

19-1715

In The
United States Court Of Appeals
For The Second Circuit

NEW HOPE FAMILY SERVICES, INC.,
Plaintiff-Appellant,

v.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of
Children and Family Services for the State of New York,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
CIVIL CASE NO. 5:18-CV-1419
(HON. MAE A. D'AGOSTINO)

THE JEWISH COALITION FOR RELIGIOUS LIBERTY,
AGUDATH ISRAEL OF AMERICA, THE RABBINICAL ALLIANCE OF AMERICA,
THE COALITION FOR JEWISH VALUES,
BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT
AND REVERSAL OF THE DISTRICT COURT

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Chabad.org, <i>The Shabbat Laws</i> , https://bit.ly/2DjPc9P	20
Dana E. Johnson, <i>Adoption and the Effect on Children’s Development</i> , 68 <i>Early Hum. Dev.</i> 39 (2002)	14
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John Dart, <i>Tale Retold to Show Pope’s Feeling for Jews</i> , <i>L.A. Times</i> at 28 (Aug. 29, 1987)	24
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The Union of Orthodox Jewish Congregations of America, <i>Sukkah Questions and Answers</i> , https://bit.ly/2Zv5upW	21
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U.S. Dept. of Health & Human Servs., *History of National Foster Care Month*,
 ChildWelfare.gov, <https://bit.ly/2oZZHap>13

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STATEMENT OF THE ISSUES

Whether the Free Exercise Clause of the First Amendment protects the ability of religiously affiliated adoption agencies to place children for adoption or foster care only with those families that will provide for what is, in the view of the agency, proper religious upbringing, thus avoiding a crisis of conscience for the child or the agency?

INTEREST OF AMICUS CURIAE¹

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

Agudath Israel of America, founded in 1922, is a national grassroots organization that among its many activities has frequently submitted amicus curiae briefs in matters involving religious liberty.

¹ No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. Because only the Plaintiff-Appellant has consented to the filing of this brief, a motion seeking Court's leave to file this brief is filed concurrently herewith.

The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 950 members that has, for over 75 years, served as a professional association for rabbis serving the Orthodox Jewish community.

The Coalition for Jewish Values, representing over 1000 traditional rabbis across America, articulates and advocates for public policy positions based upon traditional Jewish thought.

Amici have a deep interest in the free exercise of religion and the role that religion plays in public life.

SUMMARY OF ARGUMENT

A religiously affiliated agency that seeks to place a child in an adoptive or foster home that maintains the same religious values as the child or the agency (as the child's current guardian) does not invidiously discriminate. Rather, the agency merely selects among many prospective parents those who can provide the child not just with material and emotional support, but can also instill religious faith and morals in the child. It goes without saying that individuals, whether single, married, gay or straight, can (and do) make good parents. Individuals, irrespective of their marital status, or the nature of their relationship (same-sex or opposite-sex) are fully capable of creating a loving, stable, and successful household. However, that is not the only issue. Adoptive or foster parents, who in every respect may be a model

family, but who do not provide the child with what his current guardians understand to be proper religious instruction, would still be failing to raise the child as a member of the relevant religious community. That this criterion may not be important to some parents or agencies does not mean that religiously affiliated agencies should be forced to abandon it as well.

From before the founding of the Republic and to the present day, religious groups have taken the lead in caring for children in need of adoption and foster placement thus providing an invaluable service to children who, for whatever reason, are unable to live with their biological parents. These groups strive to respect the religious and moral beliefs of the child, the child's parents, the community where the child was raised, and the religious commitments of the agency itself. This approach makes imminent sense, as even the Appellees recognize. *See* N.Y. Const. art. 6, § 32; N.Y. Soc. Servs. Law § 373(1-4) (McKinney, 2019) (requiring that, “in the care, protection, adoption, guardianship, discipline and control of any child, [the child's] religious faith ... be preserved and protected.”). Allowing the children to maintain connection with their faith is important for the preservation of the individual's relationship with the Almighty — “a defining trait of humankind....” *Korte v. Sebelius*, 735 F.3d 654, 701 (7th Cir. 2013) (Rovner J., dissenting).

