UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-1498 _____ Caption [use short title] _____

Motion for: leave to file amicus brief

Set forth below precise, complete statement of relief sought:

Leave to file amicus brief in support of Defendants-Appellants' Motion for Rehearing

Belya v. Kapral, et al.

MOVING PARTY: Jewish Coalition for Religious Liberty (Amicus) **OPPOSING PARTY:** Alexander Belya

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Ryan Paulsen **OPPOSING ATTORNEY:** Oleg Rivkin

[name of attorney, with firm, address, phone number and e-mail]

Haynes and Boone, LLP
2323 Victory Ave., Ste. 700, Dallas, TX 75219
(214) 651-5000

Rivkin Law Group PLLC
800 3rd Ave., Ste. 2800, New York, NY 10022
(212) 231-9776

Court- Judge/ Agency appealed from: _____

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): _____

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this court? ☐ Yes ☐ No
Requested return date and explanation of emergency: _____

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Ryan Paulsen **Date:** 09/07/2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

21-1498

In the United States Court of Appeals
for the Second Circuit

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

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

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS BRIEF SUPPORTING DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

Ryan Paulsen
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)

Counsel for Amicus Curiae Jewish Coalition for Religious Liberty

CORPORATE DISCLOSURE STATEMENT

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

1. It is a non-profit organization that has no parent organization; and
2. There is no publicly held corporation that owns more than 10 percent of its stock.

Pursuant to Federal Rules of Appellate Procedure 29(b)(2)-(3), the Jewish Coalition for Religious Liberty ("JCRL") respectfully requests leave of this Court to file the attached brief as *amicus curiae* in support of Defendants-Appellants' petition for rehearing en banc.

The JCRL is a non-denominational organization of Jewish rabbis, lawyers, and professionals committed to protecting the ability of all Americans to freely practice their religious beliefs. As adherents of a minority religion, JCRL members have a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States. The First Amendment protections embodied in the church autonomy doctrine at issue in this case are particularly salient to the JCRL, especially in the context of a long history of government interference with matters related to the Jewish faith. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 8–9 (1947) (noting that Jews faced persecutions from governments that favored either Protestants or Catholics in the centuries before America's colonization).

Through its amicus brief, the JCRL seeks to aid the Court's consideration of this case by providing the unique perspective of a minority religion whose ecclesiastical practices and governance will be affected by the panel's decision. The brief describes several complex issues of Jewish law that relate to secular and

commercial practices and could now be subject to litigation under the panel opinion. The brief also provides recent examples of judicial misunderstandings of Jewish law—an occurrence that could multiply as more religious practices become the subject of litigation. This perspective is desirable and relevant because it illustrates the far-reaching implications of the panel's decision and how it will influence minority religions such as Judaism.

For the foregoing reasons, the JCRL respectfully requests that the Court grant this unopposed motion and file the attached brief.

Respectfully submitted,

/s/ Ryan Paulsen
Ryan Paulsen
Ryan.Paulsen@haynesboone.com
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)
214.651.5940 (fax)

Counsel for Amicus Curiae
Jewish Coalition for Religious Liberty

CERTIFICATE OF CONFERENCE

I certify that on September 6, 2022, I conferred with counsel for Alexander Belya, who advised me that this motion is not opposed.

/s/ Ryan Paulsen
Ryan Paulsen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record in accordance with the Federal Rules of Appellate Procedure on September 7, 2022.

/s/ Ryan Paulsen
Ryan Paulsen

AMICUS BRIEF

21-1498

In the United States Court of Appeals
for the Second Circuit

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

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

AMICUS BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY SUPPORTING DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

Ryan Paulsen
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)

Counsel for Amicus Curiae Jewish Coalition for Religious Liberty

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Jewish Coalition for Religious Liberty[1] certifies that:

1. It is a non-profit organization that has no parent organization; and
2. There is no publicly held corporation that owns more than 10 percent of its stock.

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

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STATEMENT OF INTEREST

The Jewish Coalition for Religious Liberty ("JCRL") is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to foster cooperation between Jews and other faith communities and to protect the ability of all Americans to practice their faith freely. Over several years, its founders have worked on amicus briefs in numerous state and federal courts, including the Supreme Court of the United States, submitted op-eds to prominent news outlets, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership.

JCRL submits this brief to aid the en banc Court in understanding complex matters of Jewish law and practice that could become subject to intrusive litigation and discovery under the panel's opinion.

