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

AMICUS CURIAE BRIEF OF THE SIMON WIESENTHAL CENTER IN SUPPORT OF PETITIONER CONGREGATION JESHUAT ISRAEL

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STATEMENT OF INTEREST

The Simon Wiesenthal Center, Inc. (the "Wiesenthal Center" or "Center") submits this brief as *amicus curiae* in support of Plaintiff-Petitioner Jeshuat Israel.[1] The Center has had extensive involvement in matters relating to the freedom to worship and the necessity of worshipping without fear of government interference.

The Wiesenthal Center is a nonprofit, global human rights organization dedicated to challenging through research and education the hate and bigotry of modern anti-semitism. *See* About the Simon Wiesenthal Center, *available at* http://www.wiesenthal.com/site/pp.asp?c=1sKWLbPJLnF&b=4441471. The Center's educational arm, in particular, promotes human rights and freedom of worship by educating the public on the horrors of the Holocaust, both for its historic importance and to provide context to contemporary anti-semitism.

The Center opened its doors in 1977, led by Rabbi Marvin Hier. Rabbi Hier, who remains director to this day, executed the plans for the Center, which was named for Simon Wiesenthal, and benefitted from Mr. Wiesenthal's knowledge and experience. Mr.

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[1] Pursuant to Supreme Court Rule 37.6, the Wiesenthal Center represents that no other counsel than the undersigned participated in the drafting of this brief. No monetary contribution has been made to the preparation or submission of this brief. The Simon Wiesenthal Center, Inc. is a non-profit corporation headquartered in California. The parties have received notice of this filing and have consented.

Wiesenthal's wisdom was and remains the Center's lodestar. Over the years, the Center has grown and has a constituency of over 400,000 households in the United States. The Center combats anti-semitism, hate and terrorism while promoting human rights and dignity. It defends the safety of Jews and the freedom of worship for all worldwide.

The Wiesenthal Center has been accredited as a non-governmental organization ("NGO") by the United Nations, UNESCO, OSCE, the Organization of American States ("OAS"), the Council of Europe, and other international bodies. In its capacity as an NGO, the Wiesenthal Center provides advice to, and cooperates with, intergovernmental organizations on matters within the Center's areas of interest, expertise, and concern. The Center participates in multinational conferences respecting human rights, religious tolerance, and freedom to worship and the return of property stolen during the Holocaust.

The Center created the Museum of Tolerance which opened in Los Angeles in 1993 and has served over 5,000,000 visitors with 300,000 visiting annually. Over 200,000 adults have been trained in the Museum's professional development programs.

Another educational aspect of the Simon Wiesenthal Center is its film division, which focused on 3,500 years of Jewish experience, as well as contemporary human rights and ethics. The Center has produced 11 films, two of which have received the Academy Award

for best featured documentary, *Genocide* (1981) and *The Long Way Home* (1997).

As an important human rights organization, it is vital to the Center's membership that all have the freedom to practice whatever religion they choose, without the regard to the wishes of the state or any other entity. The free exercise of religion is a fundamental right that is best protected by continuous use. It would be bad for this country for any group to lose their right to freely exercise their religious preferences and choice. The Simon Wiesenthal Center favors the free exercise of religion by all and the freedom to choose.

In this case the First Circuit held that because "federal law" governed a property dispute within the State of Rhode Island, the court, *sua sponte*, dissolved a 195-year-old Trust recognized by all parties including the U.S. Department of the Interior. This holding threatens the continued existence of Petitioner. *Amicus* has a particular and substantial interest in ensuring that the exercise of freedom of worship is protected.

SUMMARY OF THE ARGUMENT

The District Court's decision states in its opening paragraph: "Bricks and mortar of a temple, and silver and gold of religious ornaments, may appear to be at the center of the dispute between the parties in this case, but such a conclusion would be myopic. The central issue here is the legacy of some of the earliest Jewish settlers in North America, who desired to

make Newport a permanent haven for public Jewish worship. Fidelity to their purpose guides the Court in resolving the matters before it."[2]

The First Circuit brushed aside the needs of the Jewish community in Newport and used sterile language to imperil the future worship of the Jewish community and its right to public worship in Newport, Rhode Island.

The court held that: The Respondent is the "fee owner" of the Touro Synagogue and the owner of the silver bells known as rimonin. The Court further held: "In each case the [Respondent's] ownership is free of any trust or other obligation and Petitioner's status is that of a holdover lessee."[3] That holding will lead to confusion and chaos for religious organizations in the years ahead.