Today, the State of New York demands that the New Hope Family Services (“New Hope”) violate their “high duty,” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925), to provide their charges with “appropriate mental and religious training.” *Id.* at 532. This Court should reverse the judgment below and reaffirm that, in this country, religion is not merely “tolerated” but is an “exercise of [people’s] inherent natural rights,” Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), available at <https://goo.gl/P2GPw7>, including the right to impart religious beliefs to those children over whom these people may have custodial rights. For these reasons the judgment below must be reversed.

ARGUMENT

I. A Religious Agency Declining, on the Basis of Religious Belief, to Place a Child with a Same-Sex Couple is not “Discriminating,” but Protecting its Religious Practice

In placing children in adoption or foster homes, a faith-based agency, like any other similarly situated agency is and must be guided by the “best interest of the child.” *See* N.Y. Dom. Rel. Law § 114(1); *Matter of Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (“[T]he adoption statute’s historically consistent purpose [is] the best interests of the child.”). Thus, agencies must look to homes that will provide the

child with the best opportunity for human flourishing and human development — concepts that include within it not just gaining of knowledge, but “appropriate mental and religious training.” *Pierce*, 268 U.S. at 532. When an agency’s faith teaches it that certain families will not provide for a proper religious development of a child, the agency necessarily has to conclude that placing a child with such families is not in the child’s best interests. To force religiously-affiliated agencies to disregard a conclusion commanded by the agencies’ faith is to confront these agencies with a crisis of conscience that may force them to stop participation in placing children altogether. Such an outcome would be harmful to all faith communities, but would hit observant Jewish communities particularly hard.

The views of Jewish religious denominations and communities on gay relationships (as on many other subjects) are wide and varied. Some Jewish communities may well be comfortable placing children with single-sex parents who otherwise adhere to the Jewish way of life. Other communities, such as the Orthodox Jewish community, view same-sex relationships as a fundamental violation of Jewish law. As a result, agencies seeking to place Jewish children in homes that are consistent with their birth parents religious faith would not place Orthodox Jewish children in such households irrespective of whether other precepts of the faith are followed in that home. Because both views are motivated by a sincere religious belief, and a desire to place children in the situation most conducive to their religious

flourishing, and neither position is motivated by any sort of discriminatory animus, the government does more harm than good by banning either position. In any event, adoption agencies should not be placed in the position of having to violate their own religious principles by placing children in homes that do not conform to the agency's religious principles

In *Obergefell v. Hodges*, the Court recognized that the view that same-sex marriage violates religious precepts “has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world. 135 S. Ct. 2584, 2594 (2015). Even if no Jewish authority agreed with New Hope's position, we would still agree with the Supreme Court's admonition that New Hope should be allowed to “continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” *Id.* at 2607.

Thus, any “discrimination” against single-sex couples or unmarried individuals is in reality no different than “discrimination” against those who do not adhere to other requirements of Jewish law as it is understood by the relevant Jewish community. Since New York in fact *requires* adoption agencies to “discriminate” in favor of the child's co-religionists, *see* N.Y. Const. art. 6, § 32; N.Y. Soc. Servs. Law § 373(3), it necessarily follows that religious adoption agencies should be permitted to decline to place children with families whom they view as not fully

observing the precepts of the religious faith of the children’s birth parents, or not conforming to the precepts of the adoption agency itself.

In other words, in determining whether a prospective adoptive parent is “a person ... of the same religious faith as that of the child,” the agency would have to make determinations as to what specific sect or community the child belonged to. Thus, while Orthodox Jews and Conservative Jews are both Jews, and can both be observant (within their traditions), the members of the former community have very different views regarding many areas of religious practice not limited to the laws of kosher, the Sabbath, and holiday observances. An adoption agency would not be engaged in illegal discrimination if it declined to place an Orthodox child in a home of a Conservative family on those bases. By the same token, a religious adoption agency is not engaging in discrimination when it declines to place a child with a same-sex or unmarried couple if such a couple is not viewed as properly or sufficiently religious within the child’s community of birth. In both instances, the motivation is not to invidiously discriminate against a disfavored group, but to ensure that the child is raised in keeping with his community’s religious standards in a manner that the agency believes is in the best interest of the child.

In neither instance is animus toward the adopted parents — observing the Sabbath differently or being part of a same-sex relationship —the cause of the agency’s refusal to place the child in such a home. Rather, in both cases, it is the

positive religious imperative to have the child raised in a manner conducive to living a religious life.

