

No. 18-530

IN THE
Supreme Court of the United States

CONGREGATION JESHUAT ISRAEL,
Petitioner,

v.

CONGREGATION SHEARITH ISRAEL,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

BRIEF IN OPPOSITION

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**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 29.6**

Respondent Congregation Shearith Israel has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

This case presents a straightforward application of settled state law to a dispute between a landlord and its tenant. In an opinion authored by Justice Souter, the First Circuit unanimously held that the dispute was resolved by the written contracts by and between the parties, the unambiguous provisions of which were found to be of “dispositive significance” of the juridical relationship between the parties (Pet. App. 144a).

Because the two parties to the dispute are religious institutions, the court of appeals was sensitive to the need to apply settled state law in a manner consistent with *Jones v. Wolf*, 443 U.S. 595 (1979). The court of appeals excluded no evidence; indeed, when confronted with petitioner’s argument that the decision below announced or applied a “categorical limitation on competent evidence” or some form of exclusionary rule “in litigation of religious property disputes”, the court of appeals flatly said, “This is an erroneous characterization of the panel opinion” (Pet. App. 143a). Finding dispositive contracts between the parties, the court of appeals applied the written contracts as state law required.

The decision below does not raise any of the “questions presented” set forth in the petition. The court of appeals neither announced nor applied any exclusionary rule. Nor did the court of appeals treat the religious parties to this dispute differently from any other litigant. The rights and entitlements of the parties were unambiguously determined by state

law. As the court of appeals stated, its “holding is limited to the present parties, their controversies and their particular, contractual and contractually documented relationship” (Pet. App. 144a). This state law dispute, over the legal significance of certain documents, raises no issue for this Court.

I. STATEMENT

A. Summary of the Proceedings

Since 1903, Petitioner Congregation Jeshuat Israel has leased the Touro Synagogue and its appurtenant ritual objects from Respondent Shearith Israel (Pet. App. 4a-5a, 12a-14a). Petitioner has never owned either the Synagogue or the ritual objects. It gained possession of Touro Synagogue and its religious paraphernalia only through written, recorded leases; only after it *lost* 1903 litigation asserting that Shearith Israel held Touro Synagogue in trust; and only after it entered into a written settlement of that earlier litigation in which it “agree[d] to admit and recognize without qualification the title and ownership” of Shearith Israel (Pet. App. 4a-5a, 11a-12a).

Petitioner paid (nominal) rent to Shearith Israel, including as recently as 2012 (*see* Pet. App. 71a (citing evidence of 2012 payment); *see also* R.2275¹ (petitioner’s 2012 \$1 check to Shearith Israel)). Throughout the trial petitioner’s own website

¹ Citations to “R.#” refer to pages of the stipulated portions of the record contained in the First Circuit’s electronic copy of the Joint Appendix.

admitted, “A lease amount of \$1 per year is still paid by the current Newport congregation to Congregation Shearith Israel for use of the building and grounds, which are still owned by the New York group” (R.2590).

It was also in 2012 that petitioner again sued its landlord Shearith Israel in the court below. Petitioner sought two forms of relief:

First, it sought to sell some of the very ritual objects (Torah finials or “rimonim”) that petitioner admitted and recognized “without qualification” it did not own but only had the right to possess as a tenant.

Second, it sought to declare Shearith Israel a trustee of Touro rather than “without qualification” owner and landlord; sought to declare itself the exclusive beneficiary rather than a tenant of Touro Synagogue; and sought to remove Shearith Israel as newly-minted trustee and replace Shearith Israel with itself. Petitioner averred that Shearith Israel’s wrongdoing as alleged trustee was that Shearith Israel tried to stop petitioner from selling rimonim that it does not and has never owned.

On appeal from the district court’s decision in favor of petitioner, Shearith Israel pressed again the legally dispositive nature under governing state law of four contracts by or between the parties, which the court of appeals subsequently described as “lodestone” instruments: a 1903 settlement agreement between the parties, leases executed between the parties in 1903 and 1908, and 1945 and

2001 contracts where petitioner acknowledged its continuing status as Shearith Israel's lessee. The argument that the instruments were legally dispositive of petitioner's claims, and that reliance on them was respectful of any religious implications presented by the issues, was supported in the court of appeals by the amicus brief filed by the Becket Fund for Religious Liberty.

Both claims in petitioner's complaint implicated, and turned on, the legal relationship between the parties. To determine the legal relationship between the litigants, the court of appeals – Justice Souter, sitting by designation, as well as Judge Lynch and Judge Baldock (also sitting by designation) – reviewed each of the four “lodestone” legal instruments, “common instruments for establishing ownership and control” (Pet. App. 11a) executed by or between petitioner and Shearith Israel. After review and analysis, the court of appeals determined that the four Lodestone Instruments were of “dispositive significance” (Pet. App. 144a). Based on the Lodestone Instruments, the “only reasonable conclusions” were that petitioner did not own the rimonim and therefore could not sell them and that, as between petitioner and Shearith Israel, no trust relationship existed that overrode or could vary the repeated, unambiguous admissions by petitioner that its rights were solely that of a tenant; Shearith Israel owned Touro Synagogue and its appurtenances outright; and petitioner could not repudiate its obligations under those instruments (Pet. App. 2a, 18a-19a).

