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Manhattan High School for Girls

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FOREWORD

Literacy is the soul of education. When we are able to construct our own meaning of texts, of situations, and of the greater world, we possess a distinct identity and the potential to live purposefully. We can think for ourselves----reflect, evaluate, change and contribute. We can advocate appropriately or conform willfully. Those who lack strong literacy skills are vulnerable to the messages and meaning constructed for them by those in power. Their worldview is small and their self-concept even smaller.

As Jews, literacy is our lifeline. We derive our essence and meaning from the Torah which we read, study, interpret, discuss and continuously seek to understand. This literacy experience, our birthright privilege, has secured the bond that connects us all the way back to Maatan Torah, and will continue to secure us and sustain as a people.

As educators, we acknowledge that literacy is a skillset that can always be strengthened even more. At the summit of the taxonomy, original insight and creative synthesis sit high. Here at MHS, we are constantly seeking to build our students' higher order thinking ---- to get them to that summit. We are grateful to our teachers who brilliantly inspire our students. I am so very proud of this publication we hold in our hands. It is the reflection of students who sought to construct their own meaning of familiar constitutional law, address significant social issues, and drive intellectual discourse. Inspired by Mrs. Rosenzweig, our very talented History Chair, the writings featured offer cogent arguments. The articles reflect style, organization, and accuracy.
Please join me in welcoming the first law review journal of MHS.

Estee Friedman-Stefanksy
Principal, General Studies

June 20, 2022

One of the most elemental blessings of American government is its guarantees of personal liberties, as established in the Bill of Rights of the Constitution in 1790. These freedoms–including freedom of speech, freedom of religion, the right to private property, the right to bear arms, the right to protest, and separation of church and state–established America as a land in which state power is limited in areas where individual people retain their own power. This remarkable concept is not only a cornerstone of the United States, but is also one of America's most influential contributions to the world, where these and other human rights are foundations of the free world.

However, these rights frequently find themselves in opposition to one another in ways that challenge us as Americans to define and evaluate our hierarchies of political values. How far does one's right to protest extend before it is considered infringement on another person's right to not be harassed? How far does freedom of speech within a platform extend without infringing on the platform's freedom of its own expression? How far does one's freedom of religious practice extend without infringing on customers' rights to not face discrimination in public services? How can a state maintain its secular separation from organized religion in a program that funds *all* schools, without indirectly privileging religious institutions?

In this inaugural edition of the Law Review Journal of Manhattan High School for Girls, students' essays explore these above questions through explorations of contemporary case studies. I hope you will enjoy the remarkable fruits of their research and original analysis.

This journal is the brainchild of the student authors who spearheaded it into existence. Their vision was impressive, as was their implementation of it, and I am deeply impressed by their dedication to this new MHS journal.

Sincerely,
Mrs. Jackie Rosensweig
Law Review Journal Editor and Advisor

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MANHATTAN HIGH SCHOOL FOR GIRLS

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Religious Liberty of Jewish Vendors at Christian Weddings: An Old Issue in Light of Recent Cases

By Ariella Kornbluth and Eliya Cohen

I: Introduction

The First Amendment to the U.S. Constitution effectively prohibits the government from passing any law that infringes on the rights of citizens in respect to religion, expression, peaceful assembly, or the right of citizens to petition the government. In that, however, lies a problem, as the freedom to practice one's religion may clash with requirements of federal statute that prohibit discrimination against others on the basis of their religion. In circumstances where the freedom to practice one's religion infringes on another's protection against discriminatory business practices, which side prevails in a court of law?

The specific hypothetical case explored here is that of a Jewish photographer or other wedding vendor, approached to service a Christian wedding that is officiated with a religious ceremony in a church. According to Jewish religion, participating in a Christian wedding is a forbidden act of idol worship. However, Christians could potentially argue that a wedding vendor who refuses to offer their services is discriminating against them on the basis of their religion. The federal Civil Rights Act of 1964 states that "discrimination in public businesses in the United States is prohibited on the basis of race, color, religion or national origin." This act prohibits discrimination when hiring, promoting, and firing. Crucially, this act also prohibits discrimination in public accommodations and federally funded programs. Title II of this act further grants citizens the right to "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." Thus, the Civil Rights Act prohibits discrimination in any public accomadations.

One would presume that the Free Exercise clause of the Constitution should prevail over the Civil Rights Act when the two are in conflict, and therefore it would make sense that it is legal for an Orthodox Jewish photographer to refuse to work at a church wedding service. The Civil Rights Act has been federal law for nearly 60 years, and there is no case that we are aware of in which a Jewish wedding photographer has landed in legal trouble for refusing to photograph a church wedding. However, in light of a large number of recent court cases regarding religious wedding vendors refusing services to other recently-legalized relationship ceremonies, this old issue deserves attention in a new legal light.

