Docket No.: 2009-01579

NEW YORK SUPREME COURT
APPELLATE DIVISION – SECOND DEPARTMENT

In the Matter of the Arbitration of Certain Controversies Between

NACHUM BRISMAN,
Petitioner-Appellant

v.

HEBREW ACADEMY OF THE FIVE TOWNS AND ROCKAWAY,

Respondent-Appellee

BRIEF OF AMICI CURIAE AGUDATH ISRAEL OF AMERICA, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND TORAH UMESORAH—THE NATIONAL SOCIETY FOR HEBREW DAY SCHOOLS IN SUPPORT OF PETITIONER-APPELLANT

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INTEREST OF THE AMICI CURIAE[1]

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization with affiliated chapters and congregations throughout the country. Among its other activities, Agudath Israel serves as an advocate in various governmental arenas for the interests of and concerns of American Orthodox Jewry. Its national headquarters are in New York City.

The Union of Orthodox Jewish Congregations of America (the "Orthodox Union"), founded in 1898, is an Orthodox Jewish umbrella organization that represents nearly one thousand synagogues throughout the United States, which collectively represent hundreds of thousands of Jews. Among its activities, the Orthodox Union participates in federal and state litigations, largely through the submission of amicus curiae briefs that relate to matters of concern to the Orthodox Jewish community. Its national headquarters are in New York City.

Torah Umesorah—The National Society for Hebrew Day Schools, founded in 1944, serves as a coordinating body for the more than 600 Orthodox Jewish elementary and secondary day schools across the United

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[1] We thank Evan Kusnitz, a student at Hofstra University School of Law, for his assistance with the research and writing of this brief.

States, employing more than 6,000 teachers and educating in excess of 220,000 students. Its national headquarters are in New York City.

In the instant case, the parties originally submitted their dispute to the Beth Din of America and agreed to have it resolved in accordance with Jewish law. When the party victorious in arbitration sought to enforce his award in court, the court below vacated the award. In its decision, the court disregarded the choice-of-law provision in the arbitration agreement, which authorized the Beth Din to "resolve the controversy in accordance with Jewish law." Instead, the court decided, without any reference to the applicable Jewish law, that the Beth Din's determination was "totally irrational." In doing so, the lower court inappropriately used secular legal principles to determine the rationality of a determination made based upon Jewish law by a panel of rabbinic experts.

The amici emphasize that our involvement in this case should not be construed as advocacy on behalf of either party with respect to their underlying claims. All of the amici generally maintain a policy of non-involvement in litigation involving disputes among members of our constituency. We take no position whatsoever as to which side is in the right.

We are compelled to offer our views in the case at bar due to our deep concern that the ruling below, if upheld, will have ramifications that extend

far beyond the specific dispute at hand. The lower court's decision represents a serious threat to the religious autonomy of the Beth Din, a vital and central religious institution in the Orthodox Jewish community. It also undermines the integrity of the policies of Torah Umesorah governing the hiring of teachers in yeshivos and day schools throughout the state. Finally, the ruling creates a dangerous precedent that could lead to unconstitutional interference by the civil courts in religious matters.

ARGUMENT

I. THE LOWER COURT UNCONSTITUTIONALLY INTERFERED WITH A FUNDAMENTALLY RELIGIOUS DISPUTE BETWEEN A RELIGIOUS INSTITUTION AND RELIGIOUS STUDIES TEACHER REGARDING MATTERS INVOLVING RELIGIOUS DOCTRINE

The Supreme Court has long understood the First Amendment's prohibition on laws "respecting an establishment of religion" to preclude the "active involvement of the sovereign in religious activity," *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. Of Educ.*, 333 U.S. 203, 212 (1948).

The dispute in this case is between a religious educational institution and a member of the clergy whom it employed to serve in a religious position. The parties agreed to submit their dispute to a religious tribunal and agreed that religious law should govern that tribunal's decision. In such a case, for the courts to even inquire into the religious law and doctrine that went into that decision is a violation of the First Amendment's prohibition

against government entanglement with religion. As the United States Supreme Court has stated, "where resolution of . . . disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of . . . [an] ecclesiastical tribunal . . . but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich*, 426 U.S. 696 at 709 (1976).