Instead of addressing what the court of appeals did, petitioner tells this Court that the court of appeals felt itself “constitutionally barred from considering a voluminous trial record” (Pet. 4; accord Pet. i (“mandated excluding”)). Petitioner makes over a dozen references to petitioner’s self-coined phrase, “entanglement exclusionary rule”, which was supposedly adumbrated and applied by the court of appeals (*see* Pet. 4, 5, 6 (twice), 14, 20, 22, 25, 26, 27, 30, 31, 32). Petitioner’s assertions are fabrications to try to create an issue for this Court to consider. The court of appeals never uses any of these words or phrases. It did not announce any exclusionary rule. Nor did the court of appeals suggest that it was mandated to ignore or exclude competent evidence, much less that it was constitutionally barred from considering any evidence. On the contrary, the court of appeals, in denying petitioner’s petition for rehearing, four times criticized petitioner for mischaracterizing the court of appeals’ decision on precisely this point (Pet. App. 143a-144a).

The court of appeals examined every “common instrument[] for establishing ownership and control” (Pet. App. 11a), which in this case consisted of consensual agreements or contracts by or between the parties. It overlooked none. And were there any uncertainty about the court of appeals’ reasoning on this point, it was unequivocally and repeatedly dispelled by the court of appeals’ opinion denying rehearing.

Petitioner’s effort to fabricate a cert-worthy issue is shredded by any fair reading of the court of appeals’ decision or of the four Lodestone

Instruments. The court of appeals' decision scrupulously adhered to this Court's precedents, did not create any conflict in the Circuits, and is consistent with settled state law mandating that, in the face of unambiguous legal instruments, the court's duty is to enforce them, not rewrite parties' contracts or refashion their relationship.

B. The Court of Appeals Relied on Dispositive Secular Documents To Determine the Juridical Relationship Between the Litigants

The court of appeals observed that the district court's multi-century historical analysis of Jews in America and the Touro Synagogue's role in it would inevitably entangle itself in disputes over religious dogma. For example, the recital of the historical story that the district court chose to tell manifested "doctrinal tensions between the [Shearith Israel] congregation, committed to preserving Sephardic practice at Touro, and the later Newport congregation that emerged from the 19th century immigration, which included a significant Ashkenazic element" (Pet. App. 8a). Said the court of appeals:

[T]he [district] court's historical investigation was unavoidably an immersion in the tensions between two congregations that were not doctrinally identical, one of which clearly insisted that the other conform to some extent with a practice of Spanish and Portuguese Judaism as a condition of favorable treatment. In fact, [Shearith Israel's] insistence that its standard of

religious practice forbade the sale of ritual objects was offered as the basis for pressing its claim of ownership and authority to block the sale, which eventuated in this case. (Pet. App. 8a-9a).

Rather than entangle itself in the “trial court’s plenary enquiry into centuries of the parties’ conduct by examining their internal documentation that had been generated without resort to the formalities of the civil law” (Pet. App. 9a), the court of appeals followed this Court’s precedent in *Jones* and its antecedents in applying “neutral principles of law, developed for use in all property disputes” (Pet. App. 10a). It did so by looking at “contractual arrangements between the contending parties” made “in advance of controversy” (*id.*) – exactly as *Jones* teaches.

The court of appeals held that it would first determine whether there were secular, written instruments of ownership and control that defined and delimited the juridical relationship *between the parties* – as the court of appeals said in the first paragraph of its decision, “on the basis of the parties’ own agreements determining property rights by instruments customarily considered by civil courts” (Pet. App. 2a). If there were such documents, and if they were dispositive, then the court of appeals was required to rely on them to determine the relationship between the parties. That requirement was imposed both by Rhode Island state law – which, as we explain below (*see* pp. 22-23, *infra*), insists on enforcing unambiguous legal instruments as written – *and* by federal concerns of non-entanglement.

**C. The Four Lodestone Legal Instruments
Unequivocally Determine the Juridical
Relationship Between the Litigants**

The court of appeals found four documents directly involving the parties, the Lodestone Instruments. These valid, legal, and binding instruments were each of a type that this Court's decision in *Jones* explicitly permitted reliance on as avoiding entanglement.

First, the court of appeals analyzed the "settlement agreement made in the aftermath of the dismissal of the earlier action brought" by petitioner against Shearith Israel (Pet. App. 11a), which settled the parties' "competing claims of interest in" Touro Synagogue (Pet. App. 4a). Shearith Israel executed this document and all others in the name of its trustees, who held the power to act for Shearith Israel (*see* Pet. App. 12a). In the settlement agreement (R.1888), petitioner "agrees to admit and recognize without qualification the title and ownership of L. Napoleon Levy and acting trustees [of Shearith Israel] to the synagogue building, premises and fixtures" (Pet. App. 11a). Among other things, the settlement agreement also expressly contemplates the "absolute surrender" of the premises by petitioner to Shearith Israel and the execution of a lease by petitioner as tenant in favor of Shearith Israel "in form satisfactory to the landlord" and with clauses facilitating enforcement (Pet. App. 11a-12a). Of this document the court of appeals observed that none of the "operative language" contained "a hint of possible trust terms

or trust obligations running from the lessor landlord to the lessee” (Pet. App. 12a).