This should have been, and is, a simple property case about who should own American Jewish icons from our colonial days including the building housing the Touro Synagogue in Newport, Rhode Island and the silver bells known as rimonin. The Court below ignored the evidence, including hundreds of exhibits and testimony relied on by the District Court Judge, the trier of fact, and the legal authorities of the State of Rhode Island. Instead the Court created a new

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[2] *Congregation Jeshuat Israel v. Congregation Shearith Israel*, 186 F. Supp. 3d 158, 164 (D.R.I. 2016).

[3] *Congregation Jeshuat Israel v. Congregation Shearith Israel*, 866 F.3d 53, 56 (1st Cir. 2017).

standard, "lodestones of adjudication,"[4] heretofore unknown in American jurisprudence.

The folly of the court's holding can be shown by looking to Oliver Wendell Holmes writing in "The Common Law" at page 1: "The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[5] The Court chose to ignore the history of the parties and the "*de facto*" recognition of the Touro Synagogue's ownership of the cultural icons reflected in the Tri-Party Agreement[6] signed by the parties and the Department of the Interior in 1945 – recognizing the validity of the Trust for the benefit of the Jewish society in Newport, Rhode Island embodied today by Congregation Jeshuat Israel and binding the parties. The court below cavalierly dismissed the Agreement. The rimonin themselves have been on display in the Fine Arts Museum in Boston for many years. The bells are identified with a plaque stating that the bells are owned by the Congregation Jeshuat Israel in Newport, Rhode Island.

The Touro Synagogue is enshrined in American history because George Washington, while serving as our first President in 1790, sent the Hebrew

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[4] *Id.* at 58.

[5] "The Common Law", Oliver Wendell Holmes, Jr. Little Brown and Co. 1881, Boston.

[6] *See* Appendix A for a copy of the agreement.

Congregation in Newport a letter affirming that "the Government of the United States, which gives bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens. . . ."[7] (Founders Online, National Archives http://founders.archives.gov/documents/Washington/05-06-02-0135.) Yet despite its historic significance the congregation and its building are in peril as a result of the appellate court's decision because without being able to sell the rimonin, it may not be able to financially survive.

The history of the relationship between the parties is fraught with missed opportunities for resolution.[8] During the early 19th century the Jewish population in Newport, Rhode Island had shrunk and Congregation Shearith Israel in New York became the de facto Trustee of the building which was not used again as a Synagogue until the late 19th Century when an influx of Ashkenazic Jews came to Newport and restored the Synagogue to religious use. Over the years there were various verbal and written agreements between the parties but those understandings have become murky and unsettled. For example the parties entered into a five year lease in 1903 calling for an annual payment of $1.00. The lease was renewed in 1908 for another 5 year period and never again.[9] Since that time payments have been sporadic and the last $1.00 may

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[7] Founders Online, National Archives http://founders.archives/Washington/05-06-02-0135.

[8] *Supra*, *Congregation Shearith Israel*, 186 F. Supp. 3d at 166.

[9] *Supra*, *Congregation Jeshuat Israel*, 186 F. Supp.3d at 185.

have been made more than 31 years ago in 1987.[10] No payment has been made since and there have been no repercussions. Clarity of mind and purpose have been lacking in many of the events and documents leading to this litigation. Now the Jewish population in Newport is again in decline and Congregation Jeshuat Israel needs to save, preserve and protect the Touro Synagogue by selling its rimonim and using the proceeds to put the Touro Synagogue building on a firm financial footing. This litigation is intended to clarify Congregation Jeshuat Israel's right to occupy the Synagogue building and sell the rimonim.

The Simon Wiesenthal Center is committed to seeing that Congregation Jeshuat Israel have the ability to save the Touro Synagogue.

One of the ironies of the Court of Appeals' decision below was the net effect is to give the petitioner in this matter less access to secular courts. American law is clear that religious institutions should not be denied access to courts to settle local, secular matters. What we have now sets a bad precedent for American law and for the Touro Synagogue, which is an iconic institution. This court should not countenance the destruction of religious rights or penalize, to the point of destruction, a congregation that is more than a century old.

[10] *Supra*, *Congregation Jeshuat Israel*, 186 F. Supp. 3d at 186.

