FILED: APPELLATE DIVISION - 1ST DEPT 12/31/2024 01:59 PM 2023-00897
NYSCEF DOC. NO. 58 RECEIVED NYSCEF: 12/31/2024

New York County Clerk's Index Nos. 2023/00897; 2023/04648

New York Supreme Court

Appellate Division—First Department

BISHOP DAVID, FR. GREGORY SAROUFEEM, ST. MARY & ST. MARK COPTIC ORTHODOX CHURCH, and COPTIC ORTHODOX DIOCESE OF NEW YORK AND NEW ENGLAND,

Non-Party Appellants,

- against -

LAMIA FUNTI,

Respondent-Plaintiff,

MARCUS ANDREWS,

Respondent-Defendant.

BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT-DEFENDANT AND NONPARTY APPELLANTS

Joseph A. Ruta
RUTA SOULIOS & STRATIS LLP
Counsel for Amicus Curiae
104 West 27th Street, 11th Floor
New York, New York 10001
Telephone: 212-997-4500
Facsimile: 212-768-0469
jruta@lawnynj.com

Attorneys for Brief Of Jewish Coalition For Religious Liberty As Amicus Curiae In Support Of Respondent-Defendant And Nonparty Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists and of all religious adherents nationwide.

Amicus have an interest in the free exercise of religion and the role that religion plays in public life.

SUMMARY OF ARGUMENT

This appeal arises out of subpoenas issued to Non-Party Appellants Bishop Anba David and Father Gregory Saroufeem in the course of a matrimonial action brought by Lamia Funti against Marcus Andrews, and the testimony subsequently elicited from the Non-Party Appellants at trial.

Both the Bishop and Father Saroufeem, non-parties to the case, were issued subpoenas to testify as to the existence of a religious marriage between Funti and Andrews. Over motions to quash, Bishop David and Father Gregory were ordered to testify, threatened with arrest and imprisonment for contempt of court, and subjected to strenuous and prolonged testimony on intimate details of Church doctrine and practice – Father Gregory's testimony was elicited in part to impeach

the credibility of the Bishop and cast doubt on the Bishop's testimony as to whether the parties were married.

The trial court failed to consider the implications of its rulings – particularly their impact on the free exercise of religion and the special autonomy that religious institutions have under the Free Exercise Clause. They failed to consider – indeed, failed to understand – the incredible burdens such forced testimony would impose on the operation of religious organizations. Amicus seeks to provide information that will put the trial court's decision into context. and to clarify how those burdens would impact religious minorities, especially Jews.

Furthermore, the subpoenas issued to the Bishop and Father Gregory, and the subsequent court orders forcing them to testify, were and remain out of step with First Amendment jurisprudence and doctrine. The court-ordered testimony elicited from the Bishop and Father Gregory subjected their religious beliefs, practices, and opinions to cross-examination, despite the Supreme Court's repeated admonitions that "religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976).

As an organization which advocates on behalf of religious Americans generally and Jewish Americans in particular, amicus worried about the precedent that such rulings would set. Throughout Jewish history, secular authorities have demanded that Jewish clergymen and other religious figures "explain themselves," and defend their religious rulings, opinions, and deliberations from scrutiny by purportedly "neutral" authorities.

Amicus sees disturbing parallels between this history and what was done to the Bishop and Father Gregory in the trial court. Not only were the Bishop's religious opinions and rulings subject to intense scrutiny, they were probed by the trial court and determined to be incorrect – indeed, counsel even went so far as to subpoena a subordinate of the Bishop's in order to cast doubt on his learned ruling and opinion, pitting Father Gregory's fealty to his Church and his faith against his fear of imprisonment and other punishments.

This is not a matter of mere historic concern. New York has a large Jewish population, and Rabbis presently participate in many Jewish marriages, divorces, and other similar events every year. The First Amendment, properly understood, prevents secular courts from dragging those rabbis into court to defend the theological validity of those religious practices. In order to clarify that principle, we urge this Court to rule in favor of the Appellants, quash the subpoenas issued against

them, and order the trial court to defer to Bishop David's understanding of his own faith.