Time and again, the Supreme Court has told secular courts to stay out of religious disputes involving religious law before religious tribunals. The basis for prohibiting secular courts from involvement with these cases was perhaps best explained by the Supreme Court in *Watson v. Jones*, 13 Wall. 679 (1872): "[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." *Id.* at 728-29.

Indeed, the lower court's very finding that the decision of the Beth

Din was, in its eyes, "irrational" is precisely the sort of finding that the Supreme Court has stated is not within the realm of the courts to make when it comes to decisions of religious tribunals:

> For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule 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. . . Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. *Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, Id.*, at 713-15 (emphasis added).

Besides the constitutional prohibition, the Supreme Court also noted that civil court judges simply lack the knowledge and competence in religious law should they attempt to apply religious law to religious disputes. As the Court stated in *Watson*,

> Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these . . . bodies, has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It 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 these bodies as the ablest men in each are in reference to

> their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so. *Id.*, 13 Wall., at 729

For example, the lower court noted that one of the central issues in the dispute at hand was whether the school could terminate Rabbi Brisman's employment because of differences in *Hashkafah* (religious outlook). The Beth Din presumably determined that whatever differences in religious outlook might exist, they did not under Jewish law warrant the dismissal of Rabbi Brisman. This fundamentally religious question is one that the civil courts simply have no business second-guessing. *See Gonzalez v. Archbishop*, 280 U.S. 1 at 16 (1929).

Furthermore, the lower court, by overturning the Beth Din decision, interfered improperly with the autonomy of religious schools. One of the roles of Torah Umesorah is to establish national standards for Orthodox Jewish elementary and secondary schools, including rules regarding the hiring and firing of religious studies teachers. One of those rules is that once a teacher has worked for a particular school for three or more years, he cannot be dismissed except for specific causes as outlined in the Torah Umesorah *Code of Practice* § X. By overturning the Beth Din decision, and ruling that HAFTR had the right to dismiss Rabbi Brisman, the lower court in effect disregarded the national hiring policy in place for Orthodox Jewish

schools in the United States. This constituted direct interference with the ability of this religious organization to regulate the fundamentally religious issue of who can and should teach religious studies in religious schools and when they can and cannot be dismissed. *Gonzalez v. Archbishop, Id.*

In short, the lower court, by attempting to analyze the "rationality" of the Beth Din decision, delved into the very area that the First Amendment bars it from entering. The Supreme Court stated the following with regard to the role of civil courts in resolving church property disputes:

> The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the [lower court's decision] requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449-450 (1969).

In order for a civil court to determine that a decision of a Beth Din lacks rationality, it must first make its own inquiry into, and interpretation of, religious law. Having done so, it must then determine whether the decision made by the Beth Din properly or improperly applied that religious

law. "Plainly, the First Amendment forbids civil courts from playing such a role." *Id.*

II. THE LOWER COURT ERRED BY DISREGARDING THE PARTIES' CHOICE OF JEWISH LAW AND DISMISSING THE BETH DIN'S DETERMINATION AS IRRATIONAL

A. The lower court improperly disregarded the parties' own choice of law.

Since arbitration is a creature of contract, New York has a longstanding policy of interfering as little as possible with the parties' structuring of their relationship. *Brady v. Williams Capital Group, L.P.*, 878 N.Y.S. 2d 693, 697 (1st Dep't 2009) (quoting *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y. 3d 149, 155 (2005)). Thus, the parties control "every aspect of the arbitration," including the choice of law. *Id.* (citing *Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y. 2d 173, 182-183 (1995)).