ARGUMENT

Free Exercise Clause

The First Amendment of the Constitution is one of the basic and most important rights of citizenship. The Supreme Court has recognized the potential for religious tension but has clearly stated: The Free Exercise Clause protects against laws that "impose special disabilities on the basis of . . . religious status."[11]

The underlying question in this case is the continued existence of an active, vibrant Synagogue in Newport to benefit the Jewish community in the area. The impact of the decision of the court below is yet to be determined but not optimistic for those who want to continue to worship at the Touro Synagogue.

While there have been many attempts made to narrow the scope of the Free Exercise Clause by various branches of government at the local, state and federal levels this may be one of the rare instances in our 242 year history where a Federal Circuit Court of Appeals has promulgated, *sua sponte*, restrictions and disabilities on religious freedom by restricting the jurisdiction of the federal judiciary to decide the matter before it and then chose to emphasize language in the Tri-Party Agreement in contradiction of the main reason for the agreement which was to establish and

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[11] *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2021 (2017) citing *Church of Lukumi Babalu Ave. Inc. v. Hialeah*, 508 U.S. 520 (1993), and *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

perpetuate a national historical landmark for the Jewish community.

Chief Justice Roberts noted that " . . . [T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions' Lyng, 485 U.S. at 450."[12] In *Lukumi* the Court held: "The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation, *See*, *e.g*., *Schneider v. State*, 308 U.S. 147, 166 (1939)."[13]

Slightly paraphrasing Justice Kennedy in *Masterpiece Cakeshop*, this case should have been "an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning."[14]

The "Establishment Clause" is another of the essential parts of the First Amendment. It states, in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." Religion in this country is a free choice without state interference or restriction or favoritism. In this case the religious nature of the parties led the Court of Appeals to raise issues and, in turn, impose restrictions on the admissible evidence that had been

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[12] *Trinity Lutheran Church v. Comer*, *supra*, at 2022.

[13] *Lukumi*, *supra*, at 539.

[14] *Masterpiece Cakeshop v. Colorado*, 138 S. Ct. 1719, 1723 (2018).

used by the District Court to formulate his decision below.[15]

First Amendment jurisprudence is consistent and there is a broad consensus, with some nibbling at the edges, that religious entities should be able to resolve property disputes without their religious differences being a factor. The opinion below strikes a blow at the free exercise of religion and the religious freedoms so dear to us all which have been protected by the mandate of the First Amendment and the dictates of the Supreme Court's interpretation of the First Amendment.

The appellate court's actions *de novo* not only showed disrespect to the three parties of the 1945 Tri-Party Agreement, it also showed no respect for the Tenth Amendment to the United States Constitution and the State of Rhode Island. To what end? It created an ephemeral standard and cited "federal law"[16] without specifying a single title or section of the federal code. Instead of clarifying a complex situation it literally "threw up its hands" and "threw the baby out with the bath water" by proclaiming a new ownership to the Touro Synagogue without noting the lack of a deed or the continued existence of a trust benefitting Congregation Jeshuat Israel of Newport, Rhode Island. "The

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[15] *Congregation Jeshuat Israel*, 866 F.3d at 57-58.

[16] *Congregation Jeshuat Israel v. Congregation Shearith*, 892 F.3d 20 (Slip Op. page 2), Order Denying Rehearing (1st Cir. 2018).

charitable trust – established for public Jewish worship over 250 years ago – lives on to this day."[17]

The Court of Appeals further ignored the undisputed facts showing more than a hundred years of service by members of the Congregation Jeshuat Israel, which has not been questioned or criticized in any way. It ignored an 86 year old state law passed by the Rhode Island legislature and fashioned its own universe. It even ignored that "Shearith Israel [does] not allege that it has appointed trustees to govern Jeshuat Israel in over 110 years."[18]

Neutral Principles of Law

The soundness of the District Court's decision can best be described by Justice Felix Frankfurter in *McCollum v. Board of Education*: "If nowhere else, in the relation between church and state, 'good fences make good neighbors'" 333 U.S. 203, 232 (1948). In this case a fence has simultaneously been raised by the Court by refusing to recognize the overwhelming trial evidence and then trampled upon the solution reached by the District Court. Here the Court of Appeals relied on its own newly created notion of Federal law overpowering the court decisions, statutes and the will of the people of the state of Rhode Island regarding an issue of property located in Rhode Island. This kind of

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[17] *Congregation Jeshuat Israel*, *supra*, at 187.