One need not adopt the conservative Christian, orthodox Jewish, traditional Muslim, or any other specific religious view on proper adult sexual mores and behavior to defend a more basic principle — permitting adoption agencies to place children in homes that would facilitate rather than undermine the child’s faith and religious development. Leading a “righteous life” means different things to people of different faiths. Some religions emphasize belief in a certain dogma, others emphasize actions that benefit a fellow man, and yet others demand adherence to particular rituals. A religiously pluralistic society must respect such differences and permit each community to decide for itself what environment is best for children of their faith. That each of us has different religious imperatives and that we may disagree as to which human relationships are fully within our covenant with the Almighty is immaterial. What matters is whether a particular community that sincerely holds certain religious beliefs should be left unmolested to practice them and to raise the children with those religious values. The Constitution and the history of this country answer this question in the affirmative. To answer it otherwise would no doubt hurt all religious communities, but minority religions such as Orthodox Judaism will end up being particularly harmed if the government starts treating

religiously based preferences as acts of unlawful and perfidious discrimination rather than laudable attempts to further the interests of their faith community.

II. The Constitution Protects the Rights of Parents and Guardians to Provide their Children with such “Mental and Religious Training” they Deem Appropriate

Permitting faith based adoption agencies to place children with the households acceptable to the agency, and to their co-religionists, and (if need be) exempting such agencies from regulations that would make such a task impossible is both constitutionally required and consistent with the Supreme Court’s precedents.

Nearly a century ago, the Supreme Court recognized that the liberty guaranteed by the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right of the individual to ... establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Meyer*, the Court invalidated a Nebraska statute that prohibited the teaching of German to children under a certain age. The Court explained that even though the purpose of the Act was “to promote civic development” the “Legislature could [not] impose such restrictions upon the people of a state without doing

violence to both letter and spirit of the Constitution,” because whatever the noble goals, “the individual has certain fundamental rights which must be respected.” *Id.* at 401, 402.

Two years later, the Court decided *Pierce, supra* — a case with clear echoes in the present controversy. There, Oregon decreed that every parent or custodian must send all children between the ages of 8 and 16 years to a public school. *Id.* at 530. “[T]he Society of Sisters [w]as an Oregon corporation, organized in 1880, with power to care for orphans,” challenged the law on the basis that it interfered “with the right of parents to choose schools where their children will receive appropriate mental and religious training.” *Id.* at 532. The Court agreed explaining that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* at 535. The present case is no different. The religious adoption agencies, much like the Society of Sisters “have the right, coupled with the high duty, to recognize and prepare [the prospective adoptees] for additional obligations” including the observance of religious precepts.

The Court has not strayed from this path. Thus, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) it held that even though “a State’s interest in universal education” is at the “very apex” of the function of proper government, it is still “not totally free from a balancing process when it impinges on fundamental rights and interests, such

as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children” *Id.* at 214. So too here. Without a doubt, the State’s interest in protecting the welfare of children *and* in eradicating invidious discrimination are interests of the highest order. *See id.*; *Nat’l Ass’n of African Am.-Owned Media v. Charter Commc’ns, Inc.*, 915 F.3d 617, 630 (9th Cir. 2019) (“The Supreme Court has regularly emphasized that the prevention of racial discrimination is a compelling government interest.”).² The *amici* stress that New Hope is not engaging in discriminatory behavior when it chooses to place children in homes it considers conducive a child’s religious development. Nonetheless, the *amici note* that even if the Court were to consider the State’s interest in eliminating discrimination to be implicated here, that interest is not free from the constraints of the First and Fourteenth Amendments which protect “the traditional interest of parents with respect to the religious upbringing of their children.” *Yoder*, 406 U.S. at 214. When adoption agencies stand in place of parents, the Constitution protects their interests, and ultimately the interests of the children in not being torn apart from the community of their co-religionists. *See Pierce*, 268 U.S. at 535 (noting that the

² Whether the State has actually demonstrated that such an interest exists in the present case is a separate matter, and is best resolved on remand.

rights and the obligations belong not just to biological parents but to “those who nurture ... and direct [the child’s] destiny.”).