ARGUMENT

A. Courts Must Proceed Deliberately When Their Orders May Intrude on the Inner Workings of Religious Institutions

It is a well–established that "the First Amendment prohibits secular courts from such intrusions into ecclesiastical affairs." *Phillips v. Marist Soc. of Washington Province*, 80 F.3d 274, 275 (8th Cir. 1996); *see also Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008). Courts may not "encroach[] on the ability of a church to manage its internal affairs." *Combs v. Cent. Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (citations omitted); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (holding that the "Establishment Clause [] prohibits government involvement in such ecclesiastical decisions."). Underlying these prohibitions on government interference in ecclesiastical affairs is a constitutionally guaranteed "freedom for religious organizations, an independence from secular control or manipulation, in short, power 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).

To be sure, religious entities are not immune from all civil suits or entirely exempt from the procedural requirements attending litigation. *See generally*, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 885 (7th Cir. 1954) (holding that a church is subject to the Fair Labor Standards Act's requirements regarding minimum wage and that a suit can be maintained to enforce those requirements). At the same time, judicial "incursions [into church 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 particularly important for minority faiths.

B. The First Amendment's Protections are Particularly Vital for Adherents to Minority Faiths.

Given that minority faiths' practices are not generally well-understood by the majority population, judges are more likely to make mistakes if they are allowed to intervene in questions related to their religious doctrine. No matter how well-intentioned, this can have devastating effects on adherents to minority faiths.

For example, in *Ben-Levi v. Brown*, federal courts upheld a prison's decision not to allow Jewish prisoners to study the Torah. *Ben-Levi v. Brown*, 136 S. Ct. 930,

931-32 (2016) (Alito, J., dissenting from the denial of certiorari). The district court found that the prison's denial was intended to protect "the purity of the doctrinal message and teaching" of Judaism. *Id.* at 933. The court reached this shocking conclusion by relying on the prison's baseless conclusion that Jewish law requires having ten men present in order to study the Torah. *Id*. Jewish law imposes no such requirement. *Cf. id*. at 934 (questioning whether Jewish law imposed the requirement stated by the prison). The prison may have confused the requirement of having ten men present to read from a Torah scroll as a part of a prayer service with a general requirement of having ten men present to study the bible. Joseph Karo, Code of Jewish Law 143:1; *see also* Aryeh Citron, *Minyan: The Prayer Quorum*, Chabad.org, https://tinyurl.com/24upwavn. We do not doubt that the prison and the courts sincerely attempted to interpret Jewish teaching properly, but that does not change the end result. The government's misbegotten attempt at interpreting Jewish law resulted in a prisoner being denied the fundamental right to practice his religion.

Under the trial court's rule, a similar situation could play out countless times with courts making their own determination as to whether rabbis properly officiated Jewish weddings. There are hotly debated questions within Judaism regarding what constitutes a proper wedding. For example, many Orthodox Jews believe that if a bride and groom exchange rings—as opposed to only the groom giving the bride a ring—no valid marriage as occurred. Yosef Resnick, *Is a 'Double Ring' Wedding*

Ceremony Kosher, CHABAD.ORG, HTTPS://TINYURL.COM/4665VUMY. Some other Jewish denominations may accept such ceremonies as valid. Can a secular court determine if a double ring ceremony is a valid Jewish wedding? Can a judge tell a Reform Jewish couple that they were never really married because they did not properly follow Jewish law—as interpreted by some rabbis? Can a trial court subpoena multiple rabbis to testify regarding Jewish weddings and then decide which rabbi is "properly" understanding Jewish law? The very idea is absurd, and more importantly it is constitutionally prohibited.

This court should reverse the decision below in order to send a clear message that trial courts have no authority to second-guess sincerely religious New Yorkers' understanding of their own faith.

C. Historically, Benign Governmental Involvement in Jewish Religious Matters Works to the Ultimate Detriment of the Jewish Community.

Amicus does not believe that the trial court harbored any ill will toward religion. However, the First Amendment serves as a safeguard even against benign governmental interference in religious matters. History has repeatedly shown how seemingly neutral involvement can devolve into biased oppression. *See Hosanna–Tabor*, 565 U.S. at 182–87 (recounting the history of governmental interference in church affairs and the constitutional safeguards against this practice); *Everson v. Bd.*

of Ed. of Ewing Twp., 330 U.S. 1, 8–15 (1947) (recounting the history and purpose of the Religion Clauses). These concerns are of particular salience to amicus.

