to regardless of the day of the week) permitted attendance at religious services for Christians, this was never the sole activity undertaken on that day, nor was it at any stage the sole rationale for the day. Especially by colonial times, and by the time of the founding of the United States, days of rest were used to celebrate and socialize with friends and family, as well as just like today, to catch up on other tasks that had not been done during work days. They served a fundamentally secular purpose, while often coinciding with the Christian Sabbath.

With the growth of industry and hourly wage labor, and the need to formalize work relationships and discipline, the chaotic past gave way to a more structured system, with first Sundays and then soon a half day on Saturdays being granted as rest time.

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[10] Thomas Jefferson Monticello, *Slavery FAQs – Work*, https://www.monticello.org/slavery/slavery-faqs/work/ ("Enslaved workers at Monticello could pursue their own activities in the evening, on Sundays, and on some holidays.") (last visited March 28, 2023).

Labor unions throughout the economically developed world pushed for increases in time off for their members, as well as extra pay in the form of overtime for those who worked longer weeks or who were forced to work at the times that were not considered "normal" work days or hours.

The five-day work week became standardized in American and European industry during the first half of the twentieth century. In 1908, some mills in New England with significant numbers of Jewish employees began setting aside both Sunday and all of Saturday as rest days, allowing both Jewish and Christian employees to observe their Sabbaths.[11] Henry Ford in 1926 moved to a five-day, forty-hour standard work week.[12] During the Great Depression, pressure for workers' rights and a distribution of available work led to the enactment of the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, introducing both the minimum wage and the requirement for overtime pay of "time-and-a-half" for hours worked in excess of forty-four in a week. In 1940, this was amended to forty hours a week, and the United States had arrived (at least for many workers) at the eight-hour day with two-day weekends.

While the roots of the weekend respite may lie in religious observance, this ceased to be the driving force many years ago. Not only would officially designating religious days off be unconstitutional under the Establishment Clause, the weekend is no longer considered by most to be a time of religious reflection and

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[11] Frank T. de Vyver, *The Five-Day Week*, Current History, Vol. 33 No. 2, 223, 223-4 (Nov. 1930).

[12] *Ford Establishes a 5-Day Week After Test: Expects Spur to Labor Will Bring 6-Day Pay*, N.Y. Times Sept. 26, 1926 at 1.1.

biblically mandated avoidance of work. The weekend is a secular rest period. For those families with children, the weekend represents the time that both parents and children are free from the external requirements of work and school. The weekend is when friends and family gather and enjoy each other's company at cookouts and dinners. It is a time when we expect others to be free from work commitments and available to socialize, regardless of their individual religious persuasion. "Superbowl Wednesday" does not have the same ring as "Superbowl Sunday."

The weekend is important to all Americans, not just the religious. As Chief Justice Warren wrote for this Court, Sunday Blue Laws, requiring secular businesses to close on Sundays, were permissible as being secular, rather than religious. *McGowan v. Maryland*, 366 U.S. 420, 444 (1961).[13] This was the case even though "[t]he predecessors of the existing Maryland Sunday Laws are undeniably religious in origin." *Id.* at 446. The First Amendment does not permit the government to prioritize the desires of Christian Americans (or indeed Jewish Americans, or Americans of any other faith) to take time off on the weekend by compelling the nonreligious and those of other faiths to cover their shifts. The First Amendment does not allow the government to treat a religious motive to take Sundays off work as being of greater value than a secular one.

This case does not solely implicate the rights of the religious against the nonreligious. The United States is a religiously pluralistic nation and is becoming more pluralistic each year. It is fundamental that the

[13] Amici maintain that this decision mistakenly permitted religious privilege to continue.

United States is not a Christian nation, nor may it favor the religion of some adherents over the religion of others. While many religions have mandated days of rest, including most Christians on Sunday, Jews on Saturday, and Muslims and the Baha'i on Friday, others have religious days not based on a weekly calendar or have no mandated "days of rest." For millions of American Hindus, Buddhists, Wiccans, and Taoists, along with atheists, the weekend is a secular time. They cannot be compelled to sacrifice their weekend days off to cover for workers of other religions who hold those days as divinely mandated rest times. Such individuals may well choose to exchange shifts with workers who seek weekend days off. However, they cannot be compelled to do so to effectuate a government-mandated religious accommodation without violating the constitutional mandate of neutrality in matters of religion.

