Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

In The
Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third, Fifth, Tenth And District Of Columbia Circuits

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") IN SUPPORT OF PETITIONERS IN NOS. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

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INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews – and that of their non-Jewish co-religionists – to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Agudath Israel intervenes at all levels of government – federal, state, and local; legislative, administrative, and judicial – to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom and Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Rabbinical Council of America, with national headquarters in New York City, is a professional organization serving more than 1,000 Orthodox Rabbis in the United States of America, Canada, Israel, and around the world. Membership is comprised of duly ordained Orthodox Rabbis who serve in positions of the congregational rabbinate, Jewish education, chaplaincies, and other allied fields of Jewish communal work.

Torah Umesorah (National Society for Hebrew Day Schools) serves as the pre-eminent support system for Jewish Day Schools and yeshivos in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivos with a total student enrollment of over 190,000.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA. And because of the Orthodox Union's recognition that religious liberty must be afforded to people of all faiths on an equal and vigorous basis, it has consistently expressed concerns about the Affordable Care Act's "contraceptives mandate" and its impact on religious liberty. The Orthodox Union has lodged this concern with the President,[2] with the Department of Health and Human Services,[3] with

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[2]http://www.jewishpress.com/news/breaking-news/orthodox-push-obama-on-israel-contraceptives-in-white-house-meeting/2012/06/06/

[3]http://www.ou.org/index.php/torah/article/ou_files_comments_on_womens_health_services_mandate/#.Uua5DidOm70

the Congress,[4] and does so today, to the Supreme Court.

SUMMARY OF ARGUMENT

In the opinion of many Jewish scholars, Jewish religious law ("*Halacha*") regarding contraception and abortion differs significantly from Catholic doctrine. Among Orthodox Jewish authorities, there are differences of opinion regarding when and whether contraceptive devices may be used and when therapeutic abortions may be permitted. See, *e.g.*, Menachem Elon, "Abortion," 1 Encyclopedia Judaica (Second Ed. 2007) 270-273; Fred Rosner & Moshe Tendler, Practical Medical Halacha 26, 33-34 (1990); Nisson E. Shulman, Jewish Answers to Medical Ethics Questions 61-65, 74-77 (1998); D. M. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law (1974).

For this reason, we do not address in this *amicus* brief a central issue in the seven cases that have been consolidated for argument before this Court – *i.e.*, the impact of what petitioners call "HHS's contraceptive mandate" on religious employers who, under currently applicable HHS regulations (26 C.F.R. 1.6033-2(h)), do not qualify as houses of worship and their "integrated auxiliaries." The constitutional and statutory adequacy of the accommodation made by HHS is amply discussed in the parties' briefs and will, no doubt, be canvassed in briefs of other *amici*.

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[4]Congressional Record, Senate, S1120, Feb. 29, 2012

The Orthodox Jewish community is, however, troubled by the distinction that the HHS regulations draw between (a) houses of worship and their "auxiliaries" (both categories defined by the regulations as "religious employers") and (b) independent institutions or entities which are not themselves houses of worship or their "auxiliaries" but exercise primarily religious functions and are governed by religious doctrine. As we demonstrate in the body of this *amicus* brief, Jewish religious law ("*Halacha*") accords primacy to a house of study ("*Bet Medrash*") over a synagogue ("*Bet Knesset*").

Distinguishing between the location where worship takes place (a synagogue or *Bet Knesset*) and other independent sites which are intrinsically necessary for religious observance (such as a religious school or *Bet Medrash*) and granting broader latitude for religious freedom to the former than to the latter should be impermissible under both the Religious Freedom Restoration Act ("RFRA") and the First Amendment to the United States Constitution. On this account, the Court should invalidate the distinction drawn by the regulations challenged in these cases and direct that the petitioners in all seven cases are fully entitled to the exemption granted automatically to houses of worship.

ARGUMENT

I.

INSTITUTIONS AND ENTITIES THAT TEACH RELIGION AND ARE OPERATED ACCORDING TO RELIGIOUS DOCTRINE MUST BE GRANTED THE SAME LEGAL RIGHTS AS HOUSES OF WORSHIP

This Court's decisions have, to this date, drawn no distinction for purposes of the First Amendment between houses of worship and independent religious institutions. So long as religious doctrine governs the operation of the entity that claims religious rights under a provision of federal law or seeks constitutional protection under the First Amendment, the entity's religious status has been recognized by this Court and lower federal courts. *E.g.*, *Locke v. Davey*, 540 U.S. 712 (2004); *Larson v. Valente*, 456 U.S. 228, 246 & n.23 (1982); *University of Great Falls v. National Labor Relations Board*, 278 F.3d 1335, 1343 (D.C. Cir. 2002).

Distinguishing in government regulations between houses of worship and other religious institutions that follow religious doctrine and either teach or facilitate religious observance interferes with internal religious dogma. It is not a permissible function of a secular court to determine the relative importance that a faith community may assign to its own institutions. When government grants preferred status to one religious institution and denies that status to others within the same religious denomination and governed by the same religious

doctrine, it is guilty of impermissible entanglement in religious affairs.

This Court re-affirmed the importance of preserving the independence of religious communities in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 132 S. Ct. 694 (2012). The Court held that the Free Exercise Clause of the First Amendment "protects a religious group's right to shape its own faith and mission through its appointments" and that courts must give "special solicitude to the rights of religious organizations." 132 S. Ct. at 706.

This Court also held in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952), that the Constitution accords to religious institutions the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." In his concurring opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987), Justice Brennan observed that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."