The Appellant in this case stands on equal footing with the respondents in *Pierce* and *Yoder*. All it is asking for is for the State of New York to permit it to take care of the children over whom it has responsibilities in a way consistent with its religious obligations to these children. The State is not asked to endorse these particular (or any other) religious practices; rather, it is merely asked to accommodate them — a responsibility that the State’s own statutes recognize. *See* N.Y. Const. art. 6, § 32; N.Y. Soc. Servs. Law § 373(3). The decision below gives short shrift to the Supreme Court’s long line of precedents which erect a protective barrier around parents’ and guardians’ ability to impart their religious beliefs and practices to their children. Unless corrected by this Court, the precedent will have a significant and harmful effect not just on the Appellant, but on other religious adoption agencies. What’s more, this effect will be particularly pernicious in minority religious communities. The Court should not allow this eventuality to come to pass.

III. Religiously Affiliated Adoption Promotes the Ability of Guardians and Children to Exercise their Faith

A. *Religiously Affiliated Adoption Agencies Serve an Important Function in Providing for the Adoption of Religious Children*

Religious organizations have played a primary role in the care of children in need since before the republic's founding. The first orphanage in what would later become the United States was established in 1729 by a religious organization: an order of Ursuline nuns in New Orleans. See Nat'l Philanthropic Trust, *First American Orphanage Established*, A History of Modern Philanthropy, <https://bit.ly/2OIstx8>. The first Jewish charity incorporated in the United States was created to care for Jewish orphans in Charleston, South Carolina. See Thomas J. Tobias, *The Hebrew Orphan Society of Charleston, S.C.* 7 (1957). The first groups in America to engage in "placing out" children who lacked a home (the practice now referred to as foster care and adoption) were uniformly private and often, religious. See 2 *The Praeger Handbook of Adoption* 677 (Kathy Shepherd Stolley and Vern L. Bullough eds., 2006); U.S. Dept. of Health & Human Servs., *History of National Foster Care Month*, ChildWelfare.gov, <https://bit.ly/2oZZHap>.

Even as government agencies joined the field of foster care the role of private agencies in arranging recruitment, training and placement continued unabated. See Susan V. Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 Ohio St. L.J. 1295, 1313 (1999).

Today, religious organizations continue to play an “active and substantial role” in promoting child welfare. Stephen V. Monsma, *Pluralism and Freedom: Faith-Based Organizations in a Democratic Society* 29 (2012). As a result, state and local governments around the country “rely heavily” on religious groups to help children find loving families who are ready to adopt and care for them. Natalie Goodnow, The Heritage Foundation, *The Role of Faith-Based Agencies in Child Welfare*, (May 20, 2018), <https://herit.ag/2ojc56d>. Religious adoption agencies arrange a significant percentage of adoptions and foster placements. See Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, *The Chronicle of Social Change* (Nov. 28, 2017), <https://bit.ly/2MvEUcI>; see also Natalie Goodnow, *Faith-based Adoption Agencies are Too Valuable to Shut Down*, *The Hill*, <https://bit.ly/2OIxuFY> (“Focus on the Family helped cut in half the number of children in Colorado waiting to be adopted.”).

Religious adoption agencies help children by finding them adoptive families capable of raising them in a manner consistent with the faith tradition to which they are accustomed. Adoption can be a time of intense trauma for a child as she tries to fit in to a new and unfamiliar home. Dana E. Johnson, *Adoption and the Effect on Children’s Development*, 68 *Early Hum. Dev.* 39, 49 (2002). By assigning a child to a family compatible with the child’s preexisting religious principles, an adoption agency aims to minimize the ways in which the child will find her new household

alien and unfamiliar and maximize her opportunity to find it comforting and welcoming.

The exact outlines of this compatibility will vary from faith to faith and circumstance to circumstance. At a minimum, creating a religiously hospitable environment for the child requires not placing that child in a home that is radically inconsistent with his faith. As we explain below, for Jewish children this practice may require placing them in Jewish homes. Likewise, New Hope seeks to place children in homes that model particular familial structures consistent with the children's and agency's religious views. At bottom, religious adoption agencies that work in concert with children, potential adoptive families, and (where possible) birth parents, are in the best position to determine the circumstances best suited for a child's spiritual flourishing. Because religious views are diverse and because there are many different ways of finding an optimal situation for placing children, the government should give religious agencies significant leeway in evaluating the appropriate environment for religious children.