Second, the court of appeals examined the ensuing recorded leases that petitioner executed in favor of Shearith Israel, one in 1903 (R.1890-94) and one in 1908 (R.1895-99), with a finding, not challenged by the petition, that petitioner was a holdover tenant under the terms of the lease since that time, sporadically but definitely paying rent. The court of appeals found that the tenant’s obligations, including to pay nominal rent, with a duty in petitioner “to maintain the premises” and to surrender them in as good a condition as received, were legally inconsistent with any alleged trust obligation by Shearith Israel to petitioner (Pet. App. 13a-14a). So too was the absence of any mention of a trust obligation “underlying or complementing the terms set out” (Pet. App. 14a). The leases contained express covenants concerning what ritual was to be performed (as dictated by the way Shearith Israel conducted its services) and mandated that Shearith Israel’s approval was required for any minister to officiate at Touro (Pet. App. 13a; R.1892, R.1896). Finally, and dispositively concerning ownership of the rimonim, the leases expressly encumbered “paraphernalia” (R.1891, R.1895), which the court of appeals read in its only reasonable way, “in accordance with the common understanding of [its] terms at the time of the agreement” as unquestionably “cover[ing] the rimonim” (Pet. App. 14a).

Third, the court of appeals analyzed a 1945 agreement among petitioner, Shearith Israel (acting

through its trustees), and the Secretary of the Interior (R.2035-41). The court of appeals noted the specific provision that petitioner and Shearith Israel would act “in accordance with and subject to their respective rights and obligations as lessor and lessee as heretofore established” (Pet. App. 15a; R.2038).

Fourth, the court of appeals analyzed another agreement among petitioner, the Society of Friends of Touro Synagogue, and the Congressionally-established National Trust for Historic Preservation (R.2194-2209). This contract, too, as recently as 2001, confirmed that petitioner had “possession of the site through a lease with Congregation Shearith Israel as owner” (Pet. App. 17a; R.2195). The court of appeals observed yet again the absence of any suggestion of a trust relationship between the parties. “It simply confirmed that the two congregations were bound as lessor and lessee” and that petitioner “had no legal claim beyond that of a holdover tenant under the terms of the 1903 lease, as formally renewed in 1908” (Pet. App. 18a). Shearith Israel received the contract from petitioner through a communication highlighting petitioner’s admission that the lease remained in effect (R.2192-93).

The court of appeals observed that the four Lodestone Instruments clearly set forth the juridical relationship between the parties and, in doing so, *negated* petitioner’s claims. Admitting and recognizing “without qualification” title and ownership in Shearith Israel, making an “absolute surrender” in favor of Shearith Israel, and giving Shearith Israel the pen to draft the ensuing lease are

each radically inconsistent with any claim that petitioner owned the contents of the Synagogue or that Shearith Israel was not owner-lessor but rather an unspoken trustee (Pet. App 12a). So too were the repeated times petitioner recognized Shearith Israel's ownership and petitioner's sole role as tenant.

The court of appeals determined "that the *only reasonable conclusions* to be drawn from [the Lodestone Instruments] are that [Shearith Israel] owns both the rimonim and the real property free of any civilly cognizable trust obligations to [petitioner]" (Pet. App. 2a (emphasis added)). At the end of its decision, the court of appeals repeats its holding concerning "the *only reasonable conclusions* about property title, ownership, and control", reiterating that its holdings were "as between the parties in this case" (Pet. App. 18a (emphasis added)). In its statement on denial of the petition for rehearing, the court of appeals repeats that it found the Lodestone Instruments of "*dispositive significance*" (Pet. App. 144a (emphasis added)).

D. The Court of Appeals Neither Announced Nor Applied Any "Entanglement Exclusionary Rule"

The court of appeals analyzed all of the "common instruments for establishing ownership and control" as the basis for its decision. There were no other such documents. Petitioner does not assert that there are any other direct agreements *between* the parties or other direct relational ownership/control instruments not considered by the court of appeals.

The court of appeals did not find any evidence that altered the reasonable conclusions drawn from these documents.

Far from excluding, rejecting, or ignoring other documents, the court of appeals addressed certain other documents discussed by the district court, such as late 19th century conveyances that did not involve petitioner. Like the district court, the court of appeals found nothing of relevance in the conveyances (Pet. App. 15a-16a).

The court of appeals also reviewed language in a 1932 Rhode Island statute, expressly confirming that it was willing to consider, and did consider, other documents and belying petitioner's unsupported point that the court of appeals did not apply state law. The court of appeals concluded that the statute, which confusingly refers to the Touro property as being held in trust, did not help petitioner's argument. The legislative statement has no operative effect and "does not ... reveal whether the trustees were those of [Shearith Israel] or CJI itself, let alone what difference it would make in this litigation" (Pet. App. 17a n.4). There was and is no evidence that the Rhode Island legislature in 1932 meant to overturn its express statutory protection of Shearith Israel's rights, which only a few years earlier the legislature protected from any "interrupt[ion of] the possession, control and management with which the proprietors of said synagogue and premises . . . may be vested" (R.4212).

E. The Court of Appeals Denies Rehearing

The court of appeals denied both panel rehearing and rehearing en banc. Nonetheless, the panel included a detailed “response” to the petition for rehearing, making the scope of the earlier decision even clearer and pointing out four specific mischaracterizations by petitioner – mischaracterizations that petitioner repeats in its petition to this Court.

First, the petition for rehearing asserted exactly what petitioner argues here: that the court of appeals “holds that in litigation of religious property disputes ‘the trier-of-fact must consider only “deeds, charters [and] contracts”, to the exclusion of all other secular evidence” (Pet. App. 143a). The court of appeals responded: “This is an erroneous characterization of the panel opinion, which holds only that when such items of evidence ‘and the like are available and to the point . . . they should be the lodestones of adjudication in these cases” (*id.*). The court of appeals said, “The holding does not otherwise purport to impose any categorical limitation on competent evidence in such cases” (*id.*).

