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Navigating Values, Interests, and Identity: American Jewish Advocacy for Religious Liberty

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I. Bob Jones University v. United States (1983)

1. Amicus Brief of the National Jewish Commission on Law and Public Affairs

The purpose of the First Amendment is to protect minorities from the tyranny of the majority. The Government represents and acts for the majority, but the majority may not use its power to control the Government to destroy the constitutional rights of the minority, whether through taxation or otherwise. Tax-exemption is a status without which most non-profit organizations could not exist in today's world. The purpose of the First Amendment and its limitation on the powers of the majority would be frustrated if tax exemption and, with it, economic viability, could be granted to or withheld from the minority by the majority merely because the minority, in pursuit of its religious rights, refuses to conform to the social practices of the majority. If the majority could so behave, the First Amendment would be meaningless.

2. Amicus Brief of the American Jewish Committee

The American Jewish Committee ("AJC") is a 50,000-member national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been AJC's conviction that the security and constitutional rights of American Jews can best be protected by helping to preserve the security and constitutional rights—including specifically the right to equal educational opportunities—of all Americans, irrespective of race, creed, or national origin. Therefore, AJC has participated in numerous cases before this Court involving racial discrimination by educational institutions. It is AJC's position that the denial of tax-exempt status to educational institutions which are racially discriminatory as a matter of religious conviction does not violate the First Amendment's Free Exercise Clause.

II. Braunfeld v. Brown and Gallagher v. Crown Kosher Market (1961)

3. Amicus Brief of the Synagogue Council of America and the National Community Relations Advisory Council

Our interest in the cases before this Court is twofold. In the first place, the appellees in the Crown Kosher case and the appellants in [Braunfeld] are Orthodox Jews who observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day. Enforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of their civil, religious and economic rights and imposes a heavy burden upon their adherence to their religious beliefs.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if Braunfeld and the proprietors of Crown Kosher were not Jews or observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.

4. Amicus Brief of the American Jewish Committee and the Anti-Defamation League

Freedom of religious belief, observance and worship, both organizations are firmly convinced, can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. The organizations have always regarded the constitutional principle of separation of Church and State as one of the foundations of our American democracy and a bulwark of religious freedom.

…

The religious origin of Sunday laws is undisputed. That their religious purpose continues is demonstrated by an examination of their language, by the nature of the exceptions and by an analysis of the legal precedents upon which recent decisions upholding their constitutionality are based. Therefore, such laws are an establishment of the religion of those sects which observe Sunday as their holy day, in violation of the First Amendment, as the same has been held applicable to the states by the Fourteenth Amendment.

Sunday laws violate the religious freedom of Jews, Seventh Day Adventists, Seventh Day Baptists and all others who do not observe Sunday as their holy day. These laws require religious non-conformists to manifest a pattern of conduct inconsistent with their own religious commitment and consistent only with the religious beliefs of the majority. By prohibiting business and shopping on Sunday, such statutes impose an economic penalty upon those who observe Saturday as their Sabbath.

III. Trinity Lutheran v. Comer (2017)

5. Amicus Brief of the Anti-Defamation League, Central Conference of American Rabbis, Hadassah, Jewish Social Policy Action Network; Union for Reform Judaism; and Women of Reform Judaism as well as other Religious and Civil Rights Organizations

The framers of the First Amendment and of the early state constitutions sought broadly to protect religion against the corrupting influences that could result from public funding - such as inciting unsavory competition for ever larger slices of governmental largesse, encouraging distortions of religious doctrine as churches try to make themselves more attractive to political decisionmakers, and engendering political divisiveness and strife along religious lines. Just as importantly, the framers sought to protect citizens against what they identified as the particular tyranny of being taxed to support houses of worship and religious denominations whose beliefs one does not share.

Missouri chose to avoid those political and social ills, and the injuries to freedom of conscience that accompany them. ... The decision of the people of Missouri to leave the support of churches to church members is a valid and important means of protecting the religious freedom of all individuals and all religious denominations. The Court should resist petitioner's invitation to strip Missouri of the ability to vindicate fundamental antiestablishment principles.

6. Amicus Brief of the Union of Orthodox Jewish Congregations of America

[W]hether state Blaine Amendments can mandate state funding programs to exclude religious institutions – such as Jewish schools and synagogues – solely because they are faith-based is therefore an issue of vital concern to Jewish schools, communities as well as parents in Missouri and across the nation. This Court now has the opportunity to remove unconstitutional barriers from programs that protect children and families who attend Jewish and other faith-specific institutions from real health, safety and security risks.