When the history of the U.S.P.S. is considered, it becomes apparent that Sunday work and Sunday opening were a staple in the nineteenth century and were permitted up until the practice was ended by Congress in 1912.[14] Post offices earlier had opened on Sundays to allow neighboring residents who only came into town then to pick up their mail.[15] In 1810 Congress legislated, at the request of U.S. Postmaster

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[14] Megan Garber, *The Unlikely Alliance That Ended Sunday Mail Delivery . . . in 1912*, The Atlantic, Nov. 12, 2013 ("In 1912, without any debate on the matter, Congress added a rider to a funding bill. It ordered that 'hereafter post offices . . . shall not be opened on Sundays for the purpose of delivering mail to the public.")

[15] Caryn E. Neumann, *Sunday Mail*, The First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/932/sunday-mail (last visited March 28, 2023).

General Gideon Granger, to keep all 2,300 post offices open seven days a week, transporting mail every day.[16]

> Despite religious led repeated efforts to repeal, this law remained. As historians noted, the local post office was more than just a place to pick up mail, it was also a vital social hub, especially on the Sabbath: On Sundays, that town center role was magnified. When everything else was closed but the local church, post offices were places you could go not only to pick up your mail, but also to hang out. They were taverns for the week's tavern-less day. "Men would rush there as soon as the mail had arrived," Fischer writes, "staying on to drink and play cards."[17]

The historical environment is one, then, where U.S.P.S. employees traditionally worked on Sunday. The recent contract with Amazon represents a return to a seven-day week of operations rather than a new imposition on religious workers.

III. DEMOGRAPHIC GROWTH OF THE NONES AND WORKPLACE DISCRIMINATION AGAINST THEM

Petitioner's conception of religious accommodation in the workplace, if accepted by this Court, would impose an affirmative duty on businesses to appease the demands of religious workers to the detriment of others in the workplace, placing a significant burden on a large and growing segment of the workforce: nonreligious Americans.

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[16] *Id.*

[17] Garber, *supra* n.14, citing historian Claude Fischer.

According to surveys conducted by the Pew Research Center (Pew), more than one in every four Americans (29%) is nonreligious, more than doubling in size since 1998 and six times larger than it was in 1972, when the General Social Survey began asking about religious preference. Stephanie Kramer, Conrad Hackett & Marcin Stonawski, *Modeling the Future of Religion in America*, Pew Research Center, 19 (Sep. 13, 2022), https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/09/US-Religious-Projections_FOR-PRODUCTION-9.13.22.pdf. Pew projects that the nonreligious community in America will grow to between 41% and 52% of the population by 2070.[18] *Id.* at 34-39.

Every successive generation since the 1990s has been more nonreligious than the generation before it. *Id.* at 22. As increasing numbers of nonreligious Americans enter the workforce, the share of employees espousing no religion, openly or privately, will likewise increase. Unfortunately, nonreligious Americans face a significant amount of discrimination in the workplace. The 2019 U.S. Secular Survey collected data from 33,897 nonreligious participants and found that "[m]ore than one in five (21.7%) employed or recently employed survey participants reported negative experiences in employment because of their nonreligious identity." Somjen Frazer, Abby El-Zhifei, & Alison M. Gill, *Reality Check: Being Nonreligious in America*, 23 (2020), https://www.secularsurvey.org/s/Reality-Check-Being-Nonreligious-in-America.pdf [hereinafter *Reality Check*].

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[18] One scenario, modeled by Pew "[f]or the sake of demonstrating the impact of switching on religious change," posited that even if all switching between religious viewpoints stopped in 2020, the "Nones" share of the population would still rise to 34% by 2070. *Id.* at 40.

Workplace discrimination and stigmatization of non-religious people comes in many forms. One Mississippi resident reported, "I was passed over for promotion. My supervisor told me privately, 'You seem like a good person, I just can't understand you if you don't believe in God.'" American Atheists, *U.S. Secular Survey* (Nov. 2, 2019) (on file with author) [hereinafter *U.S. Secular Survey*]. An Arkansas resident and employee at the headquarters of one of the nation's largest employers "was told [they] would not be promoted due to [their] atheism." *Id.* A survey respondent from Michigan reported, "My coworkers pray for me and insist that I will find enlightenment one day and tell me not to share my views, while they espouse theirs freely." *Id.* An Ohio resident explained, "I work as a hospital chaplain endorsed by the Humanist Society. Because of this, all of my chaplain colleagues know of my humanism. They have been largely supportive. Where I find more discrimination is from the medical staff and administration." *Id.* Another healthcare worker told researchers "religion is heavily pushed on everyone from all sides. Prayers at every staff meeting, Bible quotes all over the facilities, etc. It's in your face everywhere you turn and very frustrating."[19] *Id.*