Second, the court of appeals specifically calls out as wrong and misleading another argument that petitioner (and the Rhode Island Attorney General) made in the court below and makes again here. By determining that the Lodestone Instruments had dispositive significance, the court of appeals ruled that the court’s holding of no trust relationship was “*as between the parties in this case*” (Pet. App. 143a (emphasis added)) – *i.e.*, that Shearith Israel “holds

the property ‘free of any civilly cognizable trust obligations to CJI’ (*id.* (emphasis supplied by the court of appeals)).

Third, the court of appeals specifically confirmed that its “opinion neither states nor implies any particular limitation on the scope of admissible evidence in any further litigation brought by a trust claimant other than CJI” (Pet. App. 144a). (The court of appeals admitted of the possibility of a trust and of other trust claimants, not as a holding, but in part because the Rhode Island Attorney General had repeatedly stated, as an amicus both in the district court and on appeal, that petitioner was *not* the exclusive beneficiary – an admission it now tries to walk away from (*see infra* Point III).) The court of appeals twice more criticizes petitioner and the State Attorney General for “mischaracterization” and “erroneous characterization” of the panel’s decision (Pet. App. 143a, 144a).

Finally, the panel responds fully to the points raised by Circuit Judge Thompson, who dissented from the denial of rehearing en banc. Correcting yet another misstatement identical to that made by petitioner to this Court, the court of appeals confirmed that the “the scope of its review of the trial court’s findings is limited by the dispositive significance of the record evidence of the present parties’ contractually established relationship” (Pet. App. 144a), specifically repeating that its decision “implies no limitation on the relevance of any rule of Rhode Island law or of any item of evidence that might be raised or offered by a party other than [petitioner] in support of a claim to a trust benefit,

the possible details of which are not before us” (Pet. App. 144a-145a).

F. Other Key Aspects of the Court of Appeals’ Decision

Three other aspects of the court of appeals’ decision bear on this Court’s consideration of the petition:

First, the district court never held that the rimonim were part of any claimed trust. Indeed, even the Rhode Island Attorney General admits that the rimonim are not part of any supposed trust (*see infra* Point III). Accordingly, the determination that Shearith Israel owns the rimonim outright is unassailable and should not be reviewed or disturbed. The petition does not challenge here the court of appeals’ determination that, as a matter of law, the lease’s unequivocal reference to paraphernalia embraces the rimonim.

Second, the court of appeals ruled that it did not need to address the *res judicata* bar to petitioner’s claims flowing from the judgment entered in the 1903 litigation (Pet. App. 4a). That issue is dispositive of the claims here, thus making this case a particularly unsuitable vehicle for the Court to reconsider *Jones*.

Third, the court of appeals directed the reassignment of this case to a different District Judge for any post-remand proceedings (Pet. App. 19a). This directive is not the subject of any assignment of error in the petition and thus stands.

II. REASONS FOR DENYING THE PETITION

The court of appeals faithfully applied Rhode Island law in a way that was consistent with *Jones*. In any event, any error in the application of law is not cert-worthy. There is no conflict between the court of appeals' decision and that of other circuits or state courts. There is no issue presented about how differently a court can treat religious parties; the court of appeals did not treat the parties here differently at all. There are no issues presented concerning the scope of "federal common law" – the court of appeals applied no such law. The petition should be denied.

A. The Petition Should Be Denied Because It Raises Issues that Are Fact-Bound and Deals Only with the Application of a Settled Rule to the Particular Facts of this Case

"[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" (S. Ct. R. 10). Here, petitioner seeks relief simply because it disagrees with how the court of appeals, bearing in mind the neutral principles of law approach articulated in *Jones v. Wolf*, 443 U.S. 595 (1979), applied state law to the facts of this case. The court of appeals held that the lower court erred by ignoring unambiguous and dispositive legal instruments that fully determined the issues presented in this case, the "common instruments for establishing ownership and control" (Pet. App. 11a). Petitioner apparently

has a different view about whether the court of appeals correctly interpreted unambiguous legal documents and gave them the proper weight, but that fact-bound question is not appropriate for this Court's review.

Petitioner objects that the court of appeals decided issues *de novo* (see Pet. i, 3, 13, 20). But the court of appeals properly employed *de novo* review only for legal issues, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-33 (1991), such as the interpretation of an unambiguous legal instrument, including the meaning of unambiguous language, *Whitney Bros. v. Sprafkin*, 3 F.3d 530, 534 (1st Cir. 1993); see also *Harrison v. United States*, 284 F.3d 293, 297-98, 300 (1st Cir. 2002) (*de novo* review of factual findings “premised on an incorrect interpretation of the relevant legal principles”).

Finally, petitioner (and the Rhode Island Attorney General as amicus curiae) argue that a wide range of evidence may be admitted to prove the existence of a trust (Pet. 9; *accord* AG Br. 12-13). The point is legally irrelevant on the facts of this case. None of petitioner's cases creates a trust between two parties when the binding legal instruments negate any such intent of those parties. Whether other litigants may plead and prove that they are beneficiaries of a trust was not presented below, not ruled on below, and not at issue here. None of this raises cert-worthy issues in any event.

