

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-1158

**TITLE** ESTATE OF DONALD E. THORNTON AND CONNECTICUT,  
Petitioners v. CALDOR, INC.

**PLACE** Washington, D. C.

**DATE** November 7, 1984

**PAGES** 1 thru 52



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ESTATE OF DONALD E. THORNTON :  
4 AND CONNECTICUT, :  
5 Petitioners :  
6 v. : No. 83-1158  
7 CAIDOR, INC. :  
8 - - - - -x

9 Washington, D.C.

10 Wednesday, November 7, 1984

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 1:34 p.m.

14 APPEARANCES:

15 NATHAN LEWIN, ESQ., Washington, D.C.; on behalf of the  
16 Petitioners.

17 JOSEPH I. LIEBERMAN, ESQ., Attorney General of  
18 Connecticut; on behalf of Connecticut.

19 PAUL GERWITZ, ESQ., New Haven, Connecticut; on behalf  
20 of the Respondent.

21 - - -

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
NATHAN LEWIN, ESQ., on behalf of the Petitioners	3
JOSEPH I. LIEBERMAN, ESQ., on behalf of Connecticut	20
PAUL GERWITZ, ESQ., on behalf of the Respondent	27
NATHAN LEWIN, ESQ., on behalf of the Petitioners -- rebuttal	50

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: Mr. Lewin, you may  
3 proceed whenever you're ready.

4                    ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,  
5                    ON BEHALF OF THE PETITIONERS

6                    MR. LEWIN: Thank you, Mr. Chief Justice, and  
7 may it please the Court:

8                    This case, which is here on writ of certiorari  
9 to the Supreme Court of Connecticut, concerns the  
10 constitutionality of a Connecticut law that declares,  
11 and I quote, that "No person who states that a  
12 particular day of the week is observed as his Sabbath  
13 may be required by his employer to work on such day.

14                    QUESTION: Has there been any change in that  
15 statute that would affect the posture of this case?

16                    MR. LEWIN: Mr. Chief Justice, there's been no  
17 change at all with regard to that statute. There has  
18 been a statute subsequently enacted in Connecticut which  
19 tracks the language of the federal provision -- Section  
20 701(j) of the Civil Rights Act -- which provides that an  
21 employer must accommodate to religious requirements of  
22 employees and need not do so if there is undue  
23 hardship. Of course, that provision was before this  
24 case in the TWA and Hardison case.

25                    It's our position with regard to that statute



1 that that neither affects this case in any technical  
2 sense -- it certainly doesn't dilute it in any way --  
3 and indeed, contrary to the suggestion that's been made,  
4 does not in any way reduce the importance of a decision  
5 in this case because --

6 QUESTION: Mr. Lewin, can those statutes stand  
7 side by side?

8 MR. LEWIN: Pardon?

9 QUESTION: Can those statutes stand side by  
10 side?

11 MR. LEWIN: Well, we think that the statutes  
12 certainly can stand. We think that the Connecticut --

13 QUESTION: Well -- well, apparently --  
14 apparently the legislature intended to make a change in  
15 the law and simply forgot to repeal this one, didn't  
16 they?

17 MR. LEWIN: Oh, I think not, Justice Brennan.

18 QUESTION: You think --

19 MR. LEWIN: No, because the legislative  
20 history --

21 QUESTION: Is there -- is there any history to  
22 indicate what they meant?

23 MR. LEWIN: Yes, sir. The legislative history  
24 indicates -- and I think it's -- it's reproduced in some  
25 portions of the State's brief -- that the legislature

1 was quite conscious of the existence of this statute and  
2 said no, that is -- the new statute they were in  
3 enacting was, in a certain sense, much broader. It  
4 covered a whole range of religious practices in addition  
5 to Sabbath observance. And indeed, this statute with  
6 regard to Sabbath observance is really quite clear with  
7 regard to the matter of working one day in seven.

8 So the statutes can coexist, and I think the  
9 legislature intended that they coexist, and did not  
10 intend in any way to -- to affect the issue that's  
11 before this Court. And I think the issue, as I say, is  
12 even rendered more important by reason of the other  
13 statute because the reasoning of the Connecticut Supreme  
14 Court, which is stated clearly in its opinion, would  
15 require that both statutes, both their old statute,  
16 which they declared unconstitutional, and their new  
17 statute both be struck down --

18 QUESTION: And Title VII.

19 MR. LEWIN: And Title VII. Indeed, the  
20 Solicitor General has so stated in his brief. We made  
21 that argument. We think that the rationale clearly  
22 would require that.

23 The reason for that is that what the  
24 Connecticut court said is quite simple. It said that  
25 the problem with a statute that protects Sabbath

1 observance is that by reason of the fact that the word  
2 "Sabbath" is used and that it permits an employee who  
3 has religious scruples to take off on that day, that  
4 means that the statute comes with religious strings  
5 attached -- that's the Connecticut court's language --  
6 and for that reason it violates all three parts of the  
7 Lemon and Kurtzman test.

8 The court said so far as the first part of  
9 that test is concerned, so far as the purpose portion of  
10 the test is concerned, the unmistakable purpose of any  
11 such statute -- and this is the Connecticut court's  
12 language -- is to allow those persons who wish to  
13 worship on a particular day the freedom to do so. And  
14 because the Connecticut court said such a statute has  
15 that purpose, which is to allow people the freedom to  
16 worship on their Sabbath, it is unconstitutional under  
17 the first prong of the Lemon and Kurtzman test.

18 The court also said it was unconstitutional  
19 under the second -- the second and third parts -- the  
20 second part because the benefit of the law, the right to  
21 claim a particular day off, is conferred on an  
22 explicitly religious basis; and therefore it says since  
23 it is limited to people who have a religious belief,  
24 therefore, its primary effect must be to enhance  
25 religion. And the court went on to say that since as

1 part of any such -- any court proceeding or  
2 administrative proceeding enforcing that statute a body,  
3 a governmental body will be examining the religious  
4 beliefs of the individual, it will inevitably result in  
5 excessive governmental entanglements.

6 Now, I've reviewed those three portions of the  
7 Connecticut court's opinion because I think it is  
8 important to emphasize at the outset what is not before  
9 the Court, and what is not before the Court, we submit  
10 with all respect, the issue that the respondent has  
11 argued principally in its brief. And the respondent  
12 argues principally in its brief that the fault of the  
13 Connecticut statute is that it is absolute, that it is  
14 unconditional; it is unconstitutional because it does  
15 not provide for an undue hardship exception.

16 But, in fact, the only issue on  
17 constitutionality that was litigated before the  
18 Connecticut courts, at both levels, at the trial court  
19 and the supreme court, and the only issue of  
20 constitutionality that was decided by the Connecticut  
21 Supreme Court was not whether the statute is  
22 unconstitutional because it is absolute, but simply  
23 whether the statute was unconstitutional because it  
24 provided an exemption for religious observers.

25 QUESTION: Mr. Lewin, what should we do if we



1 think it is unconstitutional because it's absolute?

2 MR. LEWIN: Well --

3 QUESTION: Should we not affirm, if we think  
4 that?

5 MR. LEWIN: No. No. We submit -- first of  
6 all, there -- there are several. We think on this case  
7 what you have to do is reverse. If this statute is  
8 unconstitutional because it is absolute, then that is  
9 something which would have to be raised in another  
10 litigation under the Connecticut law brought by some  
11 other party at some future time. That's true in any  
12 case.