INTRODUCTION

Since this nation's founding, religious institutions, including religious minorities, have enjoyed a fundamental right flowing from the First Amendment to decide internal matters free from government interference. Courts have protected this right in a variety of ways, including the church autonomy doctrine, which bars claims based on or related to questions of religious faith, doctrine, and internal governance at the outset of a case to prevent intrusive litigation and discovery.

The panel's decision treating the church autonomy doctrine as a run-of-the-mill defense breaks from numerous decisions by sister circuits and state high courts, strips this well-established doctrine of its vitality, and invites litigation targeting both religious conduct and the process by which various religions select their leaders. Such an intrusion violates the Establishment Clause by entangling courts in religious controversies they have no competency to decide. The consequences of this case are far-reaching, extending beyond the Defendants to all religions. For example, Jewish law abounds with complex issues that intersect with secular and commercial pursuits and that are subject to different interpretations within Judaism. Courts are simply not equipped to decide such matters, and when they try, they risk getting religious questions wrong—or endorsing one side of an ongoing theological disagreement as a matter of American law—at the expense of both litigants and the judiciary.

The Court should grant en banc review to reinvigorate the protections embodied in the church autonomy doctrine and bring Circuit precedent back in line with decisions from courts nationwide.

ARGUMENT AND AUTHORITIES

I. The panel opinion waters down important First Amendment protections, threatening harm to Jewish religious communities.

The panel opinion downgraded the church autonomy doctrine from a preclusive defense "closely akin" to official immunity[2] to just another "ordinary" defense that does nothing to protect religious organizations from litigation and discovery into matters of doctrine and internal governance. Op. 24. By so doing, the panel created a split with 11 other circuits and state high courts that have applied the doctrine to preemptively bar any claims to which it applies. Pet. for Reh'g at 11-15. The panel also turned its back on longstanding Supreme Court precedent barring claims concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. 679, 733 (1871).

Vigorous application of the church autonomy doctrine protects religious institutions' fundamental right under the First Amendment "to decide for

[2] *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013).

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). This right prevails over competing interests, even interests of high social importance, and is particularly important in the context of disputes between religious leaders and their organizations. *See id.* at 116; *see generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012) ("the First Amendment has struck the balance" for courts in favor of a religion being "free to choose those who will guide it on its way").

This ironclad protection of religious institutions has allowed religions of all creeds to flourish. By contrast, the panel's approach "would lead to the total subversion of . . . religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts" to contest those decisions. *Watson*, 80 U.S. at 729.

The panel's opinion opens the door to court interference in internal religious controversies, a result the Establishment Clause was intended to prevent. Such determinations are especially perilous for Judaism given its status as a minority religion, the complexity of its religious laws, and the existence of ongoing intrareligious debates. Because of this complexity and indeterminacy, there is a high potential a secular court would either misapply Jewish law or would adopt one side

of an ongoing intrareligious dispute and declare the matter settled, as if it were the Sanhedrim—the Jewish high court that last convened in 425 AD.

A. The panel's interpretation of the church autonomy doctrine threatens common Jewish practices with potential litigation.

Judicial "incursions [into religious matters must be] cautiously made so as not to interfere with the doctrinal beliefs and internal decisions of the religious society." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). This cautious approach is especially important for minority faiths like Judaism, where doctrinal decisions regarding secular pursuits may be subject to judicial scrutiny if the panel opinion is not reversed.

For example, Jewish law prohibits purchasing certain food from a Jewish-owned store that kept leavened products over Passover for a specified period. *See A Guide to Purchasing Chometz After Pesach*, STAR-K (Spring 2015).[3] Pursuant to this law, synagogues and Jewish organizations publish lists of local establishments that have violated the law and warn congregants not to buy food from those stores for a limited time following Passover. *Id.*; *see also Bulletin of the Vaad Harabanim of Greater Washington: Pesach 2019*, THE VAAD HARABANIM OF GREATER WASHINGTON (2019)

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

(listing stores);[4] *Chometz after Pesach*, YOUNG ISRAEL SHOMRAI EMUNAH OF GREATER WASHINGTON (April 29, 2011) (same).[5] Under the panel's opinion, businesses could challenge these lists in court—exposing a synagogue to the burdens of litigation and courts to the task of adjudicating whether a rabbi's determination was correct.

