21-1498

In the United States Court of Appeals for the Second Circuit

Alexander Belya,
Plaintiff-Appellee,
v.
Hilarion Kapral, AKA Metropolitan Hilarion, Nicholas Olkhovskiy, Victor Potapov, Serge Lukianov, David Straut, Alexandre Antchoutine, George Temidis, Serafim Gan, Boris Dmitrieff, Eastern American Diocese of the Russian Orthodox Church Outside of Russia, The Synod of Bishops of the Russian Orthodox Church Outside of Russia, Mark Mancuso,
Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York
Case No. 1:20-cv-6597

AMICUS BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY SUPPORTING DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Jewish Coalition for Religious Liberty certifies that:

1. It is a non-profit organization that has no parent organization; and
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STATEMENT OF INTEREST

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] Jewish Coalition for Religious Liberty certifies, according to Federal Rule of Appellate Procedure 29(a)(4), that no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus curiae* and counsel contributed money to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The church autonomy doctrine protects religious institutions' fundamental right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).[2] 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). Accordingly, established Supreme Court precedent bars civil courts from exercising 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." *Id.* at 733 (emphasis added).

This ironclad protection of religious institutions has allowed religions of all creeds to flourish. Indeed, this careful approach is especially beneficial to minority religions such as Judaism because it protects leadership decisions by and religious communications between and among rabbis and synagogues from government

[2] The church autonomy doctrine is also referred to as the "ecclesiastical abstention" doctrine. *See Hyung Jin Moon v. Hak Ja Han Moon*, 431 F. Supp. 3d 394, 405 (S.D.N.Y. 2019). It applies to all "religious controversies" regardless of whether a particular religion has a "church" or not. *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) (stating "the general rule that religious controversies are not the proper subject of civil court inquiry").

intrusion. The district court's refusal to dismiss Plaintiff's claims against Defendants contravened this longstanding doctrine and permits plaintiffs to evade First Amendment protections through creative pleading. 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.

The lower court's holding opens the door to court interference in internal religious controversies, a result the Establishment Clause was intended to prevent. Such determinations are especially perilous for Judaism given its status as a minority religion, the complexity of its religious laws, and the existence of ongoing intrareligious debates. Because of this complexity and indeterminacy, 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.

Because of the far-reaching implications of the underlying decision, this Court should reverse the district court's erroneous application of the church autonomy doctrine.

ARGUMENT AND AUTHORITIES

I. The First Amendment protects communications from synagogues and Jewish religious leaders.

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 recognized by America's Founders and confirmed by 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."); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 199 (2d Cir. 2017) (describing the historical underpinnings of the ministerial exception). 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, even interest of high social importance. *Kedroff*, 344 U.S. at 116. This is true even when that freedom comes at the expense of other interests of high social importance. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196, (2012) (stating "the First Amendment has struck the balance" for courts in favor of a religion being "free to choose those who will guide it on its way").

Accordingly, 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." *Simpson 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 will be subject to judicial scrutiny if the district court's erroneous holding is not reversed.

For example, Jewish law prohibits Jews from purchasing certain food from a Jewish-owned store that kept leavened grain products over Passover for a certain period of time. *See A Guide to Purchasing Chometz After Pesach*, STAR-K (Spring 2015).[3] 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: Pesach 2019*, THE VAAD HARABANIM OF GREATER WASHINGTON (2019) (listing stores in the greater Washington D.C. area);[4] *Chometz after Pesach*, YOUNG ISRAEL SHOMRAI EMUNAH OF GREATER WASHINGTON (April 29, 2011) (same).[5] This practice generally consists of sending out lists of local establishments that 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.* Like Belya's allegations regarding the letter in this case, a business could

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

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

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

easily dispute the allegations made by these lists, so under the lower court's ruling, circulation of such lists could expose a synagogue to tort liability, or at a minimum the burdens of litigation. *See id.* No court should be involved in adjudicating whether a rabbi correctly determined that a store violated the laws of Passover or whether it was permissible for his congregations to purchase bread from such a store.