13 The Court, for example, has had before it  
14 other cases in which the not passed upon, not pressed  
15 and not passed upon principle has been -- has been  
16 applied. The Court says if a statute is or a procedure  
17 is declared unconstitutional by a state court on a  
18 ground that has not been urged below, we have to go on  
19 the record as it is presented to this Court. On the  
20 record and the arguments made to this Court, this  
21 statute is constitutional.

22 QUESTION: Well, but the absolute argument if  
23 anything is a more narrow ground than the ground you say  
24 that the Connecticut court adopted.

25 MR. LEWIN: It is a more narrow ground.

1 QUESTION: And you can we cannot affirm on a  
2 narrower ground just producing the same result.

3 MR. LEWIN: For several reasons. One,  
4 because, as I say, we -- you -- this Court does not know  
5 what the Connecticut court -- how the Connecticut court  
6 would construe that statute. Second of all, because  
7 there's been no opportunity to make a factual record.

8 We submit that even on the absolutist  
9 argument, this case would have to be reversed because  
10 this individual was entitled to be exempted on Sundays  
11 because there was no undue hardship. In other words,  
12 the Court certainly will not decide, I submit, on a  
13 purely abstract and hypothetical basis that a statute  
14 which has no exception for undue hardship is  
15 unconstitutional as applied to an individual as to whom  
16 there would have been no undue hardship if they had  
17 accommodated to him.

18 Mr. Thornton --

19 QUESTION: Well, but, you know --

20 MR. LEWIN: -- had no opportunity to present  
21 that.

22 QUESTION: -- I have some trouble with that  
23 point. If -- if you're dealing with a statute that is  
24 absolute on its face as to this Sabbath observance, and  
25 the employer comes into court and says well, I want to

1 show you that we -- we couldn't make any adjustment  
2 here, and the employee says well, you could have made an  
3 adjustment without any hardship, ordinarily the trial  
4 court will say well, this statute is absolute -- it  
5 doesn't really concern itself with whether  
6 accommodations are to be made -- and simply rule out  
7 that kind of testimony.

8 MR. LEWIN: If that were true, Justice  
9 Rehnquist, if that argument had been made, and  
10 therefore, the trial court or the board of mediation had  
11 said this statute is absolute, and I won't allow it,  
12 we'd have one record. That's not the issue that was  
13 presented. In other words, no court below had an  
14 opportunity to determine whether or not this statute was  
15 or was not absolute.

16 QUESTION: You say even the Connecticut  
17 Supreme Court hasn't decided that question?

18 MR. LEWIN: The Connecticut Supreme Court had  
19 not decided that question, no. They -- because it was  
20 never presented to them. It's been an issue that has  
21 been -- that has been created only in this Court. The  
22 Connecticut Supreme Court was never told this statute is  
23 either unconstitutional because it's absolute, or you  
24 should construe it as being not absolute. And the  
25 reason I submit why the second wasn't done was because

1 there was no factual record that would have supported a  
2 judgment for the employer on that ground. No  
3 opportunity was given to Mr. Thornton or his counsel to  
4 rebut any claim of undue hardship or to present  
5 evidence.

6 We submit that even on -- on the facts in the  
7 record it's clear there would not have been undue  
8 hardship because the employer in this case by a  
9 voluntary collective bargaining agreement had agreed  
10 that he would excuse anybody who would take off, rank  
11 and file employees who would take off on Sundays or  
12 holidays.

13 So it's clear, we submit, that had they  
14 claimed undue hardship, they could not have -- they  
15 could not have made their case. But whether or not they  
16 could have made it, it is more -- even more so clear, we  
17 submit, that this Court has not under its prior cases  
18 agreed that it's going to hypothesize a set of facts for  
19 an argument that was not presented below, and the other  
20 side had no opportunity to meet below.

21 And in that regard, just one final point with  
22 regard to this whole -- the uncertainty of the -- the  
23 statute with regard to its allegedly absolute quality --  
24 the -- there would be no reason either for any remand  
25 for that reason, I mean to the Connecticut Supreme Court



1 for any construction, because no matter how the  
2 Connecticut -- a remand makes sense when the remand, the  
3 issue that's going to be decided on remand, might result  
4 in a ruling that would eliminate the constitutional  
5 issue.

6 But no matter how the Connecticut Supreme  
7 Court construes this law, whether it says the statute is  
8 absolute, or whether it says the statute is not  
9 absolute, the reasons it has given in its opinion, which  
10 is now before this Court, would apply to the statute in  
11 any event. If the statute is absolute, the Connecticut  
12 Supreme Court would say it's unconstitutional because it  
13 fails the three-part test of Lemon and Kurtzman, and if  
14 the statute is not absolute, the very same reasons would  
15 apply, as Justice White noted, because it would apply --  
16 the very same reasons would apply to Title VII and --

17 QUESTION: Mr. Lewin, do you think we review  
18 judgments or opinions of the state court?

19 MR. LEWIN: Pardon?

20 QUESTION: Do you think we review judgments or  
21 opinions of the court?

22 MR. LEWIN: Your Honor, I believe the Court  
23 reviews judgments in light of the reasons stated by the  
24 lower court, which is exactly the reason that is -- that  
25 the Court has the rule of saying that constitutional

1 issues that are neither pressed nor passed upon below  
2 are not bases for determination here.

3 QUESTION: Your view is quite different from  
4 the Solicitor General's view, who suggests that we  
5 should decide -- he suggests on page 24 of his brief  
6 that this case presents a different question than the  
7 Title VII question that he -- because of the absolute  
8 character of the statute.

9 MR. LEWIN: I believe that the Solicitor  
10 General, unless I have misunderstood his brief, I  
11 believe the Solicitor General has said that the  
12 reasoning of the Connecticut court would apply to Title  
13 VII as well.

14 QUESTION: Yeah, I understand that.

15 MR. LEWIN: He does say -- you were pointing  
16 to page 27?

17 QUESTION: Twenty-four, the last paragraph  
18 before the boldface; that if the statute goes too far,  
19 it's because of a per se rule, and that such a holding  
20 would not jeopardize Title VII. So he's taking a  
21 different view than you are.

22 MR. LEWIN: Well --

23 QUESTION: I think.

24 MR. LEWIN: No. I think, Your -- Your Honor,  
25 what I am saying is that the rationale -- and I think he

1 has said in his brief, too -- the rationale of the  
2 Connecticut Supreme Court applies to both. If for some  
3 reason there were an appropriate case in which this  
4 Court were to say an absolute statute is -- is  
5 unconstitutional, he says -- and I agree with that,  
6 certainly -- that if an absolute statute is  
7 unconstitutional, that certainly does not apply to Title  
8 VII; Title VII is not absolute, and the statutes of  
9 other states are also not absolute.

10 So I do see a distinction, and I'm not denying  
11 that distinction. I'm just saying that the Connecticut  
12 court's reasoning applies equally to both --

13 QUESTION: Well, Mr. -- Mr. Lewin, let's --  
14 let's suppose that -- that your opponents gets up and  
15 says well, we don't defend the rationale of the -- well,  
16 we defend it, but even if we didn't, we will support the  
17 judgment on the argument that the statute is absolute.  
18 And then the respondent is entitled to do that if the  
19 record -- even if it wasn't presented below. That's  
20 what our cases seem to indicate.