[18] *Id.*, at 209.

assertion of federal power has not been seen since *Erie v. Tompkins*[19] decided there is no common law at the federal level in 1938.

In 1979 the Supreme Court issued an opinion in *Jones v. Wolf*,[20] 443 U.S. 595 (1979). The case involved property rights to a church which was disputed by two groups. The court held that secular law had to be applied to settle this property dispute using neutral principles of law. "The State (i.e. Georgia) has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Id.* at 602 (citation omitted).

The trial Judge here, knowing and understanding the facts, the record, property law and trust law in Rhode Island, and, crucially, the historical significance and cultural importance of the Touro Synagogue to the people of Newport, Rhode Island and the whole of the United States, made 21 pages of proper findings of fact and 31 pages of conclusions of law after hearing the witnesses and examining hundreds of documents.[21] There was no reason for the appellate court to substitute its own *de novo* findings of fact and law without questioning a single witness or having fully examined the documents. Justice Holmes recognized in *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400-401 (1904): "Great cases like hard cases, make bad law." Here the

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[19] 304 U.S. 64 (1938).

[20] 443 U.S. 595 (1979).

[21] *Supra*, *Congregation Jeshuat*, 186 F. Supp. 3d at 166-187.

contest between two religious communities has led to a bad precedent.[22] "Neutral principles of law rely exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges."[23] The Court of Appeals should have deferred to the District Court and thereby follow the direction from *Jones*. *See Jones*, *supra* at 604: "A State, is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." A State, in this case Rhode Island, under our Constitution (Article X), should apply its own property law, not the federal government, or federal law – not even in a diversity case where the federal judiciary assumes "lodestones," to settle a property dispute. This is even more the case when the decision affects the historic value to Rhode Island and the state the opportunity to establish its paramount interest.

The Tri-Party Agreement of 1945

In the opening paragraph of the Agreement signed in November of 1945 the parties are identified as: the United States, represented by the Acting Secretary of

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[22] If, as some have observed the basis of law is experience, why not examine that experience in its totality rather than ephemeral "lodestones of adjudication" 866 F.3d 353, 358 (1st Cir. 2017)? "It would be a narrow concept of jurisprudence to confine the notion of 'laws' to what is found written in the statute books, and to disregard the gloss which life has written on it" (quotation marks in the original). Justice Felix Frankfurter in *Nashville, Chattanooga, St. Louis Railway v. Browning*, 310 U.S. 362, 369 (1940).

[23] *Supra*, *Jones v. Wolf* at 603.

the Interior, members of Congregation Shearith Israel of New York "as Trustees under Deed of Trust dated April 27, 1894 . . . and recorded in the Book of Land Evidence, Newport, Rhode Island, Volume 67, page 274" and "Congregation Jeshuat Israel in the City of Newport . . . " entered into an Agreement (see Appendix A) concerning the Touro Synagogue on the occasion of the building being declared of historical importance worthy of preservation, the two nongovernment parties to the agreement agreed in Article I(a) to "preserve, protect, maintain and when necessary, restore . . . the Touro Synagogue. . . ." In the second paragraph of Article II, the nongovernmental parties agreed: "That in carrying out the provisions of this Agreement, their obligations shall be performed in accordance with and subject to their respective rights and obligations as lessor and lessee as heretofore established, and in accordance with the Statutes of the State of Rhode Island relating to the Abraham Touro Fund and the Judah Touro Fund."

The court below ignored the important language of the Tri-Party Agreement and its terms, including the fact that Shearith Israel signed the Agreement in its capacity as Trustee and nothing more. The parties may have acted as lessor and lessee but according to the terms of the Deed of Trust and Rhode Island law (see previous paragraph) they were Trustee and Beneficiary. The court below chose to ignore a 1932 Rhode Island statute that affirmed the Touro Synagogue as being held in trust for the benefit of the Congregation

Jeshuat Israel."[24] Finally, it chose to ignore that the context of drafting the Agreement is important to understanding it.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[24] Rhode Island Acts and Resolves, 427, January, 1932. *See Congregation Jeshuat Israel* at 186 F. Supp. 3d at 158, 191. Of course, by its terms, the Tri-Party Agreement incorporates the language of the statute concerning the Abraham Touro Fund (§ 35-9-1 of the Rhode Island Code) in the second paragraph of Article II. The 1932 Act is implicitly incorporated as well.