"[P]articipants who experienced discrimination or high levels of stigmatization because of their nonreligious identity were more likely to screen positive for depression," *Reality Check* at 30 (finding a 37.2% increased chance of depression for those with negative experiences at work), and could result in other negative outcomes. *Id.* at 25. As a result of this widespread

[19] Without breaching attorney-client privilege, amici can state that they have been contacted by multiple United States Postal Service employees complaining of similar religious activity being imposed on them at staff meetings and elsewhere in the workplace.

discrimination, particularly in very religious communities, *id.* at 37, almost half (44.3%) of nonreligious workers who participated in the survey "mostly" or "always" concealed their nonreligious beliefs from others in the workplace. *Id.* at 19. One Illinois resident explained, "Since I have not disclosed my non-religious beliefs with anyone besides trusted family and friends, I rarely face direct religious-based discrimination. However, the entire reason my lack of religion is kept mostly secret is due to living in a very religious rural community and knowing that people absolutely would treat me differently if they knew." *U.S. Secular Survey* (on file with author).

This concealment "can lead people to feel a lack of authenticity, to be less able to establish close ties with others, to experience more social isolation, to have lower feelings of belonging, and to have lower psychological well-being." *Reality Check* at 32; *see also* Diane M. Quinn, *Issue Introduction: Identity Concealment: Multilevel Predictors, Moderators, and Consequences*, 73 Journal of Social Issues 230, 230–239 (2017); Diane M. Quinn & Valerie A. Earnshaw, *Concealable Stigmatized Identities and Psychological Well-Being*, 7 Social and Personality Psychology Compass 40, 40-51 (2013); Diane M. Quinn & S. R. Chaudoir, *Living with a Concealable Stigmatized Identity: The Impact of Anticipated Stigma, Centrality, Salience, and Cultural Stigma on Psychological Distress and Health*, 97 Journal of Personality and Social Psychology 634, 634–651 (2009).

These negative impacts were particularly acute for young workers between the ages of eighteen and twenty-four, 15.4% and "[y]outh participants were 2.5 times as likely to say they mostly or always concealed their secular identities compared to adults age 25 and

up." Somjen Frazer, Abby El-Shafei, & Alison M. Gill, *The Tipping Point Generation: America's Non-religious Youth*, 12 (2020), https://www.secularsurvey.org/s/The-Tipping-Point-Generation-Americas-Nonreligious-Youth.pdf. More than a third of the young people who participated in the U.S. Secular Survey screened as likely to be depressed as a result of discrimination and stigmatization, including in the workplace. *Id.* at 14.

Should this Court mandate that religious employees be given preferential treatment by their employers in the name of "accommodation" and more and more religious workers demand time off and other workplace benefits, nonreligious workers will be incentivized to pretend to be religious. Otherwise nonreligious workers will be the ones burdened with fewer rights. If this happens, the negative mental health consequences that accompany unconstitutionally imposed discrimination and stigma will be exacerbated.

IV. PETITIONER'S DESIRED OUTCOME IS UNWORKABLE AS WELL AS UNCONSTITUTIONAL

Under petitioner's interpretation of Title VII, his religious claim to Sundays off are entitled to priority over all other nonreligious claims. Such a requirement would be impossible to put into practice in the real world. Under Title VII, employees can only demonstrate a prima facie case of discrimination if they can point to "a *sincere* religious belief that conflicts with a job requirement." *Groff*, 35 F.4th at 168 (emphasis added). The requirement of sincerity is designed to guard against false religious claims where religion is used as a "get out of jail free" card by people without

sincere belief, who are just looking for an excuse, for example, to avoid being drafted into the military.[20]

This inquiry, however, is a delicate one. The role of a court, or of an employer, in determining whether to grant a particular request for accommodation, is not to determine if the belief itself is accurate, just whether the employee actually holds the belief. As this Court found regarding draft boards, their role is limited:

> Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.
>
> But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. *United States v. Seeger*, 380 U.S. 163, 184–5 (1965).