Like many other non-profit institutions, religious schools and houses of worship face a significant – and growing – range of threats in the 21st century. And it is precisely for this reason that governments have responded to these challenges by providing funding to promote the health, safety, security and sustainability of those institutions in need. Indeed, the federal government and some state and local governments have increasingly embraced their responsibility in these areas to provide funding to protect all of its citizens from these growing dangers on the basis of religion-neutral criteria. And yet, Blaine Amendments – with all their discriminatory history and perilous consequences – persist, serving as an unconstitutional obstacle that singles out religious institutions and exposes them to unwarranted hazards. The price of religious membership cannot and should not be exposure to the health, safety and security dangers of the 21st century.

Blaine Amendments serve to discriminate against religious institutions by imposing blanket and unyielding prohibitions against granting them government aid. The time has come for this Court to declare such laws unconstitutional.

IV. Kiryas Joel v. Grumet (1994)

7. Amicus Brief of Agudath Israel

Many of the issues that affect Orthodox Jews in the United States arise along the boundary between church and state. This case is a good example. While its specific fact pattern is unique, some of its features are all too common: the refusal of local governmental entities adequately to accommodate the needs of minority religious communities; the frustration of a statutory mandate that all children, regardless of their religious background, receive education related services equitably; the diminution of religious freedom through an overly rigid application of the constitutional proscription against governmental establishment of religion.

The specific issue before the Court is the constitutionality of Chapter 748 of New York State's Laws of 1989, a remedy devised by the New York State legislature to resolve the impasse that had precluded the handicapped children of the Village of Kiryas Joel from receiving their statutory educational due. The Court's resolution of this issue is likely to have a profound impact not only on the handicapped Hasidic children whose educational future is directly at stake, not only on the broader community of Orthodox Jews whose strict observance of their faith frequently leads them to seek religious accommodations, but also on the numerous religious minority communities in this nation whose ways of life are jeopardized when governmental "neutrality" effectively translates into governmental hostility. …

The importance of this case transcends the narrow and unusual context in which it arises. Its resolution may well determine whether religious practitioners and communities can turn with confidence to legislative bodies for accommodation of their special needs. Asymmetrical applications of the First Amendment's two religion clauses would pose a great threat to the interests of minority religious communities like the Hasidic Jews of Kiryas Joel. If the Free Exercise Clause is to be given so narrow a construction that minority religionists will typically not be able to look to the Constitution as a shield for protection of their religious freedoms, then the Establishment Clause ought not be given so broad a construction that opponents of religious freedom will be able to use the Constitution as a sword against legislative efforts at accommodation.

8. Amicus Brief of the Anti-Defamation League and American Jewish Committee

This case is not about whether the children of the Kiryas Joel community are entitled to receive special educational services pursuant to applicable laws. Amici acknowledge that all children, irrespective of their enrollment in public, private or sectarian schools, are entitled to receive "comparable" educational services under the law. … Instead, the issue before the Court is whether the creation of a separate school district that, by design, conforms to the geographic boundaries of an insular religious community and is controlled and operated by the same religious enclave, is a constitutionally valid mechanism for delivering such services. . . . Consequently, the narrow issue here is whether this solution -- the purposeful creation of a fully operational school district that is coterminous with the boundaries of an insular religious community and is controlled by members of that sect – is constitutionally appropriate. Amici contend that it is not. By intentionally creating a separate public school district that is geographically coincident to the boundaries of a religious community, the State of New York has expressly empowered that community to operate a unit of government. This purposeful delegation of governmental authority to a religious entity violates core notions of nonestablishment of religion going back to our nation's founding.

The Establishment Clause of the First Amendment was designed to do more than forbid the creation of a national church. As Chief Justice Warren declared in McGowan v. Maryland, the First Amendment, "in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. …

Thus, at the most fundamental level, the Establishment Clause prohibits the realigning of government structures to meet the needs of a religious community, as well as the granting of governmental authority to such communities. …

Few political arrangements come closer to violating this core notion of a religious establishment than the creation of KJVSD. By purposefully creating a separate school district that conforms to the religious practices of a religious community, the State has effectively delegated to that religious community the authority to operate an agency of government. That the Establishment Clause bars the delegation of governmental authority to religious entities while it forbids the appearance of joint enterprises between religion and government finds its roots in the most basic concerns of the Framers of the Constitution.