It is for this reason that in 1978 Congress adopted the Indian Child Welfare Act which recognized that "the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture" is necessary "to protect the best interests of Indian children and to promote the stability and security of Indian ... families." 25 U.S.C. § 1902. For the same reason, the State of New York

requires adoption agencies to consider religious compatibility when choosing adoptive parents. *See* N.Y. Const. art. 6, § 32; N.Y. Soc. Servs. Law § 373(3) (“In appointing guardians of children, and in granting orders of adoption of children, the court shall, when practicable, appoint as such guardians, and give custody through adoption, only to a person or persons of the same religious faith as that of the child.”). The policy behind New York’s Social Service Law is clearly that children should be placed in homes that are consistent with the religious faith of the birth parents, as that is what the birth parents would want and is in the best interests of the child. *See* N.Y. Dom. Rel. Law § 114(1); *Matter of Jacob*, 660 N.E.2d at 405.

By allowing a knowledgeable practitioner of a child’s faith to conduct a proper evaluation of religious compatibility agencies can increase the likelihood that a child will be accepting of, and accepted into, a new family. *See* Jason D. Brown *et al.*, *Benefits of Cultural Matching in Foster Care*, 31 Child. & Youth Servs. Rev. 1019, 1022 (2009) (“A sense of safety and comfort was promoted when a child was in a family where beliefs were shared.”); *see also id.* at 1023 (“[P]articipants in the study also reported that having common ... family customs were very helpful to ease the transition into the home for both the child and foster family.”). Conversely, breaking the bonds of religious community may disrupt a child’s “social networks with peers and adults, moral directives, and [affect his] coping strategies.” Jill Schreiber, *The Role of Religion in Foster Care*, NACSW (Nov. 2010), <https://bit.ly/2Mvkfqx>. This

in turn may negatively affect the outcomes with respect to the child's "psychopathology, ... behavioral problems, including: ... delinquency, ... sexual behavior, and ... substance use; ... conflict in families; and ... levels of education." *Id.* (citations omitted). Finally, religious matching helps avoid the crisis of conscience that could be created if a child is placed in a home whose practices are incompatible with her religious upbringing.

Furthermore, children are not only direct beneficiaries of the religious service agencies. They also benefit indirectly from the agencies' connections to potential adoptive parents with religious backgrounds. Studies show that people of faith are, on average, more willing to take up the challenge of adoption. *See* Barna Group, *5 Things You Need to Know About Adoption* (November 4, 2013), <https://bit.ly/338bvvg> ("Practicing Christians are more than twice as likely to adopt than the general population."). For a number of religious and cultural reasons, Jewish Americans are more likely to serve as adoptive parents than the population at large. Jennifer Sartori & Jayne K. Guberman, *Boundaries of Identity*, 89 *J. Jewish Communal Serv.* 46, 48 (2014) ("American Jews adopt at approximately twice the rate of non-Jews"). Religious adoption agencies facilitate adoptions into these families by connecting government agencies with religious prospective parents while simultaneously engaging these individuals in an adoption process which honors the prospective parents' religious traditions. *See* Hardy, *supra*. When these

organizations' services are rejected or curtailed, state and local governments often experience difficulties in finding substitutes for the services previously provided by these religious groups. For example, when New York City devalued religious matching in foster care in favor of other considerations,³ “[o]utcomes went from unacceptable to even worse as the new rules demoralized and drove away volunteers at the high-performing religious agencies. ... The city’s foster-care system proceeded to lurch from crisis to crisis.” Walter Olson, *An Amen for Albany*, Cato Institute, June 30, 2011, <https://bit.ly/333LEo3>.

These important benefits justify allowing religious adoption agencies to continue operating in a manner consistent with their consciences. Critically, these agencies work to best serve the needs of religious children. They are not motivated by discriminatory intent. *Cf. Wilder v. Bernstein*, 645 F. Supp. 1292, 1306 (SDNY

³ The City was of course bound by the New York State statutory and constitutional provisions requiring religious matching “when practicable,” N.Y. Const. art. 6, § 32; N.Y. Soc. Servs. Law § 373(1); however, in settling a long-running litigation over the placement of children with foster and adoptive parents, the City essentially determined that such matching is often not “practicable.” *See Wilder v. Bernstein*, 645 F. Supp. 1292, 1305-06 (SDNY 1986), *aff’d by* 848 F.2d 1338 (2d Cir. 1988). However, even under the Settlement, the City and the plaintiffs “acknowledges the existence of certain religions which have adherents whose religious beliefs pervade and determine the entire mode of their lives, regulating it with detail through strictly enforced rules of the religion,” and the City remained obligated to place such children in households where the children could “continue to practice the extensive religious customs and rituals which have been part of the child’s life.” *Id.* at 1306 (internal quotations omitted).