For millennia, secular authorities have interfered with Jewish matters of faith. As early as third century BCE, King Ptolemy II Philadelphus ordered seventy–two Jewish sages, working separately, to translate the Mosaic Bible into Greek. *See* Ammiel Hirsch & Yosef Reinman*, One People, Two Worlds: A Reform Rabbi and an Orthodox Rabbi Explore the Issues That Divide Them* 188 (2002). On its surface, this edict was a benign request: the secular government simply sought the knowledge contained in sacred Jewish texts. *See* Henry St. John Thackeray, *Translation of the Letter Of Aristeas*, 15 Jewish Q. Rev. 337, 365 (1903); *cf.* Ari Z. Bryen, *Judging Empire: Courts and Culture in Rome's Eastern Provinces*, 30 Law & Hist. Rev. 771, 811 (2012) (suggesting that at least one of the goals was to have each ethnic and religious community codify their laws so that the members of those communities could be judged in accordance with those laws). In reality, however, the purpose of the request was to embarrass the Jewish community. *See generally*, The Union of Orthodox Jewish Congregations of America, *The Translation of the Seventy*, https://bit.ly/2MVzwO2. The Greeks hoped that the various translations would

differ, thus illustrating that the Torah is not the word of G–d, but mere superstition of "lesser" people.[1] *Id.*

Throughout Jewish history, secular authorities have demanded that Jewish communities "account for themselves." In the Middle Ages, secular authorities often required rabbis to engage in religious "disputations" with Christian theologians. *See generally* Hyam Maccoby, *Judaism on Trial: Jewish-Christian Disputations in the Middle Ages* (1993). Ostensibly, the purpose of such disputations was to win adherents to the Catholic position not through force, but through intellectual pursuit and debate. *See id.* at 62. Of course, the disputants, in pressing their points, had to refer to contested Biblical and Talmudic passages. *See* Judah M. Rosenthal, *The Talmud on Trial: The Disputation at Paris in the Year 1240*, 47 Jewish Q. Rev. 58, 62 (1956). As a result, various Jewish writings had to be turned over to the authorities for study. *Id.* at 71 ("[I]n Paris [] on Saturday, March 3, 1240 Jewish books were seized and handed over to the Dominicans, and on Monday, June 25, 1240 the first public trial against the Talmud and its most popular commentary, that by Rashi, was opened in the royal court in Paris in the

[1] The Talmud teaches that miraculously each of the sages composed an identical translation. Whether or not one believes this version of the events, the point remains: even seemingly neutral demands that the secular government places on religious communities can mask much more sinister motives. Indeed, though King Ptolemy's plan failed, and "[d]espite the miracles, the rabbis viewed this event as one of the darkest days in Jewish history, comparing it to the day the Jews made the golden calf." Chabad.org, *What Is Asarah B'Tevet (Tevet 10)*, https://bit.ly/2MkMH9V.

presence of many church–dignitaries and noblemen."). The disputations were often triggered by the allegations that passages in the Talmud or another Jewish religious text blasphemed Christianity. *Id.* at 67. The tenor and consequences of these events are not surprising: the most likely outcome was the condemnation of the Jewish faith, and its holy books. Thus, in the Disputation of Paris, held on the orders of King Louis IX in 1240, the Talmud was accused of blasphemy and obscene folklore. Though four of the leading rabbis defended the Talmud against the accusations, the Dispute resulted in the burning of Jewish religious texts. Maccoby, *Judaism on Trial*, *supra* at 19–38.

In 1263, King James I of Aragon ordered a similar disputation in Barcelona. Afterwards, King James remarked that Rabbi Nachmanides's defense of Judaism represented the first time that he heard "an unjust cause so nobly defended." The King even awarded the Rabbi a prize of 300 gold coins. Yet, shortly afterwards, the Rabbi was forced to flee Aragon and the King ordered the "offensive" passages in the Talmud censored. *Id.* at 39–75.

This trend of behavior continued into modern times. For example, in post–Communist Russia there have been several petitions presented to the Office of Procurator General calling for an investigation, and possibly ban on certain Jewish groups and Jewish literature, including the *Shulchan Aruch* — the most authoritative compilation of the Jewish law which was written in the 16th century. *See* Ora R.