V. Central Rabbinical Congress of US and Canada v. NYC Department of Health (2012)

9. Agudath Israel Statement on Circumcision Regulation

Agudath Israel of America is profoundly disappointed in the New York City Board of Health's adoption of a regulation requiring a mohel to obtain written consent from parents of baby boys before performing *metzitzah b'peh*, or oral suction, as part of *b'ris milah*.

While not all Jewish religious authorities require *metzitzah b'peh*, many do–which means, for the tens of thousands of families in New York City who follow the view that the practice is an integral part of *b'ris milah*, that the city is inserting itself directly into a religious practice. It does so by compelling *mohalim* to deliver a message with which they fundamentally disagree. The regulation raises serious constitutional concerns and will surely be subject to strict judicial scrutiny.

The regulation, moreover, is based on the assumption that the risks associated with *metzitzah b'peh* are so substantial as to warrant an aggressive governmental campaign against the practice. However, serious questions have been raised regarding the Health Department's assessment of the risk. What is more, the city has never moved to regulate any of a number of other activities carrying significantly greater and more demonstrable risks.

Looming in the background of the regulation's adoption is the fact that the circumcision rite itself has come under attack in other parts of the world, raising the specter that New York City's move may establish a dangerous precedent for additional governmental interference in *b'ris milah*.

10. Rabbinical Council of America, “The RCA, Calling for Safe Circumcision Practices, Disapproves of Unilateral Government Regulation,” press release, September 10, 2012

Sep 10, 2012 -- The Rabbinical Council of America (RCA), the largest group of Orthodox rabbis in the world, in light of the pending directive of the New York City's Health Department for parents to sign statements of informed consent prior to the performance of "*metzitzah be-peh*" (direct oral suction of the wound) as part of the traditional *Bris Milah* (circumcision), states:

Many Jewish legal authorities have ruled that direct oral suction is not an integral part of the circumcision ritual, and therefore advocate the use of a sterile tube to preclude any risk of infection. The RCA has gone on record as accepting the position of those authorities. Nevertheless, the RCA respects the convictions and sensitivities of those in the Orthodox Jewish community who disagree with this ruling and joins in their deep concern about government regulation of religious practices. The RCA urges these groups to voluntarily develop procedures to effectively prevent the unintended spread of infection.

The RCA supports the recent call of the Agudath Israel of America to New York Mayor Michael Bloomberg and the New York Health Department that, instead of unilaterally imposing regulations, they collaborate with Orthodox Jewish leadership to develop protocols to address health concerns.

Rabbi Shmuel Goldin, the RCA President, summarized his organization's position. “The act of circumcision is a precious and cherished ritual for the Jewish community, one which initiates our sons into the religious covenant. The RCA maintains that parents should use methods, in strict conformity with Jewish law, which enable them to hand down our religious legacy to a new generation safely and appropriately.”

VI. Fulton v. City of Philadelphia (2020)

11. Amicus Brief of the Coalition for Jewish Values

Religious faith is not a purely emotional exercise or mere intellectual assent to a series of propositions. It is instead living and active, necessarily engaging the hands along with the head and heart. For that reason, people of faith have led the charge in caring for vulnerable children in America for nearly three hundred years. They view it as a calling, obligation, and ministry, and not merely as an altruistic or "feelgood" social service. These religious beliefs both motivate people of faith to engage in child welfare work and inform the way in which they carry it out.

. . .

[T]he Court [should] chart a third course in the cooperative spirit that reflects the best aspects of our pluralistic society—and the First Amendment compels it: Preserve for people of faith the right to exercise their beliefs by caring for children without giving up the very beliefs that move them to action.

This is a case about exclusion and harm. The City of Philadelphia has excluded Catholic Social Services (CSS) from providing home-study services based on their religious views of marriage. If such exclusion is upheld, then religious agencies will be excluded from their historical and present role as partners to government in service to vulnerable children and 6 families. Indeed, if the City's action is upheld, religious persons may be excluded from being adoptive or foster parents, due to their religious views of marriage. Exclusions like the City's do harm vulnerable children and families, and will continue to do so. The child welfare system—and the families it serves—depends on the voluntary participation of agencies and persons to do most of the difficult work of caring for vulnerable and traumatized children and families. Many of those agencies and individuals are animated by deep religious convictions; excluding them will also send a clear message of government stigma and disapproval to religious persons. On the other hand, sustaining the role of religious agencies and persons will not in any way exclude LGBT persons from participating as foster or adoptive parents, nor in any way exclude the many agencies that facilitate their participation. Disagreements on marriage and religion should not be used as a wedge to prevent us from working together as a society to assist vulnerable children.