1986), *aff'd by* 848 F.2d 1338 (2d Cir. 1988). New York inaccurately maligns New Hope and misunderstands its motivation by casting New Hope's desire to place children in religiously compatible environments as bigoted. New York's demands threaten these important benefits by forcing New Hope into an intractable dilemma: either violate its conscience by placing children with same-sex parents or stop facilitating adoptions altogether. We take the position that a faith-based adoption agency should be allowed to follow its own religious principles and not be required to place children in homes that are not consistent with the religious views of the agency.

This Court should protect the important work performed by faith-based adoption agencies nationwide. New Hope's policies were not conceived out of malice for any group. Rather, they are reasonable measures to accomplish New Hope's mission of ensuring that adoptive families have religious values consistent with those of the children they are entrusted to protect and of the adoption agency itself. This Court should ensure that Jewish adoptive agencies — like agencies of all faiths — can continue their important service by protecting New Hope's right as a religious agency to follow the precepts of its religious tradition.

B. Jewish Adoption Agencies are Particularly Important to the Preservation of Jewish Religion and Customs

While the above observations are true with respect to all religious groups, for reasons of both history and religious doctrine, they are particularly salient for the observant Jewish children and the Jewish community.

1. The Complexity of Jewish Customs Necessitates Deep Familiarity with Judaism

Jewish observance includes complex rituals, restrictions on everyday activities, and religious practices which may be completely unfamiliar to outsiders. Although the public at large may be generally familiar with such rules as “no work on the Sabbath,” most people do not know (because they have no particular reason to know) that the restrictions involve prohibitions on such basic activities as writing, operating electric lights (including the light that turns on when a refrigerator door opens), using electronic devices, cooking, or carrying items in public. See Chabad.org, *The Shabbat Laws*, <https://bit.ly/2DjPc9P>. The same prohibitions apply to certain (though not all) Jewish holidays. See Y. Dov Krakowski, The Union of Orthodox Jewish Congregations of America, *A Review of Hilchot Yom Tov*, <https://bit.ly/2yv4ypM>. Certain days of observances have their own rules and special restrictions. Again, the basic ones may well be known (*e.g.*, requirement to abstain from eating bread during Passover), but others are less known or not known at all. To continue with the example of Passover many foods other than bread are prohibited, such as oatmeal, vodka, pasta, etc. Dietary rules during Passover are

even more complicated because communities of from Eastern Europe (Ashkenazi) have additional restrictions which are not followed by Jews of Spanish (Sephardic) or Middle Eastern (Mizrahi) communities. *See generally* Shimon Finkelman *et al.*, *Pesach* (1994). Or consider the holiday of Sukkot, which requires observant Jews to eat meals in an outdoor hut or “sukkah.” *See* The Union of Orthodox Jewish Congregations of America, *Sukkah Questions and Answers*, <https://bit.ly/2Zv5upW>. There are highly technical rules about the construction of the sukka, as well as certain rituals that must be observed during the holiday. *See id.*

The rules of kashrut are also quite complicated and extend far beyond the prohibition on pork that is well-known to non-Jews. Not only are foods such as shellfish and pork products banned outright, but there are also requirements concerning the proper slaughter of animals, and prohibitions on consuming otherwise kosher animals which, upon inspection, are discovered to have had certain diseases or blemishes. *See* Gershon Appel, *The Concise Code of Jewish Law* 231-54 (1977). Furthermore, food which is otherwise kosher but is prepared with utensils or ovens previously used to prepare non-kosher foods may also be forbidden. *Id.*

Orthodox Judaism also imposes strict requirements with respect to the behavior in social, private, and even sexual and private spheres. Thus, an observant adult Jew may be religiously prohibited from spending even brief periods of time alone with a member of the opposite sex who is not a close relative. *See* Melech

Schachter, *Various Aspects of Adoption*, 4 J. of Halacha & Contemp. Soc'y. 93, 96-97 (1982). In accordance with traditional practices and Jewish law, observant Jews may also wear distinctive hairstyles (such as sidelocks) or distinctive dress (such as kippot), while foregoing clothing in which wool and linen are mixed. See Adin Steinsaltz, *Kippot, Hats and Head Coverings: A Traditionalist View*, My Jewish Learning, <https://bit.ly/2GNEtrI>; Aryeh Leibowitz, *Halachos of Peyos Harosh*, <https://bit.ly/2T1c9G0>.