Sheinson, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 Colum. J. Envtl. L. 483, 530 n.43 (2001). In support of these demands, the petitioners excerpted, out of context, the description of several Jewish laws and customs and claimed that in light of these quotes, this foundational Jewish religious text is actually guilty of spreading religious hatred. *See* U.S. Dep't of State, Country Reports on Human Rights Practices for 2007 at 1576 (2007), https://bit.ly/2KjtJQm. Similarly, in 2015, under the guise of enforcing Russian law against "offending religious convictions and feelings," local prosecutors in Yekaterinburg and Novgorod raided Jewish educational institutions and seized religious books (including copies of the Torah) in order to examine whether the books comply with Russian laws. *See* Jewish Telegraphic Agency, *Russian Prosecutors Raid Second Jewish Educational Institution* (June 15, 2015), https://bit.ly/2MaHHEN.

These events, which span centuries and continents, teach a fundamental lesson: When secular authorities demand an examination of religious texts and internal debates on the matters of faith and doctrine, even when such an examination does not seek to directly affect those deliberations, the consequences to the religious community can be dire. This lesson is especially apt when a minority religious community's practices are put under a microscope. Nonetheless, the Court did not treat seriously the concern that subjecting a minority faith's religious beliefs and

practices to cross-examination and even impeachment, with all its attendant intensity, would impermissibly interfere with the special autonomy granted to religious organizations. Nor did the Court consider the harm to the Church that might occur from any misrepresentation of the subpoenaed documents that any third party may be tempted to engage in. Of course, the trial court cannot be held responsible for poor behavior of third parties, should such behavior occur. At the same time, in issuing its orders the Court should take into account the harm that may be occasioned by improper use of the mandated disclosures. *See In re Halkin*, 598 F.2d 176, 192 (D.C. Cir. 1979), *overruled on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) ("If parties are to be forthcoming in responding to requests for discovery, they must have fair assurance that legitimate countervailing interests will be protected ….").

D. Religious Communities Need the Ability to Address Internal Affairs Without Fear that their Deliberations will be Disclosed or Questioned by Secular Authorities

Religious communities often employ internal methods to resolve disputes in a manner consistent their faith and moral obligations. If a given faith's clergymen can be subjected to intense examination on foundational tenets of their faith and practice, and if judges opine from the bench on the sufficiency of such explanations, these internal resolution processes would likely suffer a significant diminution in their effectiveness.

Consider the Jewish dietary laws, known as the law of *kashrut*. Although several thousand years old, the debate about the proper interpretation of the various requirements is still ongoing. For example, there is *still* an ongoing debate as to whether the Muscovy duck is or is not kosher. *See* The Union of Orthodox Jewish Congregations of America, *OU Position on Certifying Specific Animals and Birds*, https://bit.ly/2KiqgSn ("It is clear that many authoritative *poskim* [scholars of Jewish law] permitted it, and others did not."); Rabbi Ari Zivotofsky & Zohar Amar, *Clarifying Why the Muscovy Duck is Kosher: A Factually Accurate Response*, 11 Hakirah: The Flatbush J. Jewish L. & Thought 159, 159 (2011) (noting that the Muscovy duck has for a century been "accepted as kosher in Israel, France and South America [but] not accepted in the US."). Similarly, Israel's Chief Rabbinate ruled that artichokes — "a dish that for centuries has been the symbol, specialty and cash crop of the 2,000–year–old Jewish community in Rome" — can never be kosher. *See* Jason Horowitz, *In Defense of Jewish Artichokes.* N.Y. Times at D1 (May 2, 2018). The rabbis of Rome disagreed, announcing that Jews "are the people of the artichoke … .." *Id.* As the saying goes, "Two Jews, three opinions." The Union of Orthodox Jewish Congregations of America, Rabbi Dr. Tzvi Hersh Weinreb, *Rabbi Weinreb's Parsha Column, Korach: "Two Jews, Three Opinions,"* http://bit.ly/2MNQygV.

Furthermore, unlike the Catholic Church, 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."). Often disputes arise within different communities concerning not only the proper meaning of certain religious injunctions, but also whether these injunctions have been appropriately complied with. Thus, debates as to whether a particular authority that certifies compliance with the *kashrut* requirements is too lax or too strict are quite common. *See, e.g.*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1027–28 (8th Cir. 2014) (alleging that some Hebrew National beef products are not, as the label reads, "100% kosher," and that a Triangle K certification agency's "kosher inspection process [is] defective and unreliable."); *see also Wolf*, 914 P.2d at 472 (recognizing that a Jewish religious tribunal determination of a contested religious issue "is not an authoritative or binding interpretation of Orthodox Jewish law.").

