NO. 20-0127

IN THE SUPREME COURT OF TEXAS

IN RE DIOCESE OF LUBBOCK,

Relator

AMICUS BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY

Ryan Paulsen
Texas Bar No. 24060397
Ryan.Paulsen@haynesboone.com
Ryan N. Gardner
Texas Bar No. 24101790
Ryan.Gardner@haynesboone.com
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)
214.651.5940 (fax)

Counsel for Amicus Curiae Jewish Coalition for Religious Liberty

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence.[1] It aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. Over several years, its founders have worked on amicus briefs in the Supreme Court of the United States as well as in state supreme courts and lower federal courts, submitted op-eds to prominent news outlets, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership.

[1] No fees or costs were paid in connection with the preparation of this brief. TEX. R. APP. P. 11(c).

SUMMARY OF ARGUMENT

The church autonomy doctrine protects churches' "fundamental right to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007). The Supreme Court has long recognized that it "would lead to the total subversion of . . . religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts" to undermine those decisions. *Watson v. Jones*, 80 U.S. 679, 729 (1871). To protect these fundamental rights, both the Supreme Court and this Court have held that "civil courts should exercise no jurisdiction in matters which concern theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Tilton v. Marshall*, 925 S.W.2d 672, 685 (Tex. 1996).

This zealous protection of religious institutions has allowed religions of all creeds to flourish. Indeed, this careful approach has been especially beneficial to minority religions such as Judaism because it has ensured that religious communications from rabbis and synagogues are protected from government intrusion. By refusing to dismiss Plaintiff's defamation claim against the Diocese of Lubbock, the Amarillo Court of Appeals hobbled this longstanding doctrine and undermined both Religion Clauses of the First Amendment with a sweeping new rule: religious institutions are not entitled to First Amendment protections for

communications that extend beyond the confines of the institutions. This ruling, if upheld, threatens to undermine the foundations of the church autonomy doctrine and presents a unique danger to Judaism as a minority religion.

First, regarding the Establishment Clause, the lower court's holding will require courts to improperly take sides in internal religious controversies, one of the main government actions that the Clause was intended to prevent. Such determinations are especially perilous for Judaism given its status as a minority religion, and the complexity of its religious laws especially those that govern life outside of the synagogue. Because of this complexity, there is a high potential a secular court would misunderstand and misapply Jewish law, and in any event, the government must not get involved in doctrinal disputes regardless of the outcome.

As for the Free Exercise Clause, the lower court's ruling impermissibly confines the exercise of religion to private actions taking place within a religious institution. Many aspects of the Jewish faith extend beyond the bounds of the synagogue, and "the imposition of tort liability for engaging in religious activity" just because that activity took place outside of the synagogue or because a matter of faith or doctrine was communicated to non-members would create the "unconstitutional chilling effect" that this Court has warned against. *See Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 10 (Tex. 2008). The Free Exercise Clause offers robust protection that allows religious adherents to fully

participate in public life while maintaining their faith. The lower court threatens to undermine that protection in a way that is particularly dangerous for members of minority faiths.

Because of the far-reaching implications of the underlying decision, this Court should grant the Diocese's Petition and reverse the Amarillo Court of Appeals' erroneous application of the church autonomy doctrine.

ARGUMENT AND AUTHORITIES

I. Communications from synagogues and Jewish religious leaders regarding Jewish law must be protected.

The First Amendment prohibits secular courts from intruding into ecclesiastical affairs. *See, e.g., Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) ("religious controversies are not the proper subject of civil court inquiry"). As long recognized by America's Founders and the Supreme Court, "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all [religions] as the ablest men in each are in reference to their own." *Watson*, 80 U.S. at 729; *see also* J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 187 (G. Hunt ed. 1901) ("[T]hat the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension."). For this reason, courts have "zealously protected" a religious institution's right to manage its own affairs and have generally held that "a spirit of

freedom for religious organizations" prevails over competing interests. *Penley*, 231 S.W.3d at 403. This is true even when that freedom "comes at the expense of other interests of high social importance." *Id.*

This zealous protection of church autonomy does not allow adherents to commit intentional torts with impunity or to otherwise engage in all manner of conduct that threatens the public's health, safety, or general welfare under a religious guise. *See Schubert*, 264 S.W.3d at 12. But at the same time, judicial "incursions [into religious matters must be] cautiously made so as not to interfere with the doctrinal beliefs and internal decisions of the religious society." S*impson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). This cautious approach is especially important for minority faiths like Judaism, where doctrinal decisions often have effects beyond the confines of the synagogue.