21 MR. LEWIN: Your Honor, I think you can  
22 sustain a judgment on any ground, that's true; but you  
23 can't declare -- I think the cases of this Court have  
24 said -- you can't declare a statute unconstitutional on  
25 grounds that were not pressed or passed on below. You

1 couldn't declare a search or seizure on constitutional  
2 grounds.

3 QUESTION: Well, I don't know. I don't know,  
4 Mr. Lewin. But what I really wanted to ask you about  
5 was let's suppose the -- that the respondent here, or  
6 your opponent, is -- is entitled to argue that the  
7 judgment should be sustained on the ground that this  
8 statute is an absolute statute, and therefore, the  
9 judgment below of unconstitutionality should be  
10 affirmed. Let's assume that's a proper argument.  
11 What's your response to that?

12 MR. LEWIN: My response to that is that even  
13 if the statute is absolute, it is constitutional;  
14 because all that the statute does is what it does is put  
15 an added cost, an economic --

16 QUESTION: I would think you ought to argue  
17 that, because that's part and parcel of your argument.

18 MR. LEWIN: Yes, sir. I'm sorry. I -- that  
19 even if the statute is absolute, it is constitutional,  
20 because the only burden it imposes on an employer is not  
21 a burden to engage in some religious practice or to pay  
22 for a worship service or anything. It imposes an  
23 economic burden.

24 This Court has said in cases -- in the  
25 Turner-Elkhorn case, last term in the Pension Benefit



1 Guaranty Corporation and Gray, that when the only  
2 imposition really that a statute imposes is the  
3 allotment of economic benefits and burdens, that's up to  
4 a legislature to determine.

5 This legislature has decided -- the  
6 Connecticut legislature has decided that with regard to  
7 the simple question of one day in work out of seven an  
8 employee may say I don't have to work seven days a week  
9 -- that's entirely clear. I don't think anybody  
10 questions that a legislature can do that. And that an  
11 employee -- an employee may also say the one day I take  
12 off is the day that I observe as a religious day of  
13 rest. That's within the spirit of the free exercise  
14 clause. We're not saying --

15 QUESTION: Well, it does benefit religion,  
16 doesn't it? You don't deny that.

17 MR. LEWIN: Well, it benefits --

18 QUESTION: But I thought your argument was  
19 that sure, it benefits religion, but the state is  
20 entitled to benefit it that much to protect the freedom  
21 of religion.

22 MR. LEWIN: An -- it is an indirect benefit to  
23 religious people in the sense -- one says to religion,  
24 yes. It's not of benefit to a particular church.

25 QUESTION: You have a hard trouble -- you have

1 a hard time arguing it doesn't benefit religion if you  
2 say that the state is entitled to protect the freedom of  
3 religion this much.

4 MR. LEWIN: Yes, Your Honor. But -- but the  
5 point I would like to make is that the extent to which  
6 it benefits religion is that it says you're doing  
7 something very cruel to an employee if you're requiring  
8 him to violate a divine command in order to keep his  
9 job. The state --

10 QUESTION: What about --

11 MR. LEWIN: Yes, Your Honor.

12 QUESTION: What about Thomas against the  
13 Review Board? How do you distinguish that from --

14 MR. LEWIN: We think Thomas against the Review  
15 Board certainly supports our position, Mr. Chief  
16 Justice; that what it shows --

17 QUESTION: Do you think it benefitted religion  
18 any more or less than the hypothetical Justice White  
19 just put to you?

20 MR. LEWIN: I think it -- Thomas v. the Review  
21 Board benefitted religion the same way as this -- as  
22 this statute does. It involved, of course, government  
23 benefits. We recognize that. But nonetheless, in cases  
24 such as Gillette and various other cases, this Court has  
25 talked about the fact that the free exercise clause

1 values may go beyond merely situations where government  
2 is involved and government prohibitions or government  
3 benefits are involved. And we think that applies in  
4 this situation as well.

5 QUESTION: Mr. Lewin, does it make any  
6 difference in analyzing a free exercise case if it's an  
7 accommodation by the state for itself as compared to  
8 extending a requirement to private persons? Does that  
9 make a difference in the analysis do you think?

10 MR. LEWIN: Justice O'Connor, I think it makes  
11 a difference in the sense that certainly that the free  
12 exercise clause applies directly to the state itself.  
13 But I think that this Court's recognition of the fact  
14 that the freest expression of religion is promoted by  
15 the free exercise clause means that the very same  
16 propositions ought to permit a majority of the community  
17 through its legislature to protect against private  
18 employers as well.

19 QUESTION: Well, do you think that the state  
20 can impose on private people exactly the same things  
21 that it could require of itself under the free exercise  
22 clause?

23 MR. LEWIN: To the extent that what it does is  
24 that it removes inhibition, yes, I think it can do the  
25 same thing. The state can say to a private employer

1 just as we're required to accommodate to permit people  
2 to observe their Sabbath or to worship, so you may not  
3 prevent people from worshipping or observing their  
4 Sabbath.

5 QUESTION: Do you think that there is any  
6 element, if the statute is an absolute one, of  
7 discrimination against employees who don't observe a  
8 Sabbath?

9 MR. LEWIN: I think not, because those  
10 employees are not being required to violate any First  
11 Amendment rights of theirs. They are being required,  
12 just as they might with a statute that says you have to  
13 provide maternity leave, you have to provide leave if an  
14 -- if an employee is off for an extended period of time  
15 for illness. Other employees have to fill in. This is  
16 a personal circumstance that the other employees have to  
17 accommodate to, but they are not being required to  
18 violate their own religious convictions in any way.  
19 Consequently, their only hardship and their only harm is  
20 a harm that is economic and social. It is not a  
21 conscientious harm.

22 I would like to reserve the remainder of my  
23 time for rebuttal.

24 CHIEF JUSTICE BURGER: Very well, Mr. Lewin.  
25 Mr. Lieberman.



1 ORAL ARGUMENT OF JOSEPH I. LIEBERMAN, ESQ.,  
2 ON BEHALF OF CONNECTICUT

3 MR. LIEBERMAN: Thank you, Mr. Chief Justice,  
4 and may it please this Court:

5 As Attorney General of Connecticut, I am  
6 particularly troubled by the decision of our supreme  
7 court in this case, because of the message that it gives  
8 to our legislature, which is that any act that it may  
9 choose to adopt which gives special benefit or  
10 recognition to religious observance like the observance  
11 of the Sabbath is automatically unconstitutional. That  
12 is clearly not the message that this Court has given.

13 This Court has repeatedly warned against  
14 absolute and inflexible application of the establishment  
15 clause which would lead to mechanically invalidating any  
16 law that recognized religious observance in any  
17 particular way.

18 This Court has also defined --

19 QUESTION: General Lieberman, was the new  
20 statute that's been passed, passed by the legislature  
21 after the opinion of the supreme court was available?

22 MR. LIEBERMAN: Yes, it was, Justice Stevens.

23 QUESTION: So the message didn't deter them  
24 from enacting a statute just like Title VII.

25 MR. LIEBERMAN: Well, I'd like, if I may, to

1 give you some legislative history there.

2 In fact, the new statute was proposed to the  
3 legislature by a group of Sabbatarians who were  
4 concerned about the effect of the Connecticut Supreme  
5 Court decision.