The point is that Orthodox Judaism imposes complex and complicated requirements on its adherents with respect to every aspect of life. It is highly unlikely that even the most loving, well-meaning and sincere adoptive parents who are outsiders to the relevant religious community would be able to adopt and follow all of these rules and practices, which are after all, foreign to them. As a result, an observant Jewish child who is placed with a family whose members are not observant Jews will likely find that his rituals, holidays, and prayers are unfamiliar to his new family. This confusion will serve as an ever-present barrier between the child and his new parents and siblings, marking out his difference as he seeks to join the familial whole. The odds are that with time, beliefs, observances, and rituals to which the child was used to in his birth home will yield to the ways and customs of his adoptive family. In time, the loss of the child to his community and his community to the child will be inevitable and complete.

On the other hand, if a child is placed in familiar surroundings — a family with consistent religious values — he will likely suffer less confusion and alienation. Moreover, the familiar surroundings and practices will likely provide an opportunity for increased bonding with his new family and the religious community at large.

Precisely because Christian practices differ from Jewish practices, which in turn differ from Muslim or Buddhist practices, it is vital that adoption agencies run by religious groups be allowed to consider the requirements of their faith when placing children in foster and adoptive homes. New Hope's practices, though they may not be universally embraced by all religions, serve the same interests described above.

2. History's Lessons Show that Separation of Jewish Children from Their Community Causes Irreparable Damage to Both

Historically, the Jewish community faced persecution which often resulted in the denial of the Jewish parents' rights to raise their children in their own faith. Indeed, one of the episodes that *still* generate friction between the Jewish community and the Catholic Church is the Mortara case of the late 1850s. *See generally* David I. Kertzer, *The Kidnapping of Edgardo Mortara* (1997). In that case, Edgardo Levi Mortara, a Jewish boy suffering from an illness, was secretly baptized by his nanny who intended to save the boy's soul should he die from his condition. Once the boy

recovered, the police seized the boy and spirited him out of his parents' home to be raised a Catholic. Pope Pius IX's refusal to return the boy caused significant damage to the Catholic-Jewish relationship in Italy. This episode made it significantly more difficult for the Jews to continue to reside there, despite the fact that the Pope, the Church, and Italy as a whole were beginning to shed the medieval prejudice against the Jews. That as a result of his upbringing in the Church, Edgardo ultimately forsook his birth religion and became a Catholic priest only added to the anguish of his family and the Jewish community, both in his town of Bologna as well as in Italy and Europe at large. *See generally id.*

In contrast, one of the many reasons the worldwide Jewish community enjoyed a warm relationship with Pope St. John Paul II was that (in addition to his many other actions) while a priest in post-war Poland, he refused to baptize a Jewish child who was saved from the Holocaust. *See Holocaust & Human Right Education Center, Stanley Berger, <https://bit.ly/2OzadWC>.* To this day, the Jewish community views this as a highly commendable action because although by the point that the future Pope had made his decision the child was no longer in *physical* danger, by refusing to baptize him, Father Wojtyla saved the child as a *Jewish* child. *See John Dart, Tale Retold to Show Pope's Feeling for Jews, L.A. Times at 28 (Aug. 29, 1987).* This action is viewed as so laudable because it stands in such contrast to countless other episodes where Jewish children who survived the Holocaust were

lost to the Jewish community forever and were in turn deprived of their own roots. See Elaine Sciolino & Jason Horowitz, *Saving Jewish Children, but at What Cost?*, N.Y. Times at A6 (Jan. 9, 2005) (discussing “one of the most painful episodes of the postwar era: the refusal to allow Jewish children who had been sheltered by Catholics during the war to return to their own families and communities.”). In part as a result of these policies, thousands of children throughout Europe were never able to rejoin their families and religious communities, which contributed to the continued loss of Jewish communal life across the continent even after the killing had stopped. See, e.g., Joanna Beata Michlic, *What Does a Child Remember*, in *Jewish Families in Europe, 1939-Present* (Joanna Beata Michlic ed. 2017), <https://bit.ly/2LVO9n0>.