For example, Jewish law prohibits Jews from purchasing food from a Jewish-owned store that owned leavened grain products over Passover for a certain period of time. *See A Guide to Purchasing Chometz After Pesach*, STAR-K (Spring 2015).[2] Pursuant to this prohibition, synagogues and Jewish organizations often warn congregants not to buy foods from certain grocery stores or other locations following Passover. *Id.*; *see also Bulletin of the Vaad Harabanim of Greater Washington:*

[2] *Available at* https://www.star-k.org/articles/kashrus-kurrents/2138/a-guide-to-purchasing-chometz-after-pesach/.

Pesach 2019, THE VAAD HARABANIM OF GREATER WASHINGTON (2019) (listing stores in the greater Washington D.C. area);[3] *Chometz after Pesach*, YOUNG ISRAEL SHOMRAI EMUNAH OF GREATER WASHINGTON (April 29, 2011) (same).[4] This practice generally consists of sending out lists of local establishments indicating which ones have violated the prohibition of owning forbidden products on Passover and clearly stating that those establishments should not be patronized for a limited time. *See id.* These lists could easily appear on publicly-accessible websites, so under the lower court's new rule, circulation of such lists beyond the immediate members of a synagogue could expose a synagogue to tort liability. *See id.*

As another example of religious conduct that directly impacts the public, consider the Jewish dietary laws, known as the laws of *kashrut*. Although these laws are several thousand years old, the debate about the proper interpretation of the various requirements still exists within the Jewish faith. *See, e.g.*, *Rabbis stir salmon row*, Y NET NEWS (Mar. 11, 2010) (discussing a dispute among Jews regarding whether salmon is kosher);[5] Joseph Berger, *The Water's Fine, but Is It Kosher?*, THE NEW YORK TIMES (Nov. 7, 2004) (discussing a Jewish dispute over whether New

[3] *Available at* https://www.kashrut.com/Passover/pdf/AfterPassoverCapitolK.pdf.

[4] *Available at* https://wp.yise.org/chometz-after-pesach/.

[5] *Available at* https://www.ynetnews.com/articles/0,7340,L-3860893,00.html.

York City's water is kosher if it is not filtered).[6] Further complicating the issue are claims by restaurants that their menus are kosher (meaning they satisfy the laws of *kashrut*, permitting Jews to eat there), when a particular restaurant may or may not actually meet the communal religious standards. To assist Jewish congregants with navigating these complex doctrinal waters, it is essential that synagogues and rabbis have the freedom to freely discuss these issues with their congregants and to warn about which restaurants are kosher and which are not without fear of lawsuits. The ramifications of such discussions will undoubtedly extend beyond the confines of a synagogue if a local rabbi or synagogue instructs congregants not to patronize a particular restaurant.

Indeed, businesses who claim to be kosher while blatantly violating *kashrut* standards have shut down based upon rabbis issuing these types of warnings. *See, e.g.*, Richard Greenberg, *Treif Meat Found At Washington DC JCC Cafe; Vaad Shuts Down Store*, THE YESHIVA WORLD (Sept. 2, 2009);[7] Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 Fla. St. U.L. Rev. 509, 547–48 (2004) (stating a restaurant that engaged in kosher fraud failed after the fraud was discovered). But

---

[6] *Available at* https://www.nytimes.com/2004/11/07/nyregion/the-waters-fine-but-is-it-kosher.html.