Autonomy in arbitration is extremely important to Orthodox Jewish litigants who are required by their religion to submit their disputes to religious arbitration. The courts of New York, which is home to the largest population of Orthodox Jews in America, have dealt with numerous cases involving arbitration before a beth din, a Jewish religious court. A number of these cases involved explicit choice-of-law provisions authorizing the beth

din to apply Jewish law. *E.g.*, *Meisels v. Uhr*, 79 N.Y. 2d 526 (1992); *Kingsbridge Center of Israel v. Turk*, 98 A.D. 2d 664 (1st Dept. 1983). In such cases those choice of law provisions have been recognized as valid, and there is no reason why the choice of Jewish law in this case should be treated differently.

B. The lower court failed to inquire into the rationality of the Beth Din's decision under Jewish law.

As stated above, we believe that the courts cannot constitutionally inquire into the "rationality" of fundamentally religious disputes involving religious law before religious tribunals. However, if this Court were to hold that such inquiry is permissible, it should still overturn the lower court's decision, because the lower court declared the Beth Din's decision irrational without even inquiring as to whether there was a rational basis under Jewish law for the Beth Din's decision.

In other words, should this Court hold that a court has the constitutional ability to inquiry into the substance of religious law when applying the "rationality test", then we would argue in the alternative that the lower court erred in not doing so properly. The court applied <u>secular law</u> to test the "rationality" of the Beth Din decision when the proper test of rationality should have involved <u>Jewish law</u>. For example, the court

explicitly stated that "tenure in private schools is governed by contracts between the school and its faculty"; that "tenure by contract expires when the contract itself expires"; that "where an employment contract has expired, the provisions no longer remain in effect"; and appears to have concluded that Rabbi Brisman was an "at will" employee and as such did not have any cause of action against HAFTR for terminating his employment. *Decision/Order*, December 18, 2008 page 4. It backed up all of these statements by citations to secular case law, when the parties themselves agreed to be bound by an entirely different system of law. The court's rationality analysis was thus fundamentally flawed.

While, as stated above, we do not believe that the courts are constitutionally allowed to delve into religious law, would the court below have done so, it would have found ample basis for determining that the Beth Din's decision was a rational one.

1. **Under Jewish law, a Rabbi who teaches in a religious school has tenure-like privileges, due to the nature of his position.**

Under Jewish law, a rabbi with a teaching position in a school is not regarded as an ordinary employee, as a private teacher or tutor would be, but rather as a communal servant, and is entitled to all the privileges of such a position. Rabbi Yitzhok Yaakov Weiss, 4 *Minchas Yitzhok* §75. One of the privileges of a communal servant is that even if he was accepted for a

stipulated time period, and that time period has passed, he cannot be removed subsequently unless he was negligent in performing his duties. *Id.* *See also* Rabbi Moshe Sofer, *Responsa Chasam Sofer*, *Choshen Mishpat* §§ 205-206.

This principle is the current custom of *yeshivos* in the United States. Torah Umesorah, the National Society of Hebrew Day Schools, publishes standards for Orthodox Jewish elementary and high schools in the United States. The Torah Umesorah Code of Practice contains a section regarding "Chazakah", or tenure, of teachers. Torah Umesorah, *Code of Practice* § X. The Code states, "Awarding a renewal contract after a minimum of three years of service automatically constitutes 'Chazakah'." The privileges of Chazakah include the "[a]utomatic renewal of contract with appropriate annual increments." This concept of Chazakah is consistent with the Jewish law regarding communal positions.

In addition, New York courts have previously recognized the Jewish law concept of tenure in communal positions, particularly in the context of rabbinic appointments. *See Zimbler v. Felber*, 445 N.Y.S. 2d 366 (Sup. Ct. Queens Co., 1981). In disagreeing with an earlier decision of a court that had misunderstood a rabbi's religious function, the *Zimbler* court, itself dealing with a question of rabbinic tenure, quoted extensively from sources of

Jewish law and thought. The court noted that there are authorities of Jewish law that regard tenure as "a divinely bestowed prerogative which cannot be waived by a term or option clause." *Id.* at 371 (citing Rabbi Joseph Raphael Chazzan, *Chikrei Lev, Orach Chaim*, No. 50). These rules and the policy underlying them apply equally to rabbis who teach in yeshivos.