B. The Petition Should Be Denied Because There Is No Conflict Between the Court of Appeals' Decision and Prior Supreme Court Precedent or Decisions of Other Circuit or State Courts

All of petitioner's arguments are premised on its erroneous claim that "the Court of Appeals adopted a novel and mistaken interpretation of the First Amendment", which petitioner mischaracterizes a dozen times with the false descriptor of an "entanglement exclusionary rule" (*e.g.*, Pet. 4). Petitioner claims that the "Court of Appeals held that in trust and property disputes involving religious parties . . . the Establishment Clause requires that courts consider only available 'deeds, charters, contracts, and the like' – to the exclusion of all other secular evidence that otherwise would be legally cognizable in disputes involving secular parties" (Pet. 4).

The court of appeals expressly stated that it did no such thing. As Justice Souter himself explained in the panel's statement regarding the denial of rehearing, "[t]his is an erroneous characterization of the panel opinion" (Pet. App. 143a). In fact, the court of appeals excluded no evidence but focused on the "common instruments for establishing ownership and control that most readily enable a court to apply the required, neutral principles in evaluating disputed property claims" (Pet. App. 11a). The court of appeals does not use the word exclude or the concept of exclusion in its opinion. Rather, it holds that, when documents such as "deeds, charters, contracts, and the like are available and to the point,

then, they should be the lodestones of adjudication in these cases” (*id.*).

Petitioner claims that the court of appeals treated the examples of evidence this Court listed in *Jones* – documents like deeds and corporate charters – as “an exclusive list of admissible evidence” (Pet. 24). To the contrary, the court of appeals clearly explained that “there is no simple template” for determining how to apply “neutral principles” but that deeds, corporate charters, and contracts are “common instruments for establishing ownership and control that most readily enable a court to apply the required, neutral principles in evaluating disputed property claims” (Pet. App. 10a-11a).

The court of appeals held that the district court had erred in failing to give appropriate weight to the Lodestone Instruments (*see* Pet. App. 9a-11a). The court of appeals held that the Lodestone Instruments determined property title, ownership, and control between these two parties and were not supplanted by any other evidence in the case (Pet. App. 18a; *see also* Pet. App. 144a (“the dispositive significance of the record evidence of the present parties’ contractually established relationship” was the key to the review of the trial court’s findings)). The court of appeals also was concerned that some of the historical documents to which the lower court gave more weight were not only legally irrelevant but created an “immersion in the tensions between two congregations that were not doctrinally identical” (Pet. App. 8a).

Nor is there any conflict between the decision of the court of appeals and any circuit court decision or state Supreme Court decision. Petitioner's claim of such conflicts rests on its erroneous assertion that the court of appeals articulated and applied some exclusionary rule. All the cases cited by petitioner (Pet. 32-36) are consistent with the decision of the court of appeals. Indeed, one case petitioner cites as being in conflict, *Agudas Chasidei Chabad of United States v. Gourary*, 833 F.2d 431 (2d Cir. 1987), does not even discuss neutral principles, *Jones*, or the First Amendment. In all the other cases, the courts, like the court of appeals here, applied the neutral principles approach, with an initial focus on common instruments for establishing ownership such as deeds, charters, and constitutions. See, e.g., *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 94-96 (3d Cir. 1996), *cert. denied*, 519 U.S. 1058 (1997); *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 526 (8th Cir. 1995); *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1107-08 (Ind. 2012), *cert. denied*, 569 U.S. 958 (2013); *Hope Presbyterian Church of Rogue River v. Presbyterian Church (U.S.A.)*, 291 P.3d 711, 723-25 (Or. 2012); *St. Paul Church, Inc. v. Bd. of Trustees of Alaska Missionary Conference*, 145 P.3d 541, 553-55 (Alaska 2006); *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583, 586 (Ky. 1988); *Bishop & Diocese of Colorado v. Mote*, 716 P.2d 85, 94-99 (Colo.), *cert. denied*, 479 U.S. 826 (1986); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 473-74 (Mo. 1984), *cert. denied*, 471 U.S. 1117 (1985); *Episcopal Diocese of Fort Worth v.*

Episcopal Church, 422 S.W.3d 646, 651-52 (Tex. 2013), *cert. denied*, 135 S. Ct. 435 (2014). In each of those cases, the courts employed the very same neutral principles approach that the court of appeals employed here. The question of what particular pieces of evidence the courts in those cases felt were dispositive or worthy of discussion is specific to each case and does not create a conflict with the court of appeals here.

Likewise, the decision below does not contravene, or even implicate, this Court's Free Exercise Clause jurisprudence. The court of appeals did not treat petitioner any differently because of its religious character; on the contrary, the spectre of special treatment arises from veering away from the neutral principles approach employed by the court of appeals. The decision below simply focused on the Lodestone Instruments, which it found had dispositive significance, rather than the historical narrative recited by the district court, which the court of appeals was unwilling to permit to vary the plain meaning of the Lodestone Instruments. This was fully in keeping with the "neutral principles" approach of *Jones*. It did not improperly favor or disfavor either party and was an entirely appropriate exercise of appellate review, particularly given the settled state law that extrinsic evidence could not be used to vary the terms of unambiguous writings. Far from representing any "unequal treatment" of petitioner (Pet. 26), the determination that the Lodestone Instruments had dispositive significance was in no way related to or dependent upon any of the religious issues raised by either

party, but rather was based on the nature and content of the documents themselves. There is nothing about the court of appeals' determination or its reasoning that even remotely suggests that its analysis would have been any different had the parties been non-religious. There was thus no burden improperly imposed on petitioner for its religious beliefs or views.

