No. 24-297

In the
Supreme Court of the United States

TAMER MAHMOUD, ET AL.,
Petitioners,

v.

THOMAS W. TAYLOR, ET AL.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF NATHAN LEWIN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is an attorney who has orally argued 28 cases in this Court and filed scores of briefs here on behalf of parties and *amici*.

Fifty-three years ago I wrote and filed an *amicus* brief in this Court in *Wisconsin v. Yoder*, No. 70-110, 406 U.S. 205 (1972). In that era *amicus* briefs were much rarer than they are today, and, as a former Supreme Court law clerk (for Justice John Harlan, 1961-1962), I can attest that the Justices then personally read nearly all briefs filed in the many cases then argued.

My client in *Yoder* and in numerous later cases in which I participated as *amicus* was the National Jewish Commission on Law and Public Affairs ("COLPA"). That organization has spoken for much of the American Orthodox Jewish community. It is still active. I have not canvassed its members and asked them to join one *amicus* brief supporting petitioners in this litigation although I am confident that they would all support reversal of the decision below. Instead I present these views as those of a lawyer who has spent more than six decades litigating issues of religious freedom in American courts, including several lawsuits that bear on this case. I believe that the same fundamental principles that I articulated more than half a century ago in support of the Amish vindicate the legal position of the Maryland parents who are

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

plaintiffs in this case and who are petitioners in this Court.

SUMMARY OF ARGUMENT

More than half a century has passed since I argued in my 1971 *amicus* brief that Amish parents were constitutionally entitled to disobey Wisconsin's compulsory school-attendance law because the First Amendment obliged Wisconsin's government to respect the parents' religiously mandated objection to compulsory high-school attendance. Page 3 of my *Yoder* brief declared what I continue to believe today – that "the constitutional mandate [of the First Amendment's Free Exercise Clause] requires the State to accommodate its generally applicable educational requirements to the legitimate and unharmful needs of the Amish religious community."

The "constitutional mandate" that this Court invoked to resolve the *Yoder* case in favor of the Amish parents controls this litigation. The State of Maryland must **accommodate** its public-school instruction to the legitimate and nonharmful beliefs of Maryland parents whose religious beliefs conflict with otherwise prescribed curricular teaching on sexual orientation and gender identity. In this case reasonable accommodation is simple and elementary. Maryland must grant the relief sought by the parents –notify parents when classroom instruction and instructional material on sexual orientation and gender identity are contemplated and excuse children (1) from attending classes and (2) from reading texts that conflict with and undermine the parents' religious values.

ARGUMENT

I.

THE FREE EXERCISE CLAUSE, AS ENFORCED IN *YODER,* REQUIRES GOVERNMENT TO MAKE REASONABLE ACCOMMODATION FOR SINCERE RELIGIOUS PRACTICE AND BELIEF

A. *Yoder* Invokes "Accommodation."

The Court's *Yoder* opinion contains a painstaking "balancing process" to determine whether Wisconsin's law prescribing compulsory classroom attendance to age 16 "overbalance[s] legitimate claims to the free exercise of religion." 406 U.S. at 214. The opinion concludes after many pages that "***accommodating*** the religious objections of the Amish" does not "materially detract from the welfare of society." 406 U.S. at 234 (emphasis added). The concept of reasonable "accommodation" to religious convictions is not elaborated in the Court's extensive analysis, but, once introduced, it reappears in later footnotes. See Notes 22 and 23.

B. Congress Prescribes Reasonable Accommodation.

"Accommodation" became more prominent with the amendment to Section 701(j) of the Civil Rights Act that was enacted in 1972. I personally drafted the text of that statutory revision and recommended it to Senator Jennings Randolph for presentation on the floor of the Senate. It resolved an uncertainty in application of the 1964 law. Senator Randolph's amendment –explicitly intended by him to assist the Sabbath-observance of Seventh-Day Baptists --

received unanimous approval of the attending Senators. (118 Cong. Rec. 705-706, 731). It was then adopted by the conference committee that reconciled the amendments approved by both Houses and was signed into law. (118 Cong. Rec. 6643, 6646; 118 Cong. Rec. 7572-7573).[2]

The EEOC had initially permitted private employers subject to Title VII of the 1964 Civil Rights Act to impose conditions of employment that were neutral on their face but had a religiously discriminatory impact. In 1967 the EEOC reversed that policy, announcing with this change that employers discriminated unlawfully if they penalized religious-minority employees who were unavailable for work on religious holidays but whose absence was easily remedied. (29 C.F.R. 1605.1 (1967)). The employer of a conscientious Sunday-observer refused to accommodate his religious observance. In response to his lawsuit the employer challenged the 1967 EEOC regulation as violating the Establishment Clause. This Court granted review of an appellate ruling endorsing the employer's position, but the result – notwithstanding *amicus* briefs from COLPA and the American Jewish Congress --was affirmance by an equally divided Court. *Dewey v. Reynolds Metals Co.,* 402 U.S. 689 (1971).