Turning now to the instant case, there is thus ample basis in Jewish law to conclude that Rabbi Brisman was far from the "at will" employee that he would have been had secular law governed the terms of his employment. A strong rational argument could be made that he had tenure under Jewish law and thus could not be removed except for the specific causes outlined in the Torah Umesorah *Code of Practice.*

There is one more point that we must address. The court below did take note at one point of Jewish law, and noted that "a dismissed 'tenured' teacher is entitled to severance based upon the principle of 'Chodesh L'Shanah', which translates from Hebrew to 'one month pay for each [year] of service'." But a valid case can certainly be made that under Jewish law severance pay would not have been the appropriate remedy here. Rabbi Moshe Feinstein, one of the leading decisors of Jewish law in the United States, states in his responsa that severance pay is the appropriate remedy when a school has a valid reason under Jewish law for dismissing a rabbi. 1

Igros Moshe, Choshen Mishpat §76. In this case, the Beth Din apparently saw no valid reason under Jewish law for the school's dismissal of Rabbi Brisman. Thus, the Beth Din's order to reinstate him has a valid basis in Jewish law.

In sum, there is a rational basis in Jewish law for the decision of the Beth Din. Since a rabbi with "Chazakah" is entitled to automatic renewal of his contract, the Beth Din's decision was rational under Jewish law, and was certainly not "totally irrational" as maintained by the lower court. Obviously, the Beth Din's award did not create a new contract between the parties, as the school alleged in the court below. It merely enforced Rabbi Brisman's tenure.

2. The Beth Din's award did not violate public policy, as it was only enforcing the rights of a tenured teacher.

The court below, based on its erroneous view that Rabbi Brisman was, under Jewish law, an at-will employee, held that the Beth Din's ruling violated public policy because it compelled the school to reinstate an employee it did not wish to employ. Such a ruling would purportedly set a negative precedent with regard to at-will employees. As explained above, the parties chose Jewish law to govern their dispute, and there is a rational basis under such law to maintain that Rabbi Brisman was in fact a tenured

teacher. Seen in this light, the Beth Din did nothing more than rule in favor of a tenured teacher who was terminated for insufficient cause. The concept of tenure is well accepted in secular law, and no rational court should hold that enforcing it is against public policy. Once it has been established that, under Jewish law, Rabbi Brisman was a tenured teacher, there is no reason why the Beth Din's ruling should be deemed violative of public policy.

III. THE LOWER COURT'S DECISION, SHOULD IT STAND, WOULD DAMAGE A BETH DIN'S ABILITY TO ARBITRATE DISPUTES BETWEEN JEWISH LITIGANTS, THEREBY INTERFERING WITH THEIR RIGHT OF FREE EXERCISE OF RELIGION

As a matter of Jewish law, legal disputes between Jews must be resolved by arbitration before a rabbinical court ("Beth Din") that employs substantive Jewish law ("*Halacha*") in making its decisions. *Shulchan Aruch (Code of Jewish Law), Choshen Mishpat,* 26:1. That corpus of law encompasses not only matters of religious ritual, but also commercial dealings, interpersonal relationships, rights and duties of fiduciaries—the entire gamut of human experience. Many bylaws of Orthodox Jewish organizations, as well as numerous contracts and agreements between Orthodox Jewish individuals, thus contain clauses stating that disputes shall be submitted to a Beth Din for arbitration. Only in exceptional

circumstances may one take his case before a secular court. *Id.* Even in such circumstances, secular courts would not be able to resolve many such cases. There are numerous monetary laws in Jewish law that have no parallel in secular law, any many others that differ with their counterparts in secular law, and thus disputes concerning these matters can only be properly addressed by a beth din with sufficient knowledge of Jewish law. Therefore, access to a competent beth din is integral to the execution of the religious duties of observant Jews, and indeed to the survival of the observant Jewish community. In the absence of functioning rabbinical courts, Jewish litigants would simply have no religiously acceptable method of resolving their disputes. This would impair their constitutional rights, because preventing an individual from pursuing a claim in a beth din would violate his or her exercise of religious freedom. Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633, 654 (2004) (citing *Moskowitz v. Moskowitz*, N.Y. L.J., June 10, 1997, at 25).