6 After the legislative process began, this  
7 Court granted cert. There is then on the record some  
8 discussion of whether the new statute, which was seen  
9 originally as a stopgap, should go forward or should  
10 stop. And the chairman of the Judiciary Committee said  
11 quite clearly that the two statutes are different; that  
12 the Sabbath observer statute, the one that we're arguing  
13 today, is targeted towards Sabbath observers, while the  
14 -- the so-called new statute is broader and much like  
15 Title VII.

16 This Court has made clear in its decisions  
17 that there are different categories of the relationship  
18 -- appropriate categories of the relationship between  
19 government and religion. There are certain forms of  
20 accommodation like that in the McCollum case which are  
21 prohibited by the establishment clause. There are  
22 others like that in Sherbert which are required by the  
23 free exercise clause. And between those two there is a  
24 zone in which a legislature may properly act; it is  
25 permitted to act to accommodate religious observance.

1 That is the zone in which the Connecticut legislature  
2 adopted this act. And I believe very strongly that it  
3 is the legislature that is best suited to make the kind  
4 of balancing of interests, the kind of weighing of  
5 burdens and benefits that is involved in the statute  
6 that is before you today.

7 QUESTION: Excuse me, Mr. Attorney General.  
8 Did I hear you say that the new statute was regarded by  
9 the legislature as just a stopgap?

10 MR. LIEBERMAN: Justice Brennan, the new  
11 statute was -- a group of Sabbatarians proposed to the  
12 legislature that it adopt the new statute in the  
13 aftermath of the Connecticut Supreme Court invalidation  
14 of the statute before you today, and it was after this  
15 Court granted cert.

16 QUESTION: Well, suppose we reverse, what's  
17 going to happen to the new statute?

18 MR. LIEBERMAN: Well, as my brother Lewin  
19 indicated, we believe very strongly that these two  
20 statutes can stand side by side.

21 QUESTION: And will continue?

22 MR. LIEBERMAN: I -- I would guess that they  
23 will. One is broader, and the other is more narrow.  
24 The statute before you clearly gives a benefit to those  
25 few people in our state who observe Sabbath to the

1 extent that they feel it forbids them from working on  
2 that date.

3 The burdens it imposes are very slight -- some  
4 administrative inconvenience, in this case for the  
5 employer Caldor, very little, and some arousal of some  
6 envy among Mr. Thornton's fellow employees. But there  
7 is in this statute in this case no interference with the  
8 right of Mr. Thornton's fellow employees to observe  
9 their religion in any way they wish. There were --

10 QUESTION: How did the Connecticut Supreme  
11 Court -- I have forgotten since I read it -- how did the  
12 opinion treat Sherbert and Verner, Thomas against the  
13 Review Board?

14 MR. LIEBERMAN: Mr. Chief Justice, the  
15 Connecticut Supreme Court ignored those decisions, did  
16 not cite them, went off particularly on the Sunday  
17 closing law cases, and more to the point, rigidly and  
18 inflexibly applied this Court's three-part  
19 purpose-effect-entanglement test. So it never even  
20 considered those cases.

21 QUESTION: Thomas came quite long after Lemon  
22 against Kurtzman, didn't it?

23 MR. LIEBERMAN: Yes, it did, Your Honor. And  
24 -- and we feel very strongly that this decision of the  
25 Connecticut Supreme Court is so out of line with a



1 stream of decisions by this Court and other federal and  
2 state courts around the country that for that reason in  
3 its absoluteness it should be reversed.

4 My brother Lewin has talked about the question  
5 of whether this statute is absolute, and I'd like to  
6 address that for a moment. This Court has repeatedly  
7 held that the interpretation of a law given by the  
8 administrative agency charged with the responsibility to  
9 enforce it is entitled to great deference.

10 In this instance, the Connecticut Board of  
11 Mediation and Arbitration, which enforces this statute,  
12 has quite clearly read it as not being absolute. The  
13 board has said that it will judge every case on the  
14 facts of the case, and in fact, the cases that have been  
15 decided indicate quite clearly that the board will apply  
16 a good faith or reasonable accommodation standard.

17 In the case before you they determined that  
18 Donald Thornton could have been accommodated without  
19 undue hardship for Caldor, and Caldor did not make  
20 reasonable efforts to accommodate him.

21 There was another case which respondent cites  
22 in its brief and which we deal with in our reply brief,  
23 the case of Rinaldi v. G. Fox. And there a Sabbath  
24 observer was reasonably accommodated by the employee --  
25 by the employer and still refused to accept that

1 accommdation. The Foard of Mediation and Arbitration  
2 ruled in favor of the employer and said that reasonable  
3 accommodation had occurred, and therefore, the employee  
4 was not entitled to relief.

5 Surely in the case before you there is no  
6 evidence that Mr. Thornton could not have been  
7 accommodated without undue hardship. There are none of  
8 the standards that this Court found, none of the facts  
9 that this Court found in the Hardison case present in  
10 this case.

11 Mr. Thornton could have been accommodated  
12 without breaching a seniority agreement. There were no  
13 contractual rights of his fellow employees that would  
14 have been violated. The cost, as the record shows, to  
15 Caldor would have been not only de minimis but  
16 ultimately nil.

17 And in the last line of the Hardison case  
18 Justice White said that, "In the absence of statutory  
19 language or a clear legislative purpose to the contrary,  
20 this Court would not impose a burden on some employees  
21 to allow other employees to observe their Sabbath."

22 Members of the Court, in this case the  
23 Connecticut legislature, operating in the context of the  
24 repeal of Sunday closing laws, quite specifically had in  
25 mind the allowance of some special protection to those

1 who observed the Sabbath.

2 The burden on employers is much discussed in  
3 the respondent's brief in commenting on the alleged  
4 absoluteness of this statute. In fact, only six cases  
5 have been brought to the Board of Mediation and  
6 Arbitration in the eight years that this statute has  
7 been in effect. In fact, Mr. Thornton was the only one  
8 of Caldor's employees to assert this right, and in fact,  
9 Caldor itself entered a collective bargaining agreement  
10 with its nonsupervisory employees -- certainly more  
11 numerous than supervisory employees like Mr. Thornton --  
12 which allowed those nonsupervisory employees to take  
13 Sunday off if they do so for religious reasons.

14 If the decision of the Connecticut Supreme  
15 Court is allowed to stand, the purposes of the  
16 establishment clause are literally, in my opinion,  
17 turned on their head, for that clause, which surely  
18 aimed at protecting religious diversity and promoting  
19 religious freedom, is used here as an instrument for  
20 invalidating a law which our legislature adopted with  
21 the best of motivations and in the finest tradition,  
22 permissible tradition of accommodating the values  
23 embodied in the religion clauses of the First  
24 Amendment. If this decision is allowed to stand, it  
25 really does speak to the ability of the state to act

1 with hostility and callous indifference toward religious  
2 freedom that this Court has repeatedly warned against.  
3 And for those reasons, we respectfully ask you to  
4 reverse.

5 CHIEF JUSTICE BURGER: Very well, Mr. Attorney  
6 General.

7 Mr. Gewirtz, you may proceed when you're ready.

8 ORAL ARGUMENT OF PAUL GEWIRTZ, ESQ.,

9 ON BEHAIF OF THE RESPONDENT

10 MR. GEWIRTZ: Mr. Chief Justice, and may it  
11 please the Court:

12 This case is not a situation in which the  
13 Government has merely acted to lift a burden that its own  
14 governmental actions have placed on the way of religious  
15 exercise. Here instead the government has thrust itself  
16 into the private market to lend its strength to  
17 religion, giving certain religious observers affirmative  
18 rights to the detriment of other people.