Finally, petitioner erroneously asserts that the court of appeals' decision conflicts with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (Pet. 36-39). Justice Souter and the other judges of the court of appeals did not "displac[e] state law and creat[e] federal common law" (Pet. 36-37) in order to decide this dispute. Petitioner and amicus Simon Wiesenthal Center attempt to fashion a cert-worthy issue by quoting, out of context, the court of appeals' statement that it was being respectful to "controlling federal law" by looking at Lodestone Instruments first (Pet. App. 144a). But the court of appeals was not abandoning *Erie*; it was simply being cognizant of its responsibilities under *Jones*. It did exactly what a Rhode Island state court would have done in any garden-variety case in which there were determinative legal instruments.

The Rhode Island Supreme Court has "consistently held that, '[i]n situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.'" *Cathay Cathay, Inc. v. Vindalu, LLC*, 962 A.2d 740, 746 (R.I. 2009) (construing lease). That court recently reiterated that principle of law:

It is virtually an immutable principle of law that “[t]he language employed by the parties to a contract is the best expression of their contractual intent * * *” [citing *Cathay*]. This Court has repeatedly held that the parties’ subjective intent is irrelevant to contract interpretation and courts should only consider the intent that is clearly expressed in the language of the contract itself. Therefore, as the contract was unambiguous, the Superior Court properly excluded extrinsic evidence concerning the parties’ subjective intent and course of conduct.

Roadepot, LLC v. Home Depot, U.S.A., Inc., 163 A.3d 513, 521 (R.I. 2017) (citation omitted) (construing lease). That the court of appeals did not find material evidence in this case to alter this rule does not raise a cert-worthy conflict.

C. This Case Is a Poor Vehicle For This Court’s Review

Even if this case raised a cert-worthy issue – and it does not – it is a poor vehicle for resolving the purported questions claimed to be at issue. Irrespective of the resolution of the questions petitioner brings to this Court, petitioner’s claim would be barred by several other doctrines: res judicata, settlement, estoppel by lease, and standing under state law.

1. Shearith Israel raised a res judicata defense in the district court. That defense was based on the final judgment between the parties in petitioner’s

1903 lawsuit against Shearith Israel regarding the existence of a trust for Touro Synagogue – where petitioner’s trust arguments were based on the very same documents petitioner relies on in this case. See *David v. Levy*, 119 F. 799 (C.C.D.R.I. 1903). The *David* court dismissed the action, finding petitioner’s allegations were not sufficient to create a trust and that petitioner acted with unclean hands. *Id.* 799-800. The court of appeals did not reach that argument because it found the Lodestone Instruments of dispositive significance (see Pet. App. 4a). But quite apart from the court of appeals’ holding, petitioner’s claim is barred by principles of claim and issue preclusion.

2. In the Settlement Agreement, petitioner “The Congregation Jeshuat Israel” forever foreswore its ability to challenge Shearith Israel’s ownership, agreeing “to admit and recognize without qualification the title and ownership of [Shearith Israel] to the synagogue building, premises and fixtures” and to make an “absolute surrender of said premises” (Pet. App. 11a). Petitioner is thus barred from pursuing any of its claims irrespective of any supposedly cert-worthy issue.

3. Petitioner in the 1903 Settlement Agreement also bound itself to make a lease “in form satisfactory to the landlord”, Shearith Israel (Pet. App. 12a). Independently, the lease itself – which covers both the Synagogue and the “paraphernalia belonging thereto” (Pet. App. 14a) – precludes petitioner from challenging Shearith Israel’s ownership. Settled Rhode Island law embraces the doctrine of estoppel by lease, holding that “when a

party enters into a lease valid on its face and takes possession as tenant pursuant to the lease, the tenant becomes estopped from denying the landlord's title or right to lease those premises, especially in the absence of interference with the tenant's occupation". *Grant v. Briskin*, 603 A.2d 324, 329 (R.I. 1992). Estoppel by lease bars petitioner from raising its trust claims. See *Ayotte v. Johnson*, 56 A. 110, 111 (R.I. 1903) ("so long as a tenant retains possession given him by a landlord[,] he cannot deny the landlord's title"); accord *Lucas v. Brooks*, 85 U.S. 436, 451 (1873) (lessee cannot assert landlord holds property in trust).

4. Should this Court wish to reach the trust issues, there is another threshold issue of Rhode Island law concerning whether petitioner had standing to prosecute charitable trustee removal/appointment issues without the Rhode Island Attorney General being a party to the proceeding. Under applicable case law, the Attorney General "should be made a party" whenever "the administration of a [charitable] trust is involved" as "the representative of the interests of the public". *Leo v. Armington*, 59 A.2d 371, 371 (R.I. 1948) (cited in *Israel v. Nat'l Bd. of Young Men's Christian Ass'n*, 369 A.2d 646, 649 (R.I. 1977)). In the courts below, neither petitioner nor the Rhode Island Attorney General (as amicus) cited a single case in which a Rhode Island court considered charitable trustee removal without the Attorney General as a party.