[7] *Available at* https://www.theyeshivaworld.com/news/general/38931/treif-meat-found-at-washington-dc-jcc-cafe-vaad-shuts-down-store.html.

under the lower court's holding, a synagogue or rabbi could be subject to tort liability for labelling a restaurant as being non-kosher because such a label would have effects extending beyond the confines of a synagogue. This threat exists even if the restaurant's conduct was clearly counter to that rabbi's interpretation of Jewish law. Like the word "minor," the word "kosher" has different meanings to different people. The lower court's ruling would allow suits to be brought based on such disagreements—and would require courts to take a side as to what "kosher" means and which meaning of "kosher" accords with common perception or the reasonable person (as the lower court did here with "minor"). *In re Diocese of Lubbock*, 07-19-00307-CV, 2019 WL 6693765, at *6 (Tex. App.—Amarillo Dec. 6, 2019).

Finally, some synagogues have a practice of certifying which poor individuals in their community need charity and are allowed to request charity in or around the synagogue after daily services. *See* Rabbi Yair Hoffman, *Fraud in Tzedakah and What to do About it*, THE YESHIVA WORLD (Sept. 22, 2016) (discussing potential solutions to prevent charitable fraud);[8] *see also* Agudath Israel of Cleveland, *New Vaad Hatzedakos Cleveland*, LOCAL JEWISH NEWS (July 22, 2017) (describing the establishment to assist Jews in Cleveland with evaluating fundraisers).[9] Similarly,

[8] *Available at* https://www.theyeshivaworld.com/news/headlines-breaking-stories/465555/fraud-in-tzedakah-and-what-to-do-about-it.html.

[9] *Available at* https://www.localjewishnews.com/2017/07/22/vaad-hatzedakos-cleveland/.

synagogues might also give poor community members certificates indicating that they are trustworthy and are proper charitable recipients. *Id.* These types of communications obviously extend beyond the confines of synagogues and directly to non-members. Indeed, such communications could prevent an individual lacking such a certificate from receiving charity from multiple synagogues. But again, if the church autonomy doctrine extends only as far as the congregants of a particular synagogue, this too could result in tort liability.

A common thread that runs through each of these examples is that they all involve doctrinal decisions and effect persons and entities outside of a synagogue's congregants. Because they involve "religious controversies," they "are not the proper subject of civil court inquiry," and a civil court must "accept the ecclesiastical decisions . . . as it finds them." *Milivojevich*, 426 U.S. at 713. The lower court's decision to the contrary seeks to improperly "penetrate the veil of the church" and exposes religious institutions to liability just because a doctrinal decision extends beyond the confines of a religious institution. *See Penley*, 231 S.W.3d at 399. This Court has warned that "the imposition of tort liability for engaging in religious activity to which the church members adhere would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles of its religious beliefs." *Schubert*, 264 S.W.3d at 12. The court of appeals' opinion shows why—it chills not only the religious activity of the Diocese, but also that of other faith

groups, including Judaism. This Court should grant the Diocese's petition and reverse the lower court to assure that all religions are protected from the intrusion of secular courts into ecclesiastical affairs.

II. The lower court's holding violates both Religion Clauses and is especially harmful to Jews.

A. The Establishment Clause's prohibition on courts resolving religious or theological questions protects Judaism.

Historically, decisions regarding the church autonomy doctrine have "radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). In refusing to resolve religious controversies, courts have recognized that any exceptions to the church autonomy doctrine must be "narrowly drawn" to avoid the ever-present hazards of "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Penley*, 231 S.W.3d at 398.

But if the lower court's decision is allowed to stand, the "realm of Caesar" will be drastically expanded to include any religious dispute that "leave[s] the confines of the church." *Cf. In re Diocese of Lubbock*, 2019 WL 6693765, at *6. Such an expansion is particularly salient to Jews, who have a long history of enduring attempts by the government to interfere with matters of faith. *See, e.g. Watson*, 80 U.S. at 728 (noting that English laws prior to the founding "hamper[ed]

the free exercise of religion and worship in many most oppressive forms" and that Jews were more burdened by these laws than Protestants); *see also Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8–9 (1947) (noting that Jews faced persecutions from governments that favored either Protestants or Catholics in the centuries before America's colonization).