19 To put our constitutional argument in a  
20 sentence, our main argument at least, the Connecticut  
21 statute violates the equal protection clause because it  
22 involves excessive governmental favoritism towards  
23 religion. It does so because of two features which  
24 taken together distinguish the statute from somewhat  
25 similar state and federal statutes.



1 First, the Sabbath law is not a neutral law,  
2 but explicitly favors employees with religious reasons  
3 for wanting a particular weekend day off or other  
4 employees who have compelling secular reasons. And  
5 second, the government strengthened that message of  
6 favoritism and endorsement by insisting that religious  
7 observers have an absolute right to have every Sabbath  
8 day off without regard to any burden that is placed on  
9 other employees or on the employer.

10 QUESTION: Didn't Thomas against the Review  
11 Board do something like that?

12 MR. GEWIRTZ: That case, Your Honor, arises  
13 under the free exercise clause. It involved a  
14 government compensation program which this Court held  
15 was required under the free exercise clause of the  
16 Constitution to provide special treatment for Thomas.

17 There are no constitutional free exercise --

18 QUESTION: Special treatment for Thomas for  
19 what reason?

20 MR. GEWIRTZ: Because the free exercise clause  
21 of the Constitution gave Thomas the right.

22 QUESTION: Because of his religion.

23 MR. GEWIRTZ: That is correct, Your Honor. A  
24 distinction which we think is critical in this case is  
25 where the free exercise clause of the Constitution gives

1 individuals rights as against the government, that's one  
2 situation. But this situation is where the government  
3 is not exempting itself from a burden it itself is  
4 imposing on religion, but it's going into the private  
5 market and bringing religion into the picture. And we  
6 think that it -- it violates the establishment clause in  
7 that situation for two reasons: because of the  
8 nonneutrality of what it does when it enters the private  
9 market, and because of the absolute way in which it acts.

10 And I'd like to begin by underscoring the  
11 law's nonneutrality and by emphasizing the practical  
12 real world problem that this case reflects. In the  
13 retail trades weekend work is the lifelood of the  
14 enterprise, but it's also true that most employees would  
15 prefer to get as many weekend days off as possible.  
16 What the State of Connecticut has done in this case is  
17 that it has insisted that that problem be resolved by  
18 means of explicitly sorting people based on religious  
19 observance. It gives Sabbath observers the right to  
20 designate a weekend off, even though other employees  
21 have compelling secular reasons which they, too, would  
22 like to have Sabbath off to fulfill. And, in addition --

23 QUESTION: Your opponent, though, says that at  
24 least as to the secular concerns, when you're not being  
25 allowed to indulge those, you aren't breaking a

1 religious tenet. You say, I suppose, that the state  
2 ought not to give any special preference to a religious  
3 tenet, if an employee's violating a religious tenet as  
4 opposed to a preference to go to, you know, the child's  
5 baseball game.

6 MR. GEWIRTZ: Well, it is true that there is a  
7 difference the state says exists between having  
8 religious reasons and compelling secular reasons for  
9 wanting the holiday off -- the weekend day off. Our  
10 point, at least in this context with this kind of  
11 absolute statute, is that the state may not choose to  
12 value a religious reason for wanting the weekend off as  
13 compared to some competing secular ones.

14 I can give you a couple of examples of strong  
15 secular reasons which people have for wanting the  
16 weekend day off. For example, in a two working -- a two  
17 -- if both spouses are working, a spouse may want a  
18 weekend off because the spouse is only off on the  
19 weekend; or if a child is playing once a week only on a  
20 weekend in a Little League game, the employee may want  
21 the weekend off for that purpose; or if there's been a  
22 divorce and the custody arrangement says that the father  
23 can only see the child when the child is out of school  
24 on a weekend, that person may want the weekend off.

25 What the state is doing, and which we think,

1 at least in this context, the establishment clause  
2 prohibits, is saying we value the religious reason more  
3 than any other compelling secular reason. And not only  
4 that, there's an extra twist in the effect of the  
5 statute, because what the state, in effect, is saying is  
6 that in order to let the religious person have that  
7 Sabbath day off, the nonobservant people have to work  
8 lots of extra days. That, I think, amounts to  
9 endorsement of religion with the consequence of  
10 divisiveness --

11 QUESTION: Well, they're going to get -- the  
12 nonreligious are going to get their days off anyway.  
13 It's just that they won't come on the weekends, isn't it?

14 MR. GEWIRTZ: That's --

15 QUESTION: So when you say extra days, it  
16 isn't quite accurate. You mean extra weekend days.

17 MR. GEWIRTZ: That's right. But our position  
18 is that there are a range of strong reasons people have  
19 for wanting in particular the weekend day off. And that  
20 it isn't the business of the state to enter the market  
21 and pick and choose and say your reasons are more  
22 valuable; we don't value your reasons as much. That's  
23 endorsement of the religious reason and offends the  
24 establishment clause.

25 But further, we don't rest simply on that



1 simple fact of preference, because this statute -- this  
2 statute's favoritism and endorsement of religion is  
3 underscored, strengthened by this absolute feature which  
4 is that Sabbath observers get every weekend day off --

5 QUESTION: Well, Mr. Gewirtz, the Attorney  
6 General says the statute isn't absolute and that the  
7 administrative agency charged with its enforcement  
8 doesn't interpret it that way. The court below didn't  
9 decide that question. What should we do if that's  
10 important?

11 MR. GEWIRTZ: Well, it's true that the  
12 Attorney General and Mr. Lewin have -- have said that,  
13 and it may be best if I just take a minute or two to try  
14 to explain why the statute is clearly absolute and why  
15 their assertion is both inaccurate and I think unfair to  
16 introduce at this point.

17 First, the words of the statute clearly and  
18 unambiguously say the employee must be given every  
19 Sabbath day off if the employer -- even if the employer  
20 doesn't want it.

21 QUESTION: Well, I suppose it's theoretically  
22 possible the Connecticut courts could say it doesn't  
23 mean what it appears to say.

24 MR. GEWIRTZ: It would have been theoretically  
25 possible, but in practice, in actuality, that isn't what

1 happened. What happened was before the arbitration  
2 board, Thornton came in and said this statute's absolute  
3 and took full advantage of its absolutism, by the way.  
4 Indeed, it's worth noting that Thornton never filed a  
5 complaint under Title VII, but took advantage of the  
6 absolutism of this statute.

7 Caldor, in return, agreed that the Connecticut  
8 statute looked absolute, argued explicitly -- and I can  
9 return to that in a moment -- that this statute if  
10 absolute would be unconstitutional because it was  
11 absolute, and therefore offered certain defenses.

12 The arbitration board construed the statute  
13 absolutely, holding not that Caldor's offenses --  
14 defenses were insufficient in the sense that Caldor's  
15 efforts had been unreasonable, but the arbitration board  
16 accepted, as Thornton had argued, that this statute  
17 required Caldor to give Thornton every Sunday off  
18 whether the employer wanted it or not.

19 Fourth, the Connecticut Supreme Court  
20 construed -- accepted the board's construction. It  
21 accepted and deferred to the board's construction of the  
22 law and held that this law, which was an absolute law,  
23 was unconstitutional.