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[2] My detailed contemporaneous narrative of the full lobbying effort appears in Lewin, "A Battle Won on Purim" The Jewish Press, Vol. 23, No. 14, April 7, 1972, pp. 4, 18, 20-22, 26. See also the *amicus curiae* briefs I drafted and filed for COLPA in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.,* No. 14-86, pp. 8-11, and in *Parker Seal Co. v. Cummins*, No. 75-478, pp. 17-19.

An argument heading in the brief I filed for COLPA in the *Dewey* case read: "Respondent Failed To Make a Reasonable Accommodation to Petitioner's Religious Scruples Against Personally Obtaining a Replacement for Sunday Work."

My 1972 amendment to the statutory language echoed the EEOC text whose validity had been left unresolved in *Dewey*. It defined "religion" for purpose of Title VII's prohibition against religious discrimination in employment to include "all aspects of religious observance and practice 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).

C. The Accommodation Obligation Is Improvidently Limited.

In 1977 the Court heard an employer's constitutional challenge to the statutory accommodation obligation. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). I personally participated in the oral argument of the *Hardison* case as an *amicus curiae*. The majority opinion authored by Justice White in the *Hardison* case included a *dictum* that effectively suppressed litigation by minority-religion employees who had been denied the reasonable accommodation that the law was designed to accord. It impliedly instructed lower courts that an accommodation was required under the 1972 law only if such accommodation would have a *de minimis* effect on the employer's business.

D. Unbounded Accommodation Is Condemned.

Estate of Thornton v. Caldor, 472 U.S. 703 (1985), was a case in which I represented the petitioner and the late Senator Joseph Lieberman (then Attorney General of Connecticut) represented the State of Connecticut as intervenor. Rejecting the explicit representation made in his brief and oral argument by Connecticut's then-incumbent Attorney General that the challenged state statute requiring accommodation to any employee "who states that a particular day of the week is observed as his Sabbath" required only **reasonable** accommodation, the Court held that its literal language violated the Establishment Clause because it took no account of any "burden or inconvenience this imposes on the employer or fellow workers." 472 U.S. at 708-709. Justices O'Connor and Marshall joined the Court's ruling only because they distinguished the Connecticut law from the Title VII provision that had been amended in 1972. They said, "Title VII calls for reasonable rather than absolute accommodation." 472 U.S. at 712.

E. The Court Mandates Reasonable Accommodation.

The unanimous decision of this Court in *Groff v. DeJoy*, 600 U.S. 447 (2023), struck the erroneous *Hardison* language. It prescribed various reasonable standards other than *de minimis* to define prescribed accommodation. None requires accommodation universally or forecloses it when the religious

conviction can be reasonably accommodated with slight inconvenience.

II.

REQUIRING MARYLAND TO MAKE A REASONABLE RELIGIOUS ACCOMMODATION IN THIS CASE DOES NOT VIOLATE *EMPLOYMENT DIVISION V. SMITH*

Justice Scalia's precipitous and unexpected opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), asserted that the Court's *Yoder* decision resulted not only from the Amish parents' free-exercise claim but also from their constitutional entitlement "to direct the education of their children." 494 U.S. at 881. That same right is, of course, implicated in the present case. The petitioners' choice to have their children educated in Maryland's public schools did not erase their right, as parents, to play an important role in "the education of their children."

One can agree, as I do, with Justice Alito's compelling opinion in *Fulton v. City of Philadelphia*, 593 U.S. 522, 544-627 (2021). *Smith* was wrongly decided and has done substantial harm in more than three decades. It should be overruled.

But the distinct fundamental principle vindicated in *Yoder* was that the Free Exercise Clause requires reasonable accommodation whenever government acts in a manner that affects the religious observance of individuals, groups, or other collective entities. Their devout observance need not be accompanied by a "hybrid" right – affecting some additional non-religious protected freedom – to

deserve a constitutional shield against eradication or infringement. *Yoder*'s writ is not so limited.

The plain language of the First Amendment directs all agencies of government ("Congress" as construed expansively by judicial decision) to "make no law" that "prohibit[s] the free exercise" of "religion." This constitutional command is directed to government officials of Maryland and orders them to refrain from imposing and enforcing regulations that fail to **accommodate** –and thereby prohibit – the free exercise of religion by the parents who have initiated this lawsuit and are petitioners in this Court.

CONCLUSION

For the foregoing reasons and those presented in the briefs of petitioners and their supporting *amici* the decision of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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