Moreover, because Judaism is a minority religion, there is a substantial risk that American courts will misunderstand and misinterpret Jewish law if called upon to parse its requirements. For example, in *Ben-Levi v. Brown*, both a federal district court and the Fourth Circuit upheld a prison's denial of a Jewish prisoner's request to engage in a group study of the Torah. 136 S. Ct. 930, 931–32 (2016) (Alito, J., dissenting from the denial of certiorari). To support their holdings, the courts relied on the prison's interpretation of Jewish law that 10 men must be present to study the Torah. *Id.* No such requirement exists under Jewish law. *Cf. id.* at 934 (stating it was "not at all clear" whether Jewish law imposed the requirement stated by the prison). It is unclear exactly what law the prison relied upon to make this rule, but it is possible the prison was confused by the Jewish requirement that 10 men are needed to publicly read from a Torah scroll as a part of a prayer service. Joseph Karo, Code of Jewish Law 143:1; *see also* Aryeh Citron, *Minyan: The Prayer Quorum*, CHABAD.ORG (discussing when a *minyan* (quorum) is required to perform

certain prayers and rituals under Jewish law).[10] This misunderstanding of Jewish law had real consequences and resulted in a prisoner being denied the fundamental right to practice his religion.

Another example of the potential for a court to misunderstand Jewish law was demonstrated during an oral argument at the Fifth Circuit when one of the panel judges suggested that turning "on a light switch every day" was a prime example of an activity unlikely to constitute a substantial burden on a person's religious exercise. *See* Oral Argument at 1:00:40, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. April 7, 2015).[11] But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of Exodus 35:3, which explains that lighting a flame violates the injunction in the Ten Commandments to keep the Sabbath holy. Certainly, this judge did not intend to demean Orthodox Jews or belittle Jewish practices. He simply, and understandably, was unaware of how some Jews understand the Commandment to guard the Sabbath.

The potential for courts to misinterpret Jewish law is compounded by the numerous unresolved internal religious disagreements that exist with Judaism. For example, there is a debate between middle eastern and European Jewish

[10] *Available at* https://www.chabad.org/library/article_cdo/aid/1176648/jewish/Minyan-The-Prayer-Quorum.htm#footnote21a1176648.

[11] *Available at* goo.gl/L50Gt1.

communities over whether corn and corn products can be eaten on Passover. Jeffrey Spitzer, *Kitniyot: Not Quite Hametz*, MY JEWISH LEARNING (discussing the Jewish Passover debate surrounding rice, millet, corn and legumes).[12]

Additionally, the Orthodox and non-Orthodox denominations of Judaism disagree on various issues:

- Orthodox Jews forbid driving to synagogue on the Sabbath, and non-Orthodox Jews permit it. *Compare Driving to Synagogue on Shabbat*, AISH.COM (offering guidance on how to comply with a prohibition on driving on the Sabbath)[13] *with Conservative Judaism*, BBC (July 24, 2009) (describing various views on driving on the Sabbath).[14]
- Orthodox and non-Orthodox Jews have different standards for determining whether the production of food is kosher and rely upon different companies that apply each denomination's standard to determine if particular products are kosher. *See, e.g.*, *Directory of Kosher Certifying Agencies*, CHICAGO RABBINICAL COUNCIL (listing kosher certifying agencies);[15] Sue Fishkoff, *Conservatives taking*

[12] *Available at* https://www.myjewishlearning.com/article/kitniyot-not-quite-hametz/.

[13] *Available at* https://www.aish.com/atr/Driving_to_Synagogue_on_Shabbat.html.

[14] *Available at* https://www.bbc.co.uk/religion/religions/judaism/subdivisions/conservative_1.shtml.

[15] *Available at* http://www.crcweb.org/agency_list.php.

kashrut challenge up a notch, JEWISH TELEGRAPHIC AGENCY (April 11, 2011) (discussing the efforts of Conservative Jewish rabbis to create companies to issue kashrut certification for Conservative Jews).[16]

- Jewish denominations are divided on whether men and women may sit together within a synagogue, with Orthodox synagogues remaining sex segregated and non-Orthodox allowing mixed seating. *The Mechitzah: Partition*, CHABAD.ORG (explaining the tradition of separating men and women in synagogues); [17] *see also Katz v. Singerman*, 127 So. 2d 515, 532 (La. 1961) (observing there is a dispute among Jews regarding the question of mixed seating).
- Finally, Orthodox Judaism does not recognize female rabbis, while other denominations allow them. *See, e.g.*, 2015 Resolution: RCA Policy Concerning Women Rabbis, RABBINICAL COUNSEL OF AMERICA (Oct. 31, 2015) (adopting a resolution affirming the Orthodox Jewish tradition of not recognizing female rabbis).[18]

[16] *Available at* https://www.jta.org/2011/04/11/lifestyle/conservatives-taking-kashrut-challenge-up-a-notch.