The inquiry into sincerity, however, is acknowledged by the U.S. Equal Employment Opportunities Commission as not an in depth one. The Commission acknowledges on its website that "[w]hether or not a religious belief is sincerely held by an applicant or employee is rarely at issue in many types of Title VII

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[20] Amici do not claim that petitioner's beliefs are anything less than fully sincere.

religious claims."[21] The advice given by the EEOC is telling: "Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief."[22]

Especially when it comes to mainstream, well-understood beliefs, such as here with the desire to not work on the Sabbath, sincerity is unlikely to be challenged by the employer or any court. This becomes of particular importance when in what manner individuals' following their claimed religious dictates becomes an issue. There is no requirement of orthodoxy, as imposing such a requirement would involve this Court and others in the very theological questions they have repeatedly noted they are not qualified to address. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). "[I]t is not for [the Court] to say that [plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell*, 573 U.S. at 725 (2014).

Employers are thus presented with an impossible determination. If employees claim they cannot work on the Sabbath, it is not relevant to that claim whether the individual's religious requirement is to spend the entire day in prayer, to attend church and then eschew work for the rest of the day, or to simply avoid work

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[21] U.S. Equal Employment Opportunities Commission, Directives Transmittal 915.063, *Compliance Manual on Religious Discrimination*, Jan. 15, 2021, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_9546543277761610748655186.

[22] *Id.*

altogether. That employee's attendance at, for example, a concert or a baseball game does not indicate the belief was insincere. An employer who searched the social media of employees to discover their activities on their days of rest, or worse, who followed their employees looking for evidence that their activities were not "religious," would be risking accusations of religious persecution as well as generating significant problems with employee morale. Even finding Baptists in a strip club, with Jack Daniel's in hand, on a Sunday afternoon, would not serve to demonstrate that their religious claim to a nonworking Sabbath day was insincere.

Any individual who claims a religious Sabbath reason for refusing to work a weekend shift is then to be believed by the employer, absent a smoking gun such as a public statement admitting an ulterior motive. It is impossible, without dragging employers and the courts into intensive and unconstitutional scrutiny of a person's religious practices, to separate "genuine" from "fake" religious requests for different schedules. The only employees who will then end up working a shift against their wishes are those unwilling to claim a religious basis for not working. Interpreting Title VII to require that priority be given to religious claimants regarding shift assignments simply rewards those who are willing to lie. Those who will lose out are workers without a Sabbath day, including both the nonreligious and those of minority faiths, who are unwilling to falsely claim the opposite. Rewarding dishonesty by coercing the fabrication of false religious claims is hardly laudable public policy. *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014) ("It is irrational to allow humanists to solemnize marriages, if, and only if, they falsely declare that they are a 'religion.'")

As noted *supra* Section II, the weekend is a secular as well as a religious time. A pluralistic society such as the United States must recognize the importance of multiple sources of motivation. There is nothing in the constitutional guarantee of religious freedom that mandates prioritizing religious claims over all others. Indeed, it is the Constitution that prevents priority from being given to the claims of Sabbatarian religious followers if such priority places burdens on followers of other religions and on the nonreligious.

Time off, along with wage levels and benefits, are critical elements of workplace negotiations. On a macro scale, the five-day, forty-hour work week, *supra* Section II, is the product of a series of factors, including the development of the economy, the campaigns of social reformers, and the influence of labor unions. At the U.S.P.S., as at T.W.A, the scheduling structure challenged was the result of collectively bargained agreements with the respective unions. *Groff*, 35 F.4th at 165; *T.W.A.*, 432 U.S. at 67. These agreements included a religiously neutral method of shift assignment based on seniority.

Allowing religious exemptions that place burdens on third parties to preempt negotiated, religiously neutral agreements undermines the role of collective bargaining. It places religious employees above their nonreligious coworkers, granting them exclusive access to special privileges. This is a recipe for workforce discontent, and conflict both between employees and employers, and among employees themselves. It is also clearly unconstitutional.

CONCLUSION

For the above reasons, amici respectfully request this Court to affirm the judgement of the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

NICHOLAS J. LITTLE
CENTER FOR INQUIRY
1629 K. St NW, Suite 300
Washington, D.C. 20006
(202) 734-6494 ext 203
nlittle@centerforinquiry.org

GEOFFREY T. BLACKWELL
AMERICAN ATHEISTS, INC.
2001 Columbia Pike
Suite 212
Arlington, VA 22204
(908) 276-7300, ext. 310
legal@atheists.org

EDWARD TABASH
Counsel of Record
CENTER FOR INQUIRY
1500 West Olympic Boulevard
Suite 400
Los Angeles, CA 90064
(310) 279-5120
etabash@centerforinquiry.org

Counsel for Amici Curiae

March 30, 2023