D. The Petition Should Be Denied Because the Decision of the Court of Appeals Is Correct

The decision of the court of appeals was a straightforward application of Rhode Island law and the neutral principles approach of *Jones*. The court of appeals gave dispositive weight to and drew the “only reasonable conclusions” from four “common instruments for establishing ownership and control” (Pet. App. 2a, 11a, 18a). These are the documents that, in this case, and as between these parties, “most readily enable[d the] court to apply the required, neutral principles in evaluating [the] disputed property claims” (Pet. App. 11a). The district court failed as a matter of law to give the proper weight to the unambiguous legal instruments and instead gave too much weight to myriad historical anecdotes that were not legally sufficient to determine ownership or control as between these parties and some of which may have caused the type of entanglement that *Jones* required the courts to avoid.

The court of appeals also did not violate the Free Exercise Clause in holding that the district court improperly ignored dispositive secular evidence of the juridical relationship between the parties. The court of appeals did not, as petitioner suggests, apply a different rule to petitioner because of its religious nature. Rather, it applied secular principles of law to the Lodestone Instruments, ensuring that neither party was disadvantaged by issues of religious doctrine.

The court of appeals' decision is correct as a matter of Rhode Island law. The court of appeals considered all relevant evidence, specifically *all* of the contracts by or between the parties to this litigation. The court of appeals found the contracts to be unambiguous, and so ruled in Shearith Israel's favor on that basis. The court of appeals did not "exclude" pertinent evidence – it found the non-juridical, non-relational evidence petitioner relies on to be not pertinent to vary the terms of the parties' written agreements.

When a contract is unambiguous, Rhode Island law "exclude[s] extrinsic evidence concerning the parties' subjective intent and course of conduct", *Roadepot*, 163 A.3d at 521, and applies this rule to leases, *id.*; *Cathay Cathay, Inc.*, 962 A.2d at 746. Petitioner points to no ambiguity in the Lodestone Instruments, nothing that would warrant the consideration of extrinsic evidence in the face of the "dispositive significance" of the governing documents. As a result, petitioner cannot prevail.

The lease clearly covers the Synagogue and the "paraphernalia belonging thereto". Because the district court failed to construe the term "paraphernalia" in leases that continue in force through today, the court of appeals determined their clear meaning with reference to contemporaneous dictionaries (Pet. App. 14a-15a). Contemporaneous case law similarly demonstrates that the term "paraphernalia" encompassed the *rimonim*. *See, e.g., In re Newport Reading Room*, 44 A. 511, 512 (R.I. 1899) (corporation owned land, buildings, and "it also owns furniture, a library, billiard tables, and

various paraphernalia for the amusement of its members and subscribers”); *Goller v. Stubenhaus*, 134 N.Y.S. 1043, 1045 (N.Y. Sup. Ct. 1912) (“congregation is the owner of certain personal property consisting of scrolls, prayer-books, prayer-shawls, a congregation seal and other paraphernalia, books and papers”). The terms of the leases continue to govern the relationship between the parties. *Barber v. Watch Hill Fire Dist.*, 89 A. 1056, 1057 (R.I. 1914) (holdover year to year “tenancy is subject to all the covenants and stipulations contained in the original lease”).

Moreover, petitioner bound itself in the Settlement Agreement to Shearith Israel’s form of lease (Pet. App. 12a), and accordingly petitioner has no grounds to dispute the meaning of the term. *F.D. McKendall Lumber Co. v. Kallan*, 425 A.2d 515, 518 (R.I. 1981) (“party who signs an instrument manifests his assent to it and cannot later complain . . . that he did not understand its contents”); *see also In re McBurney Law Servs., Inc.*, 798 A.2d 877, 882 (R.I. 2002) (a “party may not escape its obligations simply because one of the parties may not consider the agreement to be as palatable to them as when they entered into it” (stipulation)); *Furtado v. Goncalves*, 63 A.3d 533, 538 (R.I. 2013) (settlements “bind[] the parties to the terms of their bargain”).

Because petitioner had possession of the Synagogue and the related paraphernalia only because it received them from Shearith Israel and subject to the terms of the lease, petitioner gave up any right to challenge Shearith Israel’s outright ownership when it foreswore the ability to do so and

thereafter became Shearith Israel's lessee. Petitioner thus could not prosecute trusteeship claims. See *Ayotte*, 56 A. at 111; *Lucas*, 85 U.S. at 451.

Furthermore, petitioner relies for its ownership claim to the rimonim on its erroneous assertion that "[u]nder Rhode Island law, possession of personal property creates a presumption of ownership" (Pet. 9), citing *Hamilton v. Colt*, 14 R.I. 209, 212 (1883). Until the district court decision below, *Hamilton* had not been cited since 1928 and was never applied with respect to possession under a lease. In accordance with the estoppel by lease cases, the Rhode Island Supreme Court has held that "use by expressed or implied permission or license, no matter how long continued", remains "permissive" and creates no presumption. *Tefft v. Reynolds*, 113 A. 787, 789 (R.I. 1921) (realty).

Due to these legal standards, all of the documents petitioner incorrectly asserts were "excluded" by the court of appeals (Pet. 14-17) would not have been admissible to alter the result under Rhode Island law. Estoppel by lease excludes petitioner's attempt to challenge Shearith Israel's ownership, therefore the documents listed at Pet. 14-17 are not to be considered. Because the lease unambiguously covers the rimonim, evidence of subjective intent or course of conduct that would vary the terms of the contract, which petitioner claims are listed at Pet. 16-17, are not cognizable. Significantly, not one of the documents that petitioner lists is a contract or like document between petitioner and Shearith Israel, and many if

not most pre-date petitioner's existence. Petitioner does not dispute that the court of appeals properly interpreted the Lodestone Instruments as matters of law.