[17] *Available at* https://www.chabad.org/library/article_cdo/aid/365936/jewish/The-Mechitzah-Partition.htm.

[18] *Available at* https://rabbis.org/2015-resolution-rca-policy-concerning-women-rabbis/.

Calling on secular courts to take a side in these types of theological disputes constitutes a clear violation of the Establishment Clause, which "prohibits government involvement in . . . ecclesiastical decisions." *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 189 (2012). Moreover, such an endeavor would be futile not only because of the judiciary's lack of familiarity with Judaism's history, traditions, and laws, but also because Judaism is not hierarchal. *See* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 Geo. Wash. L. Rev. 951, 975 (1997); *Wolf v. Rose Hill Cemetery Ass'n*, 914 P.2d 468, 472 (Colo. App. 1995) (recounting testimony of a "rabbinical expert [who] … testified that Judaism is not a hierarchical religion and that a determination rendered by any one of the tribunals is not binding on the Orthodox Jewish community."). Because there is no hierarchy, there is no discernable way to determine an authoritative view on any number of issues under Jewish law. While the existence of a hierarchy within a religion has no bearing on its First Amendment protections, any attempt to determine the "correct" interpretation of a religious matter in a non-hierarchal religion like Judaism is especially unworkable.

By holding that secular courts may review theological decisions that extend beyond the confines of a church, the lower court created a new standard that will significantly diminish the ability of Jewish institutions to manage their own affairs

and to "decide for themselves" how to navigate questions of faith and doctrine when those questions extend beyond the synagogue. *See Kedroff*, 344 U.S. at 116. Instead of focusing solely on the "lofty aims" of complying with their own belief systems, synagogue leaders and members will be forced to weigh how a court might interpret certain public statements or certain public acts under Jewish law. *Cf. Penley*, 231 S.W.3d at 395. The Establishment Clause was enacted to prevent this type of intrusion by the state into matters of faith. *See id.* To avoid the possibility of the judiciary resolving these types of religious disputes, the Court should reaffirm this country's longstanding commitment to allowing religions to flourish independent from government interference or sanction.

B. The Free Exercise Clause protects more than the cramped view of public religious activity envisioned by the lower court.

Another significant problem with the lower court's holding is that it impermissibly determined how far an adherents' religion extended before entering the "realm of Caesar." *In re Diocese of Lubbock*, 2019 WL 6693765, at *6. In holding that First Amendment protections do not extend beyond the "confines of the church," the lower court implicitly determined that the Free Exercise Clause only protects those actions that are taken in the privacy of one's own home or place of worship. *Id.*

This understanding of the exercise of religion directly contradicts the original meaning of the term "free exercise" and substitutes a watered-down freedom that

only extends to acts of worship taking place within the confines of a religious institution. As Judge McConnell articulated in his influential work on the subject, "the word 'exercise' strongly connote[s] action," and founding-era dictionaries defined the term "exercise" to include "'Act[s] of divine worship, whether public or private.'" Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1489 (1990) (quoting 4 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia 1805)).

Additionally, public religious accommodations for minority faiths can be traced to America's colonial days. For example, the colonies exempted Jews from taking public oaths premised "on the faith of a Christian" when called to testify in court. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. at 1467. Further, Rhode Island's colonial legislature passed laws exempting Jewish residents from laws governing marriage ceremonies, allowing them to instead "be joined in marriage, according to their own usages and rites." *Id.* at 1471 (quoting Hartogensis, *Rhode Island and Consanguineous Jewish Marriages*, 20 Publication Am. Jewish Hist. Soc'y 137, 144 (1911)). These accommodations for public religious acts demonstrate the prevailing view that the exercise of religion was far more than simply worshipping or holding private beliefs. *See City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (O'Connor, J., dissenting)

(stating "around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice"); c*f. Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (stating "belief and action cannot be neatly confined in logic-tight compartments").