24 QUESTION: Well, now --

25 MR. GEWIRTZ: One --

1                   QUESTION: Yeah. Did the supreme court of  
2                   Connecticut -- you say it -- it upheld the board's  
3                   construction. Was its attention called to the  
4                   difference between an absolute and a conditional law,  
5                   and did it say in so many words we find this law is  
6                   absolute?

7                   MR. GEWIRTZ: The issue is one of Connecticut  
8                   law, Justice Rehnquist, which may strike you as unusual,  
9                   but it -- Connecticut law -- and that is set forth  
10                  explicitly in the Connecticut Supreme Court's opinion --  
11                  states that on legal questions which go to the  
12                  arbitration board, as opposed to constitutional ones,  
13                  the arbitration board's legal conclusion is binding.  
14                  And therefore, as this case comes to this Court, it's  
15                  the arbitration board's construction of the statute  
16                  acceded to by the state supreme court which is the  
17                  relevant construction.

18                  And I -- and I want to add just one -- cre --  
19                  one additional point, because the Connecticut Supreme --  
20                  the Connecticut legislature responded to this statute --  
21                  see, people knew what was going on in this statute.  
22                  People knew that this was an absolute law. And the  
23                  connecticut legislature, not wishing to be in conflict  
24                  with the new judgment of the Connecticut Supreme Court,  
25                  stopped at a reasonable accommodation law -- the new

1 statute. It adopted a reasonable accommodation law.

2 So it seems to me clear that this statute  
3 before you, the statute the petitioner has until this  
4 moment argued was absolute, really is an absolute law.

5 QUESTION: One doesn't get that flavor -- at  
6 least I don't -- from the supreme court of Connecticut  
7 opinion; that since the arbitration board construed this  
8 as to be absolute, we're bound by the arbitration  
9 board's construction.

10 Now, perhaps I missed some sentence in the  
11 opinion, but I -- I didn't get that flavor from it.

12 MR. GEWIRTZ: Well, there are explicit  
13 passages in the opinion when challenges are made by  
14 Caldor and others to the legal construction of words in  
15 this statute that the Connecticut Supreme Court says as  
16 long as the issue was submitted to the arbitrator, this  
17 court doesn't sit to redecide the legal questions or to  
18 reexamine the factual questions.

19 Let -- let me just add one final -- final  
20 point on this issue of whether the statute's absolute.  
21 If you don't believe the accuracy of what I've just  
22 said, or if you have doubts about whether the statute is  
23 really absolute, it seems to me that's another reason  
24 this Court might consider dismissing the writ as  
25 improvidently granted.



1           We've set out some reasons at the conclusion  
2 of our brief bearing on the existence of this new  
3 statute where we recommend that course. But if there's  
4 lack of clarity about whether this law really is  
5 absolute, if there's uncertainty, that might be an  
6 additional reason to return -- to dismiss the case.

7           But I would like at least to spend some time  
8 on the assumption that my perhaps lengthy, overly  
9 lengthy narrative about the actual content of this law  
10 is -- is -- is viewed to be correct -- that is, that  
11 this statute is properly seen by this Court as an  
12 absolute law, just to explain why an absolute law, in  
13 our view, is both different from lots of other laws and  
14 different in a constitutionally relevant way. And it  
15 goes back to the basic theme that I started with, which  
16 is that the problem of this law is that it amounts to  
17 excessive favoritism of religion.

18           Absolute statutes do two things.

19           QUESTION: Well, Mr. Gewirtz, I suppose you  
20 have to be emphasizing there the word "excessive,"  
21 because you wouldn't -- I -- I guess you don't suggest  
22 that Title VII is unconstitutional.

23           MR. GEWIRTZ: I don't suggest Title VII is --

24           QUESTION: Or that the new Connecticut statute  
25 is unconstitutional.

1 MR. GEWIRTZ: At least if it's construed the  
2 way this Court construed it in the Hardison case --

3 QUESTION: Even though here is the state  
4 entering into the private market and making employers do  
5 what they don't want to do, and even though that does  
6 favor religion to some extent. It just doesn't favor it  
7 as much, is that it?

8 MR. GEWIRTZ: Well, this Court's opinion in  
9 Hardison, which you, Justice White, obviously are very  
10 familiar with --

11 QUESTION: Apparently not familiar enough.

12 MR. GEWIRTZ: -- construed the statute, the  
13 Title VII statute, to require accommodation only where  
14 the burdens imposed were de minimis. The consequence of  
15 that seems to me to be several.

16 First, this statute --

17 QUESTION: Was that just an issue of statutory  
18 construction?

19 MR. GEWIRTZ: It is only an issue of statutory  
20 construction, but the question is whether this statute,  
21 Title VII, is constitutional if the Connecticut statute  
22 is unconstitutional. And I think the differences are  
23 captured in the way in which this Court construed Title  
24 VII.

25 One, Title VII is an antidiscrimination law.

1 It arises in the context of an antidiscrimination  
2 statute. As construed by the Court in Hardison, the  
3 burdens imposed on the -- on anybody else by  
4 accommodating the religious person may only be de  
5 minimis; otherwise, no accommodation is required.  
6 Therefore, the endorsement of religion is less because  
7 the degree of secular burden that has to be overcome to  
8 accommodate religion is extremely small.

9 Second --

10 QUESTION: Well, so -- so in answer to my  
11 question, I -- I suppose it is that -- that the law we  
12 have before us today, it just excessively benefits  
13 religion. It could benefit religion less -- lesser --  
14 less, to a lesser extent and pass muster, is that --

15 MR. GEWIRTZ: Well, the reason I put the word  
16 "excessive" in my sentence was because this Court's own  
17 discussion of the establishment clause has indicated  
18 that rigidity --

19 QUESTION: Well, let's -- why don't -- why --  
20 tell me how -- you say this statute -- this statute is  
21 unconstitutional for certain reasons. Now, why don't --  
22 why wouldn't those reasons apply to invalidate the  
23 Connecticut -- Connecticut's new statute, its  
24 accommodation statute?

25 MR. GEWIRTZ: First, as -- as both Mr. Lewin

1 and Mr. Lieberman indicated, that statute tracks  
2 literally Title VII.

3 QUESTION: All right.

4 MR. GEWIRTZ: So it's plausible at least to  
5 think in the first instance that -- that the meaning  
6 given that -- that new statute will be the meaning this  
7 Court gave to Title VII. So I'll respond to the  
8 question in those terms.

9 The problem with an absolute law is, one, that  
10 it permits burdens to be imposed on other people without  
11 any regard to the burden, without -- it deems all  
12 competing interests legally irrelevant. Different from  
13 Title VII because Title VII constrains the burdens that  
14 may be imposed -- not burdens in the abstract, but  
15 burdens in the name of facilitating religious exercise,  
16 which is the establishment clause principle.

17 The second point, and it's in many ways a more  
18 important point, is that an absolute law amounts to  
19 endorsement of religion. Why does it amount to  
20 endorsement of religion? What does an absolute law  
21 say? It says all competing interests must give way  
22 automatically to religion. That's what the absolutism  
23 says. And if you think about the way an absolute law  
24 operates in a workplace, one can literally imagine the  
25 government speaking to workers and saying not only does



1 your reason for wanting the weekend off matter less than  
2 your reason, but I'm not even going to deem it legally  
3 relevant what burdens are placed on you or on the  
4 employer. The religious interest simply wins. That  
5 amounts to the most emphatic kind of endorsement.