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 regarding whether salmon is kosher);[6] Joseph Berger, *The Water's Fine, but Is It Kosher?*, THE NEW YORK TIMES (Nov. 7, 2004) (discussing a Jewish dispute over whether New York City's water is kosher if it is not filtered).[7] 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

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

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

have the autonomy to freely discuss these issues with their congregants and to warn about which restaurants are or are not kosher 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 that 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);[8] 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) (recounting restaurant's failure after kosher fraud was discovered). But under the lower court's holding, a synagogue or rabbi could be subject to defamation liability for labelling a restaurant as non-kosher. This threat exists even if the restaurant's conduct was clearly counter to that rabbi's interpretation of Jewish law. The word "kosher" has different meanings to different people, so 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

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

perception or the reasonable person. No rabbi should be held civilly liable for informing his congregation as to which restaurants he thinks they are theologically permitted to frequent, even if doing so negatively affects restaurants who believe that a different standard of Kashrus should prevail.

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);[9] *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).[10] Similarly, synagogues might also give poor community members certificates indicating that they are trustworthy and are proper charitable recipients. *Id.* These types of communications could prevent an individual lacking such a certificate from receiving charity from multiple synagogues. But under the district court's ruling, this too could result in tort liability.

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

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

As these examples demonstrate, the district court's misapplication of the church autonomy doctrine would subject doctrinal decisions by rabbis to the scrutiny of civil courts. This Court should reverse the district court to assure that all religions are protected from the intrusion of secular courts into ecclesiastical affairs.

II. The lower court's holding violates the Establishment Clause and is especially harmful to Jews.

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*, 344 U.S. at 116. In refusing to resolve religious controversies, courts have recognized that any exceptions to the church autonomy doctrine must be narrowly drawn to avoid the hazards of "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Milivojevich*, 426 U.S. at 710.

But if the lower court's decision is allowed to stand, courts will be inserted into countless ecclesiastical governance disputes as long as plaintiffs focus their claims on statements made during a dispute. 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 (questioning 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).[11] The courts' misunderstanding of Jewish law resulted in a prisoner being denied the fundamental right to practice his religion.

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

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).[12] 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 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).[13]

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

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

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)[14] *with Conservative Judaism*, BBC (July 24, 2009) (describing various views on driving on the Sabbath).[15]
- 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);[16] Sue Fishkoff, *Conservatives taking 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).[17]

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

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

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

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

- 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);[18] *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).[19]

Calling on secular courts to take a side in these types of theological disputes violates the Establishment Clause, which "prohibits government involvement in . . . ecclesiastical decisions." *See Hosanna-Tabor*, 565 U.S. at 189. Moreover, such an endeavor would be futile not only because of the lack of judicially cognizable standards and the judiciary's lack of familiarity with Judaism's history,

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

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

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 specious.

By holding that secular courts may review internal ecclesiastical governance decisions, 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, including the foundation question of which individuals should serve in leadership roles within a 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 statements or certain acts

under Jewish law. *Cf. McCollum v. Bd. of Ed.*, 333 U.S. 203, 212 (1948)). 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 the longstanding commitment embedded in the First Amendment of allowing religions to flourish independent from government interference or sanction.

CONCLUSION

Since this nation's founding, religious institutions, including religious minorities, have 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 this well-established doctrine and threatens both religious conduct and the process by which various religions select their leaders. Such an intrusion by courts violates the Establishment Clause by empowering courts to take sides in religious controversies. The consequences of this case are far-reaching, extending beyond the Defendants to all religions. In fact, the stakes are highest for minority religions such as Judaism. This Court should therefore reverse the district court's ruling to assure that adherents of all religions remain free to act according to the dictates of their own conscience.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because, according to the Microsoft Word 2016 word count function, it contains 3227 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) 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 Federal Rules of Appellate Procedure on the 2nd day of September, 2021.

/s/ Ryan N. Gardner
Ryan N. Gardner