Jewish dietary laws (known as the laws of *kashrut*) present another potential litigation minefield under the panel opinion. Although several thousand years old, applications of the law are still disputed within the Jewish faith. *See, e.g.*, Yaniv Halily, *Rabbis stir salmon row*, Y NET NEWS (Mar. 11, 2010) (salmon);[6] Joseph Berger, *The Water's Fine, but Is It Kosher?*, THE NEW YORK TIMES (Nov. 7, 2004) (unfiltered water).[7] The issue is further complicated by restaurants' claims to be *kashrut* compliant when they may not meet the communal religious standards. Businesses that claim to be kosher while violating *kashrut* standards have shut down after rabbinical warnings. *See, e.g.*, Richard Greenberg, *Treif Meat Found at Washington*

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

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

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

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

DC JCC Cafe; Vaad Shuts Down Store, THE YESHIVA WORLD (Sept. 2, 2009);[8] Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 Fla. St. U.L. Rev. 509, 547–48 (2004) (recounting restaurant's failure after kosher fraud discovery). Under the panel opinion, a synagogue or rabbi could be subject to defamation liability for labelling a restaurant as non-kosher, and courts will be required to take a side as to what "kosher" means and which meaning of "kosher" accords with common perception.

Finally, some synagogues certify which poor individuals in their community need charity and are allowed to request donations in or around the synagogue after daily services. *See* Rabbi Yair Hoffman, *Fraud in Tzedakah and What to do About it*, THE YESHIVA WORLD (Sept. 22, 2016) (discussing solutions to prevent charitable fraud);[9] *see also* Agudath Israel of Cleveland, *New Vaad Hatzedakos Cleveland*, LOCAL JEWISH NEWS (July 22, 2017) (describing efforts to evaluate fundraisers).[10] Under the panel opinion, such certifications, which regulate who does and does not receive contributions, could result in tort litigation.

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

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

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

B. The panel's decision could thrust courts into disputes over Jewish law and practice they are ill-equipped to adjudicate.

As these examples illustrate, the panel's opinion imperils not just Jewish leaders but also courts, which will be asked to resolve religious questions beyond both their capacity and their Constitutional remit. The First Amendment prohibits secular courts from intruding into ecclesiastical affairs. *See, e.g.*, *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) ("religious controversies are not the proper subject of civil court inquiry"). As recognized by America's Founders and confirmed by the Supreme Court, "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all [religions] as the ablest men in each are in reference to their own." *Watson*, 80 U.S. at 729; *Fratello v. Archdiocese of New York*, 863 F.3d 190, 199 (2d Cir. 2017) (describing the historical underpinnings of the ministerial exception).

Because Judaism is a minority religion, there is a substantial risk that courts will misunderstand and misinterpret Jewish law if called upon to parse its requirements. For example, in *Ben-Levi v. Brown*, a Jewish prisoner's request to engage in a group study of the Torah was denied based on an erroneous conclusion that Jewish law required 10 men to be present. 577 U.S. 1169, 136 S. Ct. 930, 931–32, 934 (2016) (Alito, J., dissenting from denial of certiorari). It is unclear exactly what

law the prison and lower courts relied upon, but it is possible the prison was confused by the requirement for 10 men to publicly read from a Torah scroll as part of a prayer service. Joseph Karo, Code of Jewish Law 143:1; *see also* Aryeh Citron, *Minyan: The Prayer Quorum*, CHABAD.ORG.[11] Whatever the cause, the courts' misunderstanding of Jewish law denied a prisoner the fundamental right to practice his religion.

Another example of the potential for courts to misunderstand Jewish law occurred during an oral argument at the Fifth Circuit when one of the panel judges suggested that turning "on a light switch every day" was a prime example of an activity unlikely to substantially burden a person's religious exercise. *See* Oral Argument at 1:00:40, *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. Apr. 7, 2015).[12] To an Orthodox Jew, turning on a light bulb on the Sabbath could violate Exodus 35:3, which forbids lighting a flame on the Sabbath day. Certainly, this judge did not intend to demean Orthodox Jews or belittle Jewish practices. He simply, and understandably, was unaware of how some Jews understand the commandment to keep the Sabbath holy.

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

[12] A*vailable at* goo.gl/L50Gt1.

The potential for courts to misinterpret Jewish law is magnified by the numerous unresolved internal religious disagreements that exist within Judaism. For example, middle eastern and European Jewish communities disagree over whether corn and corn products can be eaten on Passover.[13] Similarly, the Orthodox and non-Orthodox denominations of Judaism disagree on a variety of issues including Sabbath-day driving,[14] kosher standards and enforcement,[15] gender-separate synagogue seating,[16] and recognition of female rabbis.[17]

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[13] Jeffrey Spitzer, *Kitniyot: Not Quite Hametz*, MY JEWISH LEARNING, *available at* https://www.myjewishlearning.com/article/kitniyot-not-quite-hametz/ (discussing the Jewish Passover debate surrounding rice, millet, corn, and legumes).