6 A reasonable accommodation law like Title VII  
7 seems to me to send an altogether different kind of  
8 message. Ultimately, what a reasonable accommodation  
9 law permits is for an employer to take account of  
10 everyone's interests, to respond to some, to give  
11 reasons to waiver --

12 QUESTION: Well, but certainly -- certainly  
13 the accommodation the Title VII -- says you've got to  
14 give consideration to religious preferences in a way you  
15 don't have to give consideration to any secular  
16 preferences at all.

17 So I think Justice White is quite right. If  
18 -- if the Title VII thing is all right under the  
19 establishment clause, it must be because -- and your  
20 statute is not good, it's because of excessive.

21 MR. GEWIRTZ: Maybe another way to try the  
22 answer is to -- is to underscore the fact that Title VII  
23 is a nondiscrimination provision.

24 QUESTION: Well, I don't see what's that got  
25 to do with it?

1 MR. GEWIRTZ: Because -- because a  
2 nondiscrimination provision says no discrimination based  
3 on religion, sex, race and other things, and doesn't  
4 speak about other sorts of characteristics, and  
5 therefore, might at first blush look like it's treating  
6 religion more favorably. But we say it doesn't. We say  
7 a nondiscrimination statute doesn't violate the  
8 Constitution, the establishment clause, because a  
9 nondiscrimination statute is simply lifting essentially  
10 irrational barriers in the way of people's employment.  
11 This --

12 QUESTION: Well, but what's -- what's  
13 irrational about an employer saying everybody should  
14 work five days a week or six days a week and we're open  
15 Monday through Saturday, everybody gets Sunday off  
16 whether that's your Sabbath day or not? From the  
17 employer's point of view that's perfectly rational.  
18 Title VII comes in and says no, you can't do that  
19 because we're going to make you consider religion.

20 MR. GEWIRTZ: I do think there's -- there's a  
21 significant difference between the government saying to  
22 an employer you may not take account of someone's  
23 religion and say to someone because you're a Catholic,  
24 because you're a religious observer, you can't work  
25 here, and when the government says, as it says to Caldor

1 here, you may not rely on legitimate job criteria, which  
2 is that managers of your store in an industry where  
3 weekend business is the lifeblood of the enterprise, you  
4 have to work.

5 QUESTION: Yeah, but Title --

6 MR. GEWIRTZ: That's a big, big difference.

7 QUESTION: -- Title VII Sabbath provisions are  
8 not classical antidiscrimination provisions at all.  
9 They're not saying an employer can't discriminate  
10 against somebody because he's a Catholic. An employer  
11 could be absolutely neutral in all of his hiring  
12 policies about religion and still violate Title VII's  
13 Sabbath clause because it says you've got to give  
14 special consideration to Sabbatarian matters.

15 I don't think your -- your antidiscrimination  
16 analogy doesn't work, I don't think.

17 MR. GEWIRTZ: Well, let me try with just two  
18 quick responses to that last question. One, I think one  
19 way to understand Hardison is that an employer who  
20 doesn't make even de minimis accommodation is plausibly  
21 viewed by Congress really to be discriminating. And  
22 second -- and I think that's really the strongest  
23 point.

24 But second, even if that's not quite right,  
25 even if what Congress is saying in Title VII is be fair

1 to religion, be especially sensitive, it is not saying  
2 give them a flat preference automatically, always. And  
3 that -- that statement, that first kind of statement  
4 which is captured in the Title VII statute which says be  
5 fair, it may be that there's some play at the joints, as  
6 this Court has said, and there may be a slight  
7 preference, a slight degree of attention, that is  
8 altogether different, I think, from that Connecticut  
9 statute which on its face says you want Sablath off, you  
10 always get it. Everything else is irrelevant.

11 It seems to me it's a real difference both in  
12 -- in content and appearance and perception and impact  
13 in the work force. If you read the record in this case,  
14 you'll see that even with one person, Thornton saying,  
15 insisting on his rights, there was division and  
16 rebellion -- that's not my word; that was the word in  
17 the record. One of the real advantages of -- of a  
18 reasonable accommodation provision is that it allows  
19 competing interests to harmonize, both religious and  
20 secular.

21 QUESTION: Mr. Gewirtz, can I interrupt you  
22 with a question about the statute as applied in this  
23 case, and putting to one side for a moment the question  
24 of the absolute character of the statute. Supposing the  
25 statute just does this. It says that the deceased gets



1 every Sunday off, and the other three supervisors who  
2 would normally work every fourth Sunday must work every  
3 third Sunday. That's the net practical effect.

4 As so applied, in your view would it be  
5 constitutional or unconstitutional?

6 MR. GEWIRTZ: Well, it would turn --

7 QUESTION: That's all we know.

8 MR. GEWIRTZ: It might turn on the extent of  
9 burden, and one of our central objections in this case  
10 is that we never had an opportunity under this statute  
11 to argue whether one or another kind of accommodation  
12 would or wouldn't really be reasonable.

13 What this statute says is if the employee  
14 wants Sunday off and the employer says we can't have it,  
15 that ends the inquiry. So the objection to an absolute  
16 law I think doesn't -- doesn't answer the question of  
17 where precisely along the continuum --

18 QUESTION: I wonder if you could answer my  
19 hypothetical, because it seems to me that this much is  
20 clear about my hypothetical: there's some burden on the  
21 employer, not very much, and there's also some burden on  
22 three other employees who want to see their -- their  
23 children or whatever it may be. Is that enough?

24 MR. GEWIRTZ: My hesistance, my shifting my  
25 feet is in part, I think, a product of the fact that

1 this Court's own doctrine under the establishment clause  
2 indicates that matters of degree, fine lines, that's our  
3 constitutional fate. There might have been a simpler  
4 course that this Court's doctrine could have taken which  
5 is simply religion may never be taken account in any  
6 way, shape or form by the government, in which case this  
7 case would be -- our case, which is clear, would never  
8 have arisen, and yours wouldn't even be difficult.

9 In that middle range, in that middle range  
10 where there is some burden, there is some preference, I  
11 could distinguish it from this case, there's less  
12 endorsement. There's less endorsement as the benefit to  
13 the religious person decreases and as the burden to  
14 competing secular interest deepens.

15 QUESTION: But as I understand you, that's  
16 still different from Thomas. It's a clear difference,  
17 that is.

18 MR. GEWIRTZ: Clear difference. Clear  
19 difference.

20 QUESTION: And, of course, Hardison really  
21 didn't reach the constitutional question. That was a  
22 statutory --

23 MR. GEWIRTZ: Right. Hardison did not reach  
24 the constitutional questions, but I think two things  
25 about Hardison are relevant. One is the Court did seem

1 to recognize the degree of burden, the degree of burden  
2 is relevant to the fairness of the situation. And  
3 second, the Court used characterizations -- unequal  
4 treatment, discrimination -- to describe a situation  
5 which I think covers this case.

6 Let me -- let me say something about the  
7 entanglement question with -- is another feature of this  
8 statute which I think indicates its aberrational  
9 quality, indicates why this statute is so different as  
10 construed by the Connecticut Supreme Court from somewhat  
11 similar statutes.

12 This -- this Connecticut Supreme Court  
13 construed this statute to require a particular kind of  
14 inquiry. The inquiry that was required was not simply  
15 into the subjective sincerity of the observer, but  
16 included two other features. One is an inquiry into  
17 whether the religious practice -- whether the religious  
18 sect -- that's my word, not their word -- said that  
19 observance of the Sabbath, a work-free Sabbath, was part  
20 of that religious observance. And the second was  
21 inquiry into what the individual person actually did,  
22 what the scope of observance actually was.