A correct interpretation of the Free Exercise Clause is particularly important to Judaism, which is a practice-based religion. Jewish law governs a plethora of activities that do not occur in synagogues. For example, it is a central tenet of Judaism that, throughout one's daily life, one should accept and act upon the great multitude of opportunities to improve one's thoughts and behavior. Talmud, Makkot 23b; *see also* Rabbi Moshe Chaim Luzzato, Derech Ha-Shem §§ 1:2:1–5. These opportunities are "mitzvot," or commandments, which constitute a complete set of civil and criminal laws that govern literally all aspects of Jewish life. The mitzvot apply both inside and outside of the synagogue:

- Because many Jews believe themselves prohibited from deriving any benefit from a cooked mixture of dairy and meat, a Jewish store owner cannot sell a cheeseburger to any customer, Jewish or Gentile, and would not be allowed to profit from allowing one of his employees to cook meat

and dairy together. *Why Not Milk and Meat*, AISH.COM;[19] Exodus 23:19, 34:26; Deuteronomy 14:21; Babylonian Talmud: Hullin 113b, 115b.

- For Jews who engage in farming, there are several laws governing how crops must be sown. For example, the Torah forbids planting various plant species together or making hybrids. Dov Bloom, *What Is Kilayim?*, CHABAD.ORG (explaining the Torah's prohibition on mixing seeds).[20] It also requires fields to lay fallow every seventh year. Orthodox *Union Staff, Shemitah and Yovel Sabbatical and Jubilee Years*, ORTHODOX UNION (Feb. 7, 2014) (explaining that the Shemitah Year, the seventh year, is analogous to the seventh day, the Shabbat, in that it is a "year of rest" for the land).[21] Further, Jewish farmers must also donate a certain portion of their crop to charity. Jeffrey Spitzer, *Pe'ah: The Corners of Our Fields*, MY JEWISH LEARNING (explaining that the corners of fields (pe'ah) are designated for the poor).[22]
- Jewish law also contains requirements for the public reading of Jewish holy texts, and Jews are required to engage in public prayers. *See*

[19] *Available at* https://www.aish.com/atr/Why_Not_Milk__Meat.html.

[20] *Available at* https://www.chabad.org/library/article_cdo/aid/3570273/jewish/What-Is-Kilayim.htm.

[21] *Available at* https://www.ou.org/judaism-101/resources/shemitah-2/.

[22] *Available at* https://www.myjewishlearning.com/article/peah-the-corners-of-our-fields/.

Orthodox Union Staff, *Parshat Zachor: Remember Amalek*, ORTHODOX UNION (Feb. 26, 2014);[23] Aryeh Citron, *Minyan: The Prayer Quorum*, CHABAD.ORG.[24]

- Jews are forbidden from charging interest on money lent to other Jews. *See* Tzvi Freeman and Yehuda Shurpin, Moneylending and Jewish Law, CHABAD.ORG.[25]

The intertwined nature of private belief and public actions is nowhere more aptly demonstrated than in one of Judaism's most well-known symbols: the Menorah. During each of the eight nights of Chanukah, Jews light a candle in the Menorah. Significantly, the Menorah must be displayed in a location that is publicly visible in order to publicize the miracles related to Chanukah to the world. *See* Moshe Bogomilsky, *Questions and Answers on Publicizing the Chanukah Miracle*, CHABAD.ORG.[26]

The ability of Jews to be a "light to the nations," *see* Isaiah 42:6, will be severely diminished if they face tort liability any time their religious conduct is

[23] *Available at* https://www.ou.org/holidays/four-shabbatot/parshat-zachor/.

[24] *Available at* https://www.chabad.org/library/article_cdo/aid/1176648/jewish/Minyan-The-Prayer-Quorum.htm#footnote21a1176648.

[25] *Available at* https://www.chabad.org/library/article_cdo/aid/4108763/jewish/Moneylending-and-Jewish-Law.htm.