Soviet Jewry dealt with a similar type of persecution. Although the Soviet authorities, unlike the Nazis, did not try to physically eradicate its Jewish population, as a result of state-sponsored anti-Semitism and virulently anti-religious (and specifically anti-Judaism) policies “many Soviet Jews had little knowledge of their cultural or religious heritage.” Peter Steinfels, *Soviet Jews Seeing Fruit of Efforts*, N.Y. Times at A11 (Dec. 22, 1989).

This phenomenon of separation of children from their communities, which happened against background of racism, discrimination, and sometimes annihilation of those communities, has been repeated time and again. Thus, Native American

children have been separated from their families and culture as a result of “removal, often unwarranted, ... from the[ir familie] by nontribal public and private agencies.” 25 U.S.C. §1901(4). The surviving child victims of Armenian genocide were forcibly converted to Islam. See Marlo Safi, *The Memory of the Armenian Genocide Should Be Preserved*, Nat’l Review (Apr. 24, 2019), <https://bit.ly/332d5OZ>; Dorian Jones, *Growing Numbers of Turks Discover Armenian Ancestry*, Voice of America (Apr. 23, 2015), <https://bit.ly/2M2MZGD>.

None of this is to suggest that the State of New York is seeking to physically eliminate or culturally eradicate any minority religious or ethnic group. However, it is difficult for a religious group to maintain its unique identity if it prohibited — *for whatever reason* — from passing down its beliefs, language, and practices (however “peculiar” they might be) to the next generation. The resultant assimilation, with its attendant loss of cultural identity, is a harm to the children who are deprived of the link with their past, the community that is deprived of an ability to self-sustain, and ultimately, the society at large that is dispossessed of the vibrancy that the diversity of faiths and ethnicities brings. Policies, even ones adopted with the best intentions, that do not take into account the complex nature and particular requirements of the religious communities, ultimately contribute to the diminution of such communities, especially where the religious obligations of a specific minority group are not easily understood or followed by the public at large.

3. Denying the Ability of Jewish Adoption Agencies to Place Children in Homes in a Manner Consistent with the Agency’s and Child’s Faith Leads to a Destruction of Jewish Communal Life

There are certain dangers when a child is placed in a non-observant home. For example, he may lose the connections to his community, and the community will lose its connections to one of its most vulnerable members. As a result, Jewish religious law imposes a prohibition on placing children up for adoption outside of the community. Indeed, Jewish law places the responsibility for the care of orphans and other children in need on the Jewish communal authorities. *See* B. Talmud Ketubot 67a-67b. These authorities, or the guardian(s) they appoint, are obligated to ensure that the child receives a Jewish upbringing. B. Talmud Bava Batra 21a. For this reason, modern-day Orthodox rabbinic authorities consider an observant household a necessary prerequisite for adoption of a Jewish child to occur. *See* Menachem M. Schneerson, *Part II Reproduction — Chapter VII: Adoption*, <https://bit.ly/31cndmu>. Consequently, children from observant Jewish families need to be placed in homes that observe Jewish precepts. For the same reason Jewish adoption agencies need to be able to place children in accordance with their religious mission.

“Jews, as a result of their historical experience as a minority, are particularly sensitive to ‘losing’ their children via out-of-culture adoption. Jewish history is

replete with instances of such loss.” Laura J. Schwartz, *Religious Matching in Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 Family L. Quarterly 171, 187 (1991-92). As a result, an agency — even if it does not strictly adhere to Jewish law — might have reservations about placing Jewish children in non-Jewish homes. Affirming the judgment below is a disservice to the Jewish orphans and the Jewish community.

CONCLUSION

For the reasons stated, as well as those in the Appellant’s brief, the Court should reverse the judgment below.

August 22, 2019

Respectfully submitted,

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Dated: August 22, 2019

s/ Gregory Dolin

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this 22nd day of August, 2019, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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