12. Amicus Brief of the Jewish Coalition for Religious Liberty

[A] diminished Free Exercise Clause disproportionately harms "those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 876. This is not surprising. Generally applicable laws are more likely to inadvertently burden lesser known religions than those that enjoy widespread practice and support. Under *Smith*, a hypothetical "generally applicable" law that banned circumcision or required practices incompatible with kosher animal slaughter would escape Free Exercise scrutiny. This is true even though such laws would severely burden some of Judaism's most sacred practices. An interpretation of the Free Exercise Clause that leaves Jewish Americans' religious liberty so vulnerable betrays America's proud history of religious pluralism.

. . .

One does not have to be a believer to recognize that faith has played an important role in American life. Faith was essential to the lives of founders, abolitionists, suffragettes, civil rights leaders, Republicans, and Democrats. In George Washington's farewell address, he stressed religion's importance to the Republic that America was creating. He referred to religion as an "indispensable support" to "political prosperity" and a "great pillar of human happiness." John Adams similarly noted that our Constitution was "made only for a moral and religious people." More recently, President Obama "pray[ed] that we will uphold our obligation to be good stewards of God's creation," and that "we answer Scripture's call to lift up the vulnerable, and to stand up for justice, and ensure that every human being lives in dignity."

Thirty years ago, the Smith Court overlooked the importance of religion in American life. It "preferred" to diminish the Free Exercise Clause to a shell of its former self, doing so (by its own admission) at the expense of minority faiths. Smith's "preference" contradicts America's historic dedication to religious pluralism. The past thirty years demonstrate that a better way is possible: This case represents the ideal opportunity to restore the Free Exercise Clause's protection to generally applicable laws that impose burdens on American's faith.

13. Amicus Brief of the Rabbinical Assembly, United Synagogue of Conservative Judaism, Central Conference of American Rabbis, Reconstructionist Rabbinical Association, Union for Reform Judaism and others

The posited dichotomy between LGBT rights and people of faith is false for another reason: Within the diverse panorama of American religious thought, a large and growing portion of the religious community welcomes, accepts, and celebrates LGBT individuals and their families and rejects the notion that they should be subject to discrimination based on differing religious views. Views embracing LGBT equality— based on the religious belief in the dignity and worth of all people—are widely shared by, among others, Christian denominations such as The Episcopal Church, the Evangelical Lutheran Church in America, the Presbyterian Church (USA), and the United 8 Church of Christ; the Unitarian Universalist Association; Judaism's Conservative, Reconstructionist, and Reform movements; and countless individual religious believers from faiths ranging from Roman Catholicism to Islam. Consistent with these views, many leaders among longstanding pillars of the faith community— including Episcopalians, Lutherans, Presbyterians, and Unitarian Universalists, as well as the Central Conference of American Rabbis and the United Church of Christ—have objected to claims for broad religious exemptions from antidiscrimination laws applicable to the performance of government contracts for the provision of social services. Any suggestion that "religion" or "people of faith" as a whole reject LGBT equality is false and insulting to millions of Americans of faith. And, given the broad and growing religious support for LGBT equality, any claim that enforcing antidiscrimination provisions in government contracts will discourage faith-based organizations from providing social services is, at the very least, vastly overstated.

There is no need for the Court to revisit *Employment Division v. Smith*, 494 U.S. 872 (1990), because CSS is not entitled to the exemption it seeks under any legal standard. As a threshold matter, CSS cannot show that Philadelphia is substantially burdening the free exercise of religion. Affirming the decision below will not impinge upon religious doctrine or practice. Religions and religious people will remain free to determine what and who satisfies the requisites for practice of their faith. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 (2012) (recognizing that certain matters are "'strictly ecclesiastical'" and therefore "the church's alone") (citation omitted). This includes defining marriage within the faith and preserving marriage practices consistent with those tenets. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (affirming right of religions to define marriage according to principles of their faith).

. . .

Amici submit that the best way to ensure that all people retain the First Amendment right to speak, preach, pray, and practice their religious beliefs—including with respect to sexual orientation and marriage—is to prevent illegal discrimination in the civil sphere regardless of its basis. Affirming the ability of state and local governments to prevent discrimination in the provision of public social services under a taxpayer-funded government contract will not constitute an attack on religion or signal a judicial imprimatur on changing social mores. Rather, such a result will confirm that the religious pluralism woven into the fabric of American law, culture, and society requires that all, regardless of faith, are entitled to equal treatment under the law.

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