No. 19-1388

In the
Supreme Court of the United States

JASON SMALL,
Petitioner,
v.

MEMPHIS LIGHT, GAS & WATER,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND OTHER JEWISH ORGANIZATIONS 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 more than half a 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 leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

▪Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

▪Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪Coalition for Jewish Values ("CJV") is a national rabbinic public policy organization that represents more than 1,500 traditional Orthodox rabbis and

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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 were timely noticed and consented to the filing of this *amicus* brief.

advocates for classical Jewish ideas and standards in matters of American public policy.

▪National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

▪Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. This case's impact upon those who are Sabbath observant and may require accommodations is critically important. The Orthodox Union has, for years, persistently advocated for judicial and legislative responses to this Court's ruling in *TWA v. Hardison* which set back religious accommodation in the American workplace.

SUMMARY OF ARGUMENT

In the ordinary course, we would be urging this Court to grant certiorari and direct full briefing and oral argument of the important issue presented by this petition. This Court's ruling of June 15, 2020, in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), makes this burdensome and time-consuming procedure unnecessary. This Court's equal division in 1971 in *Dewey v. Reynolds Metals Co.,* 402 U.S. 689 (1971), taken together with this Court's *Bostock* decision establish that an employer's discrimination against an employee because of his religious observance is prohibited by Title VII of the Civil Rights Act as initially enacted in 1964. There is, therefore, no *de minimis* condition limiting the duty to accommodate, just as there is no *de minimis*

limitation on the prohibition against discrimination on account of race, color, sex, or national origin.

ARGUMENT

THIS COURT SHOULD OVERRULE THE *HARDISON* DICTUM SUMMARILY IN LIGHT OF *BOSTOCK v. CLAYTON COUNTY, GEORGIA*

This case is another opportunity, as was *Patterson v. Walgreen Co.,* No. 18-349, *cert. denied*, 140 S. Ct. 685 (2020), for this Court to consider the continuing validity of the disastrous dictum in the Court's majority opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). For the reasons presented in the briefs of the petitioner in *Patterson* and in the supporting briefs of his six *amici*, including the United States, *Hardison*'s erroneous limitation of the term "undue hardship" should now be explicitly overruled in this case and in *Dalberiste v. GLE Associates, Inc.,* No. 19-1461, so that employees whose religious observance can be accommodated by their employers – even at some cost – will benefit from the protection granted by the Civil Rights Act.

The issue now presented by this case was, in substance, before this Court half a century ago. In *Dewey v. Reynolds Metals Co.,* 402 U.S. 689 (1971), a member of the Faith Reformed Church was fired because he refused to work on Sundays or request another employee to work in his stead. The Court of Appeals for the Sixth Circuit, by a 2-to-1 vote, rejected his claim that this conduct by the employer violated the prohibition in Title VII of the Civil

Rights Act against employment discrimination on account of "religion." *Dewey v. Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970). **Section 701(j) of the Act, as currently applicable, had not been enacted in 1970.** This Court granted Dewey's petition for certiorari. The Question Presented was: "Does an employer engage in religious discrimination in violation of Section 703(a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?"

Dewey's contention that the prohibition against employment discrimination "because of . . . religion" included discrimination because of an employee's religious observance was supported by several *amici*, including the United States. See Brief for the United States as Amicus Curiae, Oct. Term 1970, No. 835.

An *amicus curiae* brief on behalf of the National Jewish Commission on Law and Public Affairs, American Jewish Committee, and Anti-Defamation League of B'nai B'rith was submitted to this Court in the *Dewey* case. The first argument heading in that brief was: "Petitioner's Observance of a Weekly Day of Rest Is 'Religion' Within the Meaning of the Civil Rights Act of 1964." Page 5 of the *amicus* brief noted that "the sole reason for petitioner's discharge was his adherence to a principle of conduct commanded by his faith. And conduct such as observance of a weekly day of rest is protected by the constitutional and statutory safeguards for religious freedom."

Following oral argument in the *Dewey* case this Court issued the following order on June 1, 1971:

"The judgment is affirmed by an equally divided Court." 402 U.S. 689 (1971). This order means that four Justices of this Court would have sustained Dewey's claim under the language of Title VII of the Civil Rights Act **even without the "reasonable accommodation" obligation later added to the Act by Section 701(j).**

On June 15, 2020, this Court issued its decision in *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020). The Court held (p. 5) that the word "sex" in Title VII of the Civil Rights Act as enacted in 1964 includes "norms concerning gender identity and sexual orientation" and not merely "biological distinctions between male and female."

By the same token, the word "religion" in Title VII, as first enacted in 1964, should now be held to include all aspects of religious observance and practice, just as "sex" was held in *Bostock* to include sexual orientation and conduct that results from such sexual orientation.

The *de minimis* standard announced in the *Hardison* majority opinion does not govern the legal duty to refrain from discrimination on account of "race, color, . . ., sex, or national origin." It similarly should not govern the duty to avoid discrimination on account of "religion."

When *Hardison* was heard and decided in 1977 there may have been some concern among Justices of this Court that requiring accommodation to an employee's religious observance could violate the Establishment Clause of the First Amendment

because it would constitute prohibited governmental financial assistance to religion.

Then recent cases such as *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), may have contributed to this concern. *See*, *e.g.*, *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976). But in *Mitchell v. Helms*, 530 U.S. 793 (2000), this 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 agreed that the 1975 and 1977 *Meek* and *Wolman* decisions were overruled. 530 U.S. at 836-837.

This Court's recent decisions, culminating in *Espinoza v. Montana Department of Revenue*, 2020 WL 3518364 (2020) (decided June 30, 2020), and *Trinity Lutheran Church of Columbia*, *Inc. v. Comer*, 137 S. Ct. 2012 (2017), also reject the view of the Establishment Clause that may have concerned some Justices in 1977. In light of this Court's current understanding of the Establishment Clause, there is no reason today to distinguish between the burden that an employer is required to assume in order to avoid discrimination on account of "religion" from the burden the employer must assume to avoid discrimination on account of "race," "color," "sex," or "national origin."

In light of *Bostock* and the decision by four Justices of this Court in 1971 that "religion" includes

the Sunday-observance of the petitioner in *Dewey v. Reynolds Metals Co.*, this Court need not now give the issue presented by this petition and the petition in *Dalberiste* a plenary hearing. The Court should summarily grant certiorari in both cases and reverse the decisions below, overruling the dictum in the *Hardison* case in a summary Per Curiam order.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case and in *Dalberiste v. GLE Associates,* No. 19-1461, and reverse both judgments summarily in a Per Curiam opinion overruling the *Hardison de minimis* dictum.

Respectfully submitted,

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[2] Mr. Lewin presented oral argument as *amicus curiae* for the respondent in *Trans World Airlines, Inc. v. Hardison*. He also wrote the *amicus curiae* brief for the National Jewish Commission on Law and Public Affairs, *et al.* filed with this Court in *Dewey v. Reynolds Metals Co.*