No. 18-349

In the Supreme Court of the United States

DARRELL PATTERSON, PETITIONER,

v.

WALGREEN CO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for the past half century. COLPA's first *amicus* brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 *amicus* briefs to convey to this Court the position of the leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

List To Be Provided

QUESTION PRESENTED

Amici believe that this case squarely presents the following important constitutional question:

Whether this Court should overrule the holding in the majority opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that Section 701(j) of the Civil Rights Act of 1964, as amended, 42

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Petitioner and Respondent have filed blanket consent to the filing of *amicus* briefs.

U.S.C. § 2000e(j), requires an employer to engage in nothing more than *de minimis* accommodation to the religious observance and practice of an employee.

REASONS FOR GRANTING THE WRIT

On June 16, 1977, more than forty years ago – at a time when a broad reading of the Establishment Clause dominated this Court's decisions on church-state issues – the Court decided *Trans World Airlines, Inc. v. Hardison*, *supra*. Expressing concern that the Establishment Clause would prohibit compelling an employer to incur expense to accommodate an employee's Sabbath observance, the Court's majority opinion (from which Justices Brennan and Marshall dissented) declared that a then-recent amendment to Title VII of the Civil Rights Act provided no meaningful protection for an employee's religious observance and practice.

The organizations filing this *amicus* brief filed an extensive detailed friend-of-the-Court brief in *Trans World Airlines, Inc. v. Hardison*, Nos. 75-1126 and 75-1385.

The Court granted leave to undersigned counsel, then representing several of the Orthodox Jewish entities that are filing this *amicus* brief, to present oral argument in *Trans World Airlines, Inc. v. Hardison* as an *amicus curiae* in support of respondent Larry G. Hardison. Mr. Hardison was an adherent of the Worldwide Church of God, a Christian religious faith that observed the Sabbath from sundown on Friday until sundown on Saturday. Hardison was fired by TWA when he refused to work a Saturday shift. He "had insufficient seniority to bid for a shift having Saturdays off," and TWA refused

to "pay premium wages" to have "someone not regularly assigned to work Saturdays" fill in for him. 432 U.S. at 68.

The majority opinion written by Justice Byron White reversed the decision of the Eighth Circuit, which had held that TWA had failed to engage in the statutorily mandated "religious accommodation" to Hardison's Sabbath observance. A majority of this Court held that Section 701(j) of the Civil Rights Act, enacted by the Equal Employment Opportunity Act of 1972, provided no real practical protection for employees who are Sabbath-observers. The majority opinion declared that TWA need not "bear more than a *de minimis* cost in order to give Hardison Saturdays off." 432 U.S. at 84.

In 1977, at the time *TWA v. Hardison* was argued and decided, this Court was interpreting the Establishment Clause as condemning any financial support whatever of religion. See *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). Little more than two decades later, in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court declared that both *Meek v. Pittenger* and *Wolman v. Walter* were "anomalies in our case law" and were "no longer good law." 530 U.S. at 808. Both decisions were explicitly overruled. 530 U.S. at 835. Concurring separately in *Mitchell v. Helms*, Justices O'Connor and Breyer also explicitly overruled the 1975 and 1977 *Meek* and *Wolman* decisions. 530 U.S. at 836-837.

The Court has had no occasion since its repudiation of *Meek* and *Wolman* in the 2000 *Mitchell v. Helms* decision to address the continued

constitutionality of the "*de minimis* limitation" announced in *Trans World Airlines v. Hardison.* The time has now come with this case to accord the same polite burial to *Hardison* as the Court gave 18 years ago to *Meek* and *Wolman.*

In this case the Eleventh Circuit ruled against a Sabbath-observer because it applied the *de minimis* limitation that this Court imposed on Section 701(j) of the Civil Rights Act as amended in 1972. See 727 Fed. Appx. at 585-586. The decision below should now be reversed and remanded with instructions to decide petitioner's appeal without the *de minimis* limitation.

ARGUMENT

In the *amicus curiae* brief we filed in 1977 in the *Hardison* case we argued for meaningful enforcement of Section 701(j), which directed reasonable accommodation to an employee's religious observance and practice. We will not repeat that argument in full at this juncture of this case, but we quote below the Argument Headings of the relevant pages in our *amicus* brief:

> A. Section 701(j) Is a Means of Prohibiting Unjustified Religious Discrimination.
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> B. Section 701(j) Does Not Accord an Impermissible "Preference" to Religion.
>
> C. Section 701(j) Obligates an Employee To Cooperate with His Employer's Efforts To Make a "Reasonable Accommodation."
>
> D. Section 701(j) Imposes the Burden of Accommodating and Explaining on the Employer Because He Has the Facts.

E. Other Employees – Even If Covered by a Labor Contract – Must Make Adjustments of the Kind Customary in an Employment Relationship.

F. Congress' Authority To Legislate Is Not Affected by the Fact That Private, Rather Than Governmental, Discrimination Is Involved.

These points are as valid today as they were when we presented them in 1977. Indeed, this Court's ruling just three years ago in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), demonstrates that the *de minimis* limitation of the *Hardison* opinion is, like *Meek v. Pittenger* and *Wolman v. Walter*, an "anomaly" in this Court's case law and "no longer good law." The accommodation that Abercrombie & Fitch was required to make in that case was patently more than a *de minimis* accommodation because it assertedly reduced the employer's sales. Nonetheless, the employer did not argue that it was permitted to refuse an accommodation on this ground.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari, overrule *Trans World Airways v. Hardison*, and reverse the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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