23 And one of the things which occurred in this  
24 very hearing was a series of questions, extremely  
25 awkward and unpleasant questions, open air, on public

1 record, inquiring into what Thornton actually did, how  
2 did he celebrate or observe his Sabbath. And one of the  
3 distinctive things which we think is wrong with this  
4 statute -- I emphasize as construed by the Connecticut  
5 Supreme Court -- is the degree of government intrusion  
6 which such questions pose.

7 By raising that issue I don't mean to step  
8 back from the central point which is that this statute  
9 endorses religion impermissibly; that as such, it is  
10 sharply distinguishable from the score or more of state  
11 statutes and from Title VII of the Civil Rights Act.

12 It is also -- presents a very different  
13 constitutional question than the McGowan case, McGowan  
14 against Maryland presented in this Court more than two  
15 decades ago. The McGowan against Maryland case, it  
16 seems to me, points to a way of government acting which  
17 doesn't involve excessive government favoritism.

18 In McGowan the Court upheld the Sunday closing  
19 law. It was a controverted decision, but the Court's  
20 decision was explicitly based on the fact that there was  
21 a common day of rest created, and that the statute  
22 applied to everyone. In this case, the central  
23 constitutional deficiency is that the statute prefers  
24 some people for certain rights and disprefers others,  
25 and does so in a way, in an absolute way where it sends



1 this powerful message of endorsement.

2 QUESTION: Well, Mr. Gewirtz, suppose --  
3 suppose a statute was passed that said no employer may  
4 fire an employee because he wants to go to school on  
5 Saturdays or on Sundays. Anybody who's trying to get a  
6 degree or something who wants to go on those days can  
7 go, and even though that means other employees are going  
8 to have to work more weekends than they would have.  
9 Would that be constitutional?

10 MR. GEWIRTZ: That case does not involve  
11 action taken by the government in the name of religion --

12 QUESTION: Exactly. It does not. Then, so  
13 what's your answer to my question?

14 MR. GEWIRTZ: It might well be  
15 constitutional. There are -- the question of burden --

16 QUESTION: And yet -- and yet a statute that  
17 prefers religion as much as it prefers education would  
18 be unconstitutional.

19 MR. GEWIRTZ: And the -- and the reason is  
20 that there's an establishment clause and that this  
21 Court's construction of substantive due process has  
22 indicated there's only minimal limitation on what the  
23 government can do in regulating the marketplace. But  
24 where the establishment clause exists, we're concerned  
25 distinctively about favoritism and about endorsement of

1 religion.

2 QUESTION: So suppose -- suppose the law said  
3 anybody who either wants to -- to observe his Sabbath or  
4 go to school may get -- get Saturday or Sunday off, just  
5 in an absolute way. You would strike down part of it  
6 and sustain the other?

7 MR. GEWIRTZ: Well, the difference in that  
8 statute -- in that statute is that the category of  
9 coverage is enlarged.

10 QUESTION: Well, how about -- that may be  
11 difficult, but what's the quick -- have you got a quick  
12 answer to would you or wouldn't you just strike down  
13 part of it and sustain the other?

14 MR. GEWIRTZ: I don't have a quick answer. I  
15 probably would strike it down. But the important point  
16 --

17 QUESTION: You wouldn't strike down the whole  
18 statute, would you?

19 MR. GEWIRTZ: No, no. No, but the important  
20 point is to recognize the principle of neutrality and  
21 its central role here. In the Walz --

22 QUESTION: Well, that isn't very neutral, is  
23 it, between religion and education if you strike down  
24 the religious thing and -- and sustain the educational  
25 provision. That's not very neutral, is it?

1 MR. GEWIRTZ: No, but in that situation, the  
2 Walz case, which was actually decided by this Court,  
3 might be a good -- a good analog. In Walz we have two  
4 features. Walz is a case in which -- in which the Court  
5 upheld tax exemptions for churches, schools and other  
6 nonprofit entities. And the challenge was made is that  
7 a violation of the establishment clause. No, because  
8 the category of coverage was broader than the religion,  
9 and that was an exemption from a government program.  
10 Neither is the case here.

11 Thank you.

12 CHIEF JUSTICE BURGER: Do you have anything  
13 further, Mr. Lewin? You have two minutes remaining.

14 ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,  
15 ON BEHALF OF THE PETITIONERS -- REBUTTAL

16 MR. LEWIN: Thank you, Mr. Chief Justice.

17 If I might just pick up on the question that  
18 Justice White was just asking and really maybe tie it in  
19 with Justice O'Connor's question originally to me.

20 This Court last term in Lynch and Donnelly  
21 talked in the course of its opinion about the fact that  
22 Thanksgiving and Christmas are national holidays which  
23 have religious significance, and it noted that it's  
24 clear that the government has long recognized, indeed  
25 has subsidized, holidays with religious significance by

1 giving federal employees off on that day.

2 To take your hypothetical, Justice White, if  
3 in fact a legislature said you cannot fire somebody who  
4 takes off on Thanksgiving or Christmas for religious  
5 reasons, we think that would be obviously an absolute  
6 statute that would have religious significance in the  
7 sense that this Court has recognized those were  
8 religious days and indeed were subsidized.

9 I think there's no question it almost follows  
10 a fortiori, Justice O'Connor, that if the federal  
11 government can subsidize those days that this Court has  
12 recognized to be religious holidays, that it should  
13 certainly be able to say to a private employer you can't  
14 fire somebody. That's the spirit of the free exercise  
15 clause that this Court talked about in Gillette where  
16 the Court specifically said that apart from the question  
17 whether the free exercise clause might require some sort  
18 of exemption, it is hardly impermissible for Congress --  
19 and I submit for a local legislature -- to attempt to  
20 accommodate free exercise values in line with our happy  
21 tradition of avoiding --

22 QUESTION: Mr. Lewin --

23 MR. LEWIN: -- unnecessary clashes with the  
24 dictates of conscience. That's --

25 QUESTION: Mr. Lewin, do you think --



1 MR. LEWIN: -- exactly what this statute does.

2 QUESTION: Do you think the fact that  
3 government can subsidize a minister to say prayer at the  
4 opening of legislative sessions would authorize the  
5 government to pass a statute saying there must be a  
6 minister at the board of directors meeting?

7 MR. LEWIN: No, Your Honor. I think that  
8 would be -- that would be unconstitutional. But that's  
9 not because -- in terms of legislative prayer, I think  
10 the fact is this Court has said there's a historic basis  
11 for it in Marsh and Chambers. There's really a minimal  
12 effect on any taxpayers.

13 That, I submit, would be an extreme case in  
14 which an employer is being asked to subsidize directly  
15 some religious performance. This statute doesn't say to  
16 an employer you have to pray on Saturdays, you have to  
17 go work on Sundays, or you have to go to church on  
18 Sundays, or you have to perform religious observances.  
19 It says permit your employees to do it and don't force  
20 them to the cruel choice of choosing between their  
21 livelihood and divine command.

22 Thank you.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.

24 The case is submitted.

25 (Whereupon, at 2:34 p.m., the case in the  
above-entitled matter was submitted.)

CERTIFICATION

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#83-1158 - ESTATE OF DONALD E. THORNTON AND CONNECTICUT, Petitioners  
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BY Paul A. Richardson

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