[26] *Available at* https://www.chabad.org/library/article_cdo/aid/2829832/jewish/Publicizing-the-Miracle.htm.

directed externally to the public instead of internally to the synagogue. Jews have faced a long and unfortunate history of governmental pressure to abandon their faith. Fortunately, the First Amendment has ensured that the United States has largely been, and continues to be, a safe refuge from such persecution and a welcoming home to Jewish people. The lower court's decision permitting tort liability for public acts is a step in the wrong direction, because under such a regime "'the pressure . . . to forego'" such acts would be "'unmistakable.'" *Thomas v. Review Board*, 450 U.S. 707, 717 (1981) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

This type of limitation of the exercise of religion undercuts the Free Exercise Clause. After all, "[a] person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion." *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in the judgment). "[T]hat person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons." *Id.*

To avoid such a hostile foray by civil courts into religious matters and assure that all religions are free to exercise their religious beliefs—both in private and in public—this Court should grant the Diocese's petition and reverse the lower court's erroneous application of the Free Exercise Clause.

CONCLUSION AND PRAYER

Since this nation's founding, religious institutions have, including religious minorities, enjoyed a fundamental right to decide for themselves matters of faith and doctrine free from government interference. Courts have therefore consistently abstained from exercising jurisdiction over such matters. But the lower court's decision undermines the very foundation of this well-established doctrine and presents an unprecedented threat to religious conduct that either extends beyond the confines of a religious institution or is directed to the public. Such an intrusion by courts not only violates the Establishment Clause by empowering courts to take sides in religious controversies, but also the Free Exercise Clause by limiting where a person may exercise his religion. The consequences of this case are far-reaching, extending beyond the Lubbock Diocese to all religions. In fact, the stakes are highest for religious minorities such as Judaism. This Court should therefore grant the Diocese's petition and reverse the lower court's ruling to assure that adherents of all religions remain free to act according to the dictates of their own conscience, both in private and in public.

Respectfully submitted,

/s/ Ryan N. Gardner

Ryan Paulsen
Texas Bar No. 24060397
Ryan.Paulsen@haynesboone.com
Ryan N. Gardner
Texas Bar No. 24101790
Ryan.Gardner@haynesboone.com
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)
214.651.5940 (fax)

Counsel for Amicus Curiae,
Jewish Coalition for Religious Liberty

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because, according to the Microsoft Word 2016 word count function, it contains **4,639** words on pages 1-22 excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

/s/ Ryan N. Gardner
Ryan N. Gardner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record in accordance with the Texas Rules of Appellate Procedure on the 6th day of March, 2020.

Nick L. Olguin
nick@olguinandprice.com
OLGUIN LAW FIRM
808 1/2 MainStreet
Lubbock, Texas 79401
Attorney for Jesus Guerrero

Steven C. Levatino
steven@lpfirm.com
LEVITANO | PACE PLLC
1101 S. Capital of Texas Hwy.
Building K, Suite 125
Austin, Texas 78746
Attorney for Amicus Curiae, Texas Catholic Conference of Bishops

Honorable Les Hatch, Respondent
237th Judicial District Court
Lubbock County Courthouse
904 Broadway, Suite 606
Lubbock, Texas 79401

The Seventh District Court of Appeals of Texas at Amarillo,
501 S. Fillmore, Suite 2-A
Amarillo, Texas 79101

Eric C. Rassbach
erassbach@becketlaw.org
Eric S. Baxter
ebaxter@becketlaw.org
William J. Haun
whaun@becketlaw.org
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Avenue NW, Suite 700
Washington, D.C. 20036

Thomas C. Riney
triney@rineymayfield.com
Kerri L. Stampes
kstampes@rineymayfield.com
Alex L. Yarbrough
ayarbrough@rineymayfield.com
RINEY & MAYFIELD, LLP
320 South Polk Street, Suite 600
Amarillo, Texas 79101

Vic Wanjura
vwanjura@hkwwlaw.com
HUND, KRIER, WILKERSON & WRIGHT, P.C.
3217 34th Street
Lubbock, Texas 79410

Attorneys for Diocese of Lubbock

/s/ Ryan N. Gardner
Ryan N. Gardner