It is not the province of secular government authorities to decide which institution has greatest importance to a religious community. For some religions, the site where worship occurs – a church, for example – may occupy the highest rung in the hierarchical ladder of sanctity. For these faiths, it might seem reasonable to treat the house of worship

as the institution that automatically receives an exemption from provisions of law that apply to secular counterparts. Other institutions that are secondary within that particular faith community might then be required to request exemptions and explain why they should be granted similar status.

Other faiths may, however, accord a lower status to the house of worship than to religious institutions that propagate the religion's teachings. In traditional Judaism, for example, the Synagogue – the site where Jews gather to pray – is very sacred, but it is not the highest rung on the ladder of sanctity. As we demonstrate below, in Jewish Law and traditional doctrine, as it has developed for many centuries, the Yeshiva – a *Bet Medrash* or Torah study hall – is more sacred than a Synagogue – a *Bet Knesset*.

II.

UNDER JEWISH LAW AND TRADITION, A YESHIVA HAS GREATER SANCTITY THAN A SYNAGOGUE

Tractate *Megillah* of the Babylonian Talmud (folio 26b) describes a disagreement between Rabbi Pappi and Rabbi Pappa, each quoting Rava, a renowned leader of Babylonian Jewry. The two rabbis disagree over the authority, under *Halacha*, to convert a synagogue into a study hall. Rabbi Pappi declared that a synagogue may be converted to a study hall, but that a study hall may not be converted into a synagogue. Rabbi Pappa expressed the opposite view: that a study hall may be converted into a synagogue, but that a synagogue

may not be converted into a study hall. The Talmud then proceeds to quote Rabbi Acha as declaring that the position of Rabbi Pappi "is more acceptable."

Talmudic scholars' understanding of the basis for the dispute between Rabbis Pappi and Pappa is explained as follows in footnote 36 on page 26b(4) of the ArtScroll edition of the Babylonian Talmud (Mesorah Publications 1991):

> In Rav Pappi's view, the sanctity of a study hall is greater than that of a synagogue, so that converting the latter into the former enhances the synagogue's status. Conversely, when a study hall is converted into a synagogue, the study hall's status is diminished (see *Meiri*, *Ran*).

This dispute was resolved by later authorities in favor of Rabbi Pappi's view. Maimonides, the Twelfth Century authority on Jewish Law who authored the *Mishneh Torah*, expressed the decision as follows in Chapter 11 of *Hilchot Tefilah* (Laws of Prayer), Halachah 14 (Moznaim Publishing Corp. 1989):

> It is permitted to transform a synagogue into a house of study. However, it is forbidden to transform a house of study into a synagogue because the sanctity of a house of study exceeds that of a synagogue and one must proceed to a higher rung of holiness, but not descend to a lower rung.

The authoritative Sixteenth Century compendium of Jewish Law, the *Shulchan Aruch* authored by Rabbi Joseph Caro, expressed the same rule in *Orach Chaim*, Chapter 153(1): "It is permitted to convert a *Bet Knesset* into a *Bet Medrash*, but not a *Bet Medrash* into a *Bet Knesset*." Rabbi Yisrael Meir Kagan of Radin, also known as the *Chofetz Chaim* (1839-1933), explained in his *Mishnah Berurah* commentary to *Orach Chaim* that a *Bet Medrash* "is a place set aside for Torah study" and that it "has more holiness even if it is not usual to pray there at all." See also (in Hebrew) 3 *Encyclopedia Talmudit* 210 (Talmudic Encyclopedia Publ. Ltd. 1963).

The consensus that derives from these authorities can be summarily stated: Although the Jewish place of worship – a Synagogue – is a very sacred location, its sanctity is exceeded by a location where there is communal Torah study – a Yeshiva.

III.

IF SYNAGOGUES ARE GRANTED AN AUTOMATIC EXEMPTION FROM A FEDERAL LAW, YESHIVAS SHOULD BE ACCORDED SIMILAR TREATMENT

We turn now to the federal regulations that are being challenged in the cases before this Court. Under these regulations, synagogues will be exempted automatically, if they so choose, from certain provisions of the Affordable Care Act. Schools of Jewish study – Yeshivas – that are governed by identical religious doctrine will not be exempt unless and until they submit applications and provide information, and their applications are

approved. The submission of this documentation is an obvious burden – albeit not as weighty as the burden that the petitioners in these seven cases must endure – on the exercise of rights protected by the First Amendment and by the Religious Freedom Restoration Act.

This distinction between a place of worship and a study hall rests on a fundamentally unsound misunderstanding of levels of sanctity prescribed by Jewish Law. It assumes – contrary to the authorities we cite in this *amicus* brief – that a place of worship occupies a higher status in the religious doctrine of these *amici* than a Torah study hall. By affording greater liberty from governmental intrusion and regulation to a *Bet Knesset* than to a *Bet Medrash* the challenged regulations unconstitutionally, and in violation of federal law, entangle secular governmental judgments into the constitutionally guarded area of religious practice and belief.

Although the current regulations authorize exemptions for religious institutions that are not "auxiliaries" of a "place of worship," permitting the distinction that the regulations presently prescribe opens the door to denials of religious freedom to institutions that are not "places of worship." We urge this Court, in the words immortalized by James Madison in his *Memorial and Remonstrance*, to "take alarm at the first experiment on our liberties."

CONCLUSION

For the reasons stated in this brief, the regulations challenged in these cases should be declared invalid under the First Amendment and the Religious Freedom Restoration Act.

Respectfully submitted,

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