[14] *Compare Driving to Synagogue on Shabbat*, aish.com (Aug. 21, 2011), *available at* https://www.aish.com/driving-to-synagogue-on-shabbat.html (offering guidance on how to comply with a prohibition on driving on the Sabbath) *with Conservative Judaism*, BBC, *available at* https://www.bbc.co.uk/religion/religions/judaism/subdivisions/conservative_1.shtml (July 24, 2009) (describing various views on driving on the Sabbath).

[15] *See, e.g.*, *Directory of Kosher Certifying Agencies*, Chicago Rabbinical Council, *available at* http://www.crcweb.org/agency_list.php (listing kosher certifying agencies); Sue Fishkoff, *Conservatives taking kashrut challenge up a notch*, Jewish Telegraphic Agency (Apr. 11, 2011), *available at* https://www.jta.org/2011/04/11/lifestyle/conservatives-taking-kashrut-challenge-up-a-notch (discussing the efforts of Conservative Jewish rabbis to create companies to issue kashrut certification for Conservative Jews).

[16] *See The Mechitzah: Partition*, Chabad.org, *available at* https://www.chabad.org/library/article_cdo/aid/365936/jewish/The-Mechitzah-Partition.htm (explaining the tradition of separating men and women in synagogues); *see also Katz v. Singerman*, 127 So. 2d 515, 532 (La. 1961) (recognizing dispute among Jews regarding the question of mixed seating).

[17] *See, e.g.*, 2015 Resolution: RCA Policy Concerning Women Rabbis, Rabbinical Council of America (Oct. 31, 2015), *available at* https://rabbis.org/2015-resolution-rca-policy-concerning-women-rabbis (reaffirming Orthodox Jewish tradition of not recognizing female rabbis).

Calling on secular courts to take a side in these types of theological disputes violates the Establishment Clause, which "prohibits government involvement in . . . ecclesiastical decisions." *See Hosanna-Tabor*, 565 U.S. at 189. Moreover, such an endeavor would be futile not only because of the lack of judicially cognizable standards and unfamiliarity with Judaism's history, traditions, and laws, but also because Judaism is not hierarchal. *See* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 Geo. Wash. L. Rev. 951, 975 (1997); *Wolf v. Rose Hill Cemetery Ass'n*, 914 P.2d 468, 472 (Colo. App. 1995) (recounting expert testimony that "Judaism is not a hierarchical religion and that a determination rendered by any one of the tribunals is not binding on the Orthodox Jewish community"). Because there is no hierarchy, there is no discernable way to determine an authoritative view on any number of issues under Jewish law. While the existence of a hierarchy within a religion has no bearing on its First Amendment protections, any attempt to determine the "correct" interpretation of a religious matter in a non-hierarchal religion like Judaism is specious.

CONCLUSION

By opening the door to litigation and discovery on claims arising from internal ecclesiastical decisions, the panel created a new standard that will significantly diminish the ability of Jewish institutions to manage their own affairs and to "decide

for themselves" how to navigate questions of faith, doctrine, and internal leadership. *See Kedroff*, 344 U.S. at 116. Instead of focusing solely on the "lofty aims" of complying with their own beliefs, synagogue leaders and members will be forced to weigh how a court might interpret certain statements or acts under Jewish law. *Cf. Ill. ex. rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948). The Establishment Clause was enacted to prevent this type of intrusion by the state into matters of faith. *See id.* To avoid the possibility of these judicial entanglements in religious disputes, the Court should grant the petition for rehearing, reverse the district court, and reaffirm the vigorous protections of the church autonomy doctrine.

Respectfully submitted,

/s/ Ryan Paulsen
Ryan Paulsen
Ryan.Paulsen@haynesboone.com

HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214.651.5000 (phone)
214.651.5940 (fax)

Counsel for Amicus Curiae
Jewish Coalition for Religious Liberty

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because, according to the Microsoft Word 2016 word count function, it contains 2,412 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 software in Equity A 14-point font in text and Equity A 12-point font in footnotes.

/s/ Ryan Paulsen
Ryan Paulsen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record in accordance with the Federal Rules of Appellate Procedure on September 7, 2022.

/s/ Ryan Paulsen
Ryan Paulsen