In this essay, we will first demonstrate that forced participation as a photographer at a wedding ceremony in a church would be a violation of an Orthodox Jew's free exercise of religion. Second, we will evaluate whether photography and other forms of wedding vending

meet the definition of "public accommodations." We will then evaluate contemporary case law on the topic, and conclude with our own analysis of the topic.

II: Demonstrating Orthodox Judaism's Prohibition on Participation in Church Weddings

It is clearly seen in Jewish religious law that participating in a religious Christian wedding is prohibited. It is also clear that the inability to refuse a request of service is infringing on the free exercise rights of the Jewish vendor, rights that are supposed to be protected by the First Amendment. Therefore, American law should allow Jewish wedding photographers the right to refuse to participate in a Christian wedding, because this right is a simple application of the Jewish individual's free exercise rights.

III: Defining "Public Accommodations" in the Matter of Vendors Servicing the Public

Is a person seeking a wedding photographer protected against discrimination under the Civil Rights Act? That depends on what a "public accommodation" is.

There are several laws that expound on what exactly a public accommodation is, the main ones being Title II of the Civil Rights Act of 1964, and Title III of the Americans with Disabilities Act of 1990. In the Civil Rights Act of 1964, a public accommodation is defined as any establishment that provides lodgings to transient guests, such as a hotel or an inn; any facility established to primarily sell food in a premises by a retail establishment, such as a restaurant or cafeteria; and any place of exhibition or entertainment, like a theater or sports stadium. According to Title III of the Americans with Disabilities Act, public accommodations include places of lodging, recreation, education, transportation, and dining, as well as stores, care-providing facilities, and places of public display.

Halachic authorities would evaluate whether the work of a wedding vendor providing photography or music or catering at a wedding is considered part of the legal category of a public accommodation. Many might argue that wedding vendors, such as photographers, are considered businesses that are a public accommodation, since their services are directed toward the public. Therefore, these vendors would be unable to refuse services to people of a certain religion, as it would violate anti-discriminatory laws.

There might be a case to be made that wedding photographers do not provide a public accommodation. However, we will assume for our purposes that they do.

IV: Precedent Cases of Religious Liberty Exemptions from Civil Rights Legislation

As long as the Civil Rights Act has existed, potential conflict has existed between the free exercise rights of religious people who work as wedding vendors and these same rights of members of wedding parties of other faith groups. The paucity of precedent casework on the

subject through decades of the late twentieth century suggests that no one has ever tried suing a religious Jewish wedding vendor for refusing to service a Christian wedding.

However, there has recently been an influx of court cases regarding discrimination against supplying services based on religious convictions. These cases are contemporary, and the new implications they suggest about legal interpretation of religious liberty exemptions from civil rights legislation cast the age-old issue of Jewish involvement in non-Jewish weddings in a new light. These cases suggest that the right of Jews to decline services at Christian weddings is headed to shakier legality than before.

The most famous of these recent cases is the Supreme Court case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), which garnered a great deal of media attention. In 2012, a couple from Colorado made plans to get married in Massachusetts because the marriage ceremony that they sought was not legal in Colorado. They visited Masterpiece Cakeshop in Lakewood, Colorado, with the intention of purchasing a wedding cake for a celebration upon their return to Colorado. The Christian owner of the bakery, Jack Phillips, refused to allow them to purchase a wedding cake because the couple's wedding ceremony went against his religious beliefs, but stated that the couple could get other baked goods available in the display cases, just not a unique, commissioned wedding cake. The Colorado Civil Rights Commision, a seven-member, bipartisan board with the mission statement of enforcing anti-discrimination laws, took Phillips to court, with the hopes that the Supreme Court would rule in the Commision's favor, and state that Phillips's actions were a direct violation of anti-discriminatory laws. However, the Supreme Court ruled that the Commission's actions violated Phillips's right to free exercise, and therefore Phillips did not have to service the couple. Due to the complications of the Commission's lack of religious neutrality, the Court did not pass a general rule concerning anti-discrimination, free exercise of religion, and freedom of speech laws. While the public hoped that the Supreme Court's ruling would offer guidance for further rulings, instead the decision in *Masterpiece Cakeshop* hinged on particular details about the Colorado Civil Rights Commission, and broader implications were quite ambiguous. Therefore, other cases each have to be evaluated in their own right.

A similar case is that of *Arlene's Flowers v. Washington*, a case currently seeking appeal at the Supreme Court, in which Barronelle Stutzman refused to service a couple for their wedding due to her traditional Christian beliefs. In her defense, Stutzman maintained that floral arrangements amount to personalized expression, akin to speech, and that her refusal to arrange flowers for the wedding was not an action of her exercising her faith, but rather of her refusing to produce compelled *speech* that contradicted her beliefs. The case concluded with