An allegation that someone has been skirting the strict laws of kashrut may be ruinous not only to an individual's business, but to his personal reputation within the community. *See* Heather Doyle, *Rabbis Urge Public: Don't Rush to Judgment in*

Kosher Scandal, Syosset Patch (Feb. 15, 2012), https://bit.ly/2lptSXB. Moreover, the Jewish law explicitly forbids embarrassing someone in public. *See* Elie Mischel, *"Thou Shalt Not Go About As A Talebearer Among Thy People": Jewish Law and the Private Facts Tort*, 24 Cardozo Arts & Ent. L.J. 811, 831 (2006) (citing The Babylonian Talmud, Bava Metzia 59a). It is therefore imperative that when questions about individual's or business's compliance with the religious law are raised that, at least initially, they should be handled internally. Subjecting the internal process of these investigations and debates to disclosure, going so far as to demand rabbinical testimony on the sufficiency of a marriage, would undermine the community's attempt to self–regulate its own religious affairs and will risk, in direct violation of the religious prohibition, publicly embarrassing the investigated person.

The traditional form of seeking rabbinical advice known as *responsa* further demonstrates the importance of safeguarding intra–communal religious debates from outsiders' prying eyes. Oftentimes, Jews seeking to properly carry out the commandments of the Jewish law, write to rabbinical authorities with questions regarding the application of that law to unforeseen, modern day situations. *See, e.g.*, Rabbi Louis Jacobs, The Jewish Religion: A Companion 202 (1995), *reprinted at* https://bit.ly/2KgWU6y. Often these questions concern extraordinarily private matters, and the guidance sought touches on issues of family life, child rearing, healthcare decisions, and the like. *See* Stephen J. Werber, *Cloning: A Jewish Law*

Perspective with A Comparative Study of Other Abrahamic Traditions, 30 Seton Hall L. Rev. 1114, 1126 (2000). Understandably, the individuals who seek religious guidance would often not wish their queries to be disclosed to anyone beyond the question's addressee. If such communications were to be routinely disclosed, the ability of the faithful to seek guidance of their spiritual leaders would be severely impaired.[2]

There are countless examples where internal communications within the community are necessary and where they would lose their effectiveness if disclosed to secular authorities. For example: how to evaluate a family's commitment to Judaism in the context of distributing financial aid to Jewish school attendees; how to treat religious milestones in gay families; whether to recognize a conversion performed by rabbis who adhere to somewhat different traditions. These questions all implicate extraordinarily sensitive topics which religious Jewish communities continue to debate. Their answers remain in flux. These debates and the ability of the Jewish communities to practice their faith according to their own best

[2] Given the small, and often tight–knit nature of religious Jewish communities, even redacting identifying information may not help, for often times, the individual may be identified by the nature of the question asked. *See, e.g.*, *Rosenberg v. Avila*, No. B268320, 2017 WL 1488689, at *2 (Cal. Ct. App. Apr. 26, 2017) (recounting a concern of one of the litigants that the mere entry of a restraining order would disclose his identity to the rest of the "'very small' ultra-orthodox Jewish community" of which he was a member).

understanding of the religious requirements will be jeopardized should the state demand that the records of the debates be turned over to the secular authorities.

The trial court failed to properly consider the harm that the subpoenas, and intense examination of the Bishop and Father Gregory, could wreak not just on the litigants in this case, but on religious communities generally.

CONCLUSION

For the foregoing reasons, we request that the Appellate Division reverse the trial court and quash the subpoenas issued against the Non-Party Appellants.

Dated: New York, York
November 15, 2024

Respectfully submitted,

/s/Joseph A. Ruta

Joseph A. Ruta
RUTA SOULIOS & STRATIS LLP
Counsel for Amicus Curiae
104 West 27th Street, 11th Floor
New York, New York 10001
Telephone: 212-997-4500
Facsimile: 212-768-0469
jruta@lawnynj.com

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 NYCRR) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, Times New Roman typeface was used, as follows:

Typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,745.

Dated: New York, New York
November 15, 2024

Respectfully submitted,

/s/ Joseph A. Ruta
Joseph A. Ruta, Esq.
RUTA SOULIOS & STRATIS LLP
Counsel for Amici Curiae