If the lower court decision is allowed to stand, the principle that it propounds—that a secular court may vacate an order of a beth din whenever the court believes that that order is "irrational" when seen through the eyes of secular legal principles—would become a matter of judicial precedent.

The mere fact that the lower court ruling has been upheld will have a major chilling effect on the very ability of the rabbinic courts of New York to continue to hear cases and render decisions. Each beth din would henceforth need to not only apply Jewish law, but would also need to be concerned about how "rational" their decision would appear to secular court judges unfamiliar with Jewish law. Litigants unhappy with the ruling of a beth din would henceforth be encouraged to run to the secular courts to attempt to overturn the beth din's decision on the grounds that it appears "irrational" when viewed through the prism of secular law. Many litigants, aware that the arbitration decision of a beth din can now be so easily challenged and overturned, would be much less likely to go to a beth din to begin with. The beth din system, a communal religious institution that is central to the ability of Orthodox Jews in New York to freely observe and keep their religion, would have been dealt a serious blow to its ability to function.

IV. THE LOWER COURT'S DECISION, SHOULD IT STAND, WOULD IMPAIR A BETH DIN'S ABILITY TO ARBITRATE DISPUTES BETWEEN JEWISH LITIGANTS, THEREBY INCREASING THE CASELOAD OF THE COURTS

If the lower court ruling stands and, as a result, litigants who would have otherwise gone to a beth din turn instead to the civil court system, two significant problems for the judicial system will develop.

First, weakening the rabbinical courts will result in an increased burden on the civil courts at a time when public policy seeks to encourage alternative methods of dispute resolution. As noted in *Meisels v. Uhr*, 547 N.Y.S. 2d 502, 505-06 (Sup. Ct. Kings Co. 1989) (dictum), *aff'd* 570 N.Y.S. 2d I007 (2d Dept.1991), *rev'd on other grounds*, 79 N.Y. 2d 526 (1992), "The need for expansion of arbitrations as a method of resolving intragroup conflicts is well recognized. That is especially true when you factor in the proliferation of state court litigation. Were state courts required to absorb the explosion of dispute resolution situations created by these contractual rights contests, the system would be bogged down. Already overburdened facilities and resources would be taxed beyond acceptable limits."

Second, Jewish litigants will be forced to go to secular courts to resolve disputes which they have freely agreed should be governed by Jewish law. As a result, judges would be faced with complex issues of Jewish law, in which they are unfamiliar. Courts faced with the job of adjudicating such disputes will either craft decisions without reference to Jewish law, which would frustrate the intention of the parties; or,

alternatively, attempt to understand and apply Jewish law, which would inevitably lead to unconstitutional and undue entanglement with religious beliefs and practices. Many of these cases involve issues that require knowledge of Jewish law to adjudicate properly. Jewish business partnerships and organizations structure themselves according to the requirements of Jewish law, and often include provisions in their agreements that refer to and sometimes even expressly rely on Jewish legal principles. The New York State courts have recognized that it is not within the scope of their designated role to "decide any question of Jewish law." *In re National Council of Young Israel*, 2003 NY Slip Op 51716u at 8. For the courts to entangle themselves in deciding cases that involve complex matters of Jewish law would lead to the very "excessive entanglement between government and religion" that the Establishment Clause was designed to avoid. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (U.S., 1971).

It is therefore in the best interests of the judicial system that the beth din system survives and continues to handle disputes between observant Jews. For this to happen, the parties who bring their disputes to a beth din for adjudication need to feel secure in the knowledge that the decision of the beth din will be binding and that they will not have to relitigate their case in a civil court. Such security can only be provided by a civil court system that

appropriately respects the decisions made by a beth din, and recognizes the right of beth din to adjudicate disputes in accordance with Jewish law

CONCLUSION

For the reasons set forth herein, the decision of the lower court should be overturned.

RESPECTFULLY SUBMITTED this 11th day of August, 2009.

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