**E. Additional Erroneous Statements in the
Petition's Statement of the Case (Rule
15.2 of this Court's Rules)**

Petitioner asserts that "the survival of Touro Synagogue" may be at stake (Pet. 2; *accord* Pet. 10, referencing without citation "severe financial difficulties"). The proof at trial (petitioner's own financial records) was unrebutted that since 2010 petitioner operated profitably every year except for the year it paid its litigators hundreds of thousands of dollars to sue Shearith Israel (*e.g.*, Def. Ex. 439). The proof at trial further showed that Shearith Israel was willing to make significant financial contributions to the upkeep of Touro Synagogue (R.2281).

The petition inaccurately asserts that petitioner is the "historic congregation" that has maintained Touro Synagogue (Pet. 3). Petitioner did not exist before 1893, and when it came into existence it had nothing, neither realty nor personalty, expressly avowing to Shearith Israel, "[c]ertainly we do not claim any ownership in the property . . . or appurtenances" (R.1628). Petitioner obtained lawful possession of the Touro Synagogue and its ritual objects *only* pursuant to the terms of a lease and only since 1903. The district court specifically *declined* to find that petitioner was a successor in interest to the congregation worshipping at Touro

before the American Revolution, when the Jewish community in Newport disbanded (*see* Pet. App. 122a n.69). The court of appeals similarly determined that petitioner has “no formal connection with its predecessor” (Pet. App. 4a).

The petition misleadingly asserts that the district court admitted hundreds of exhibits without objection (Pet. i). In every brief Shearith Israel filed pre- and post-trial it made and preserved its objection that the leases and other contractual documents fully determined the parties’ juridical relationship and required dismissal of the complaint without resort to extrinsic evidence.

The petition asserts that “Shearith Israel had abandoned its challenge to the charitable trust on appeal” (Pet. 3; *accord* Pet. 13). That assertion is false every time petitioner makes it, as the court of appeals ruled (Pet. App. 19a n.5).

The petition falsely implies that Shearith Israel is seeking to evict congregants wishing to pray at Touro (Pet. 10). Shearith Israel objected to petitioner’s trying to sell the rimonim, sacred ritual objects that petitioner did not own. As the court of appeals observed, it was Shearith Israel that litigated and ultimately prevailed in the 1903 litigation when *petitioner* tried to prevent Touro Synagogue from remaining open for *all* Jews to pray in, whatever their affiliation or background (*see* Pet. App. 4a). The court of appeals noted the district court’s grant of Shearith Israel’s motion to amend its pleading (Pet. App. 6a n.1), which expressly reaffirms Shearith Israel’s commitment that Touro

will remain open to all Jews, irrespective of whether petitioner remains a holdover tenant.

III. THE AMICI BRING NO RELEVANT MATTER TO THE COURT'S ATTENTION

The petition is supported by amicus briefs from the Rhode Island Attorney General and Simon Wiesenthal Center. Neither raises any issues not previously addressed. On analysis, neither supports granting the petition.

The Rhode Island Attorney General filed his amicus brief after the election of his successor. The Rhode Island Attorney General declined to join the proceedings below except as an amicus, even though it is a necessary party in all actions relating to the administration of a charitable trust, *Leo*, 59 A.2d at 371; *Israel*, 369 A.2d at 649, or to remove or replace a trustee, *Stearns v. Newport Hosp.*, 62 A. 132, 135 (R.I. 1905). It should not be heard now to weigh in on issues that it declined to present on its own behalf below. In addition, its characterization of the court of appeals' decision suffers from the same inaccuracies as that of petitioner – inaccuracies that were pointed out by the court of appeals in its denial of rehearing in response to the Attorney General's amicus brief in that court.

Before this Court, the Attorney General has radically changed its position on several key issues. The Attorney General affirmatively told the district court that it “does *not* take the position that [petitioner] is the exclusive beneficiary under the trust” (R.199 (emphasis added)), whereas now it

asserts that petitioner is “the only conceivable beneficiary of the charitable trust” (AG Br. 16.) It told the district court that Shearith Israel “became the legal title holder in Touro Synagogue” (R.193); that Shearith Israel “has complied” with any supposed trust obligations (R.199), and expressly took “no position” supporting removal of Shearith Israel from Touro or permitting petitioner to gain control (R.190 n.2). The Attorney General neglects to advise this Court that it admitted that the rimonim are not held in any trust (R.201).

The Simon Wiesenthal Center (which has two members of petitioner on its Board of Trustees) asserts as the major premise of its brief that the court of appeals improperly “substitute[d] its own *de novo* findings of fact and law” (SWC Br. 12). The argument fails. The court of appeals made *no* findings of fact and properly reviewed the district court’s errors of law *de novo*. The brief also seriously misstates the facts – *e.g.*, suggesting that the latest rent payment by petitioner “may have been made more than 31 years ago” (SWC Br. 6-7), when the check reflecting petitioner’s 2012 payment was an exhibit at trial (R.2275); stating that the court of appeals “proclaim[ed] new ownership to the Touro Synagogue” (SWC Br. 10), when the decision *reversed* the district court’s attempt to change the ownership. The Wiesenthal Center speculates about a possible fiscal effect of the ruling on the petitioner’s future. The proof at trial was to the contrary (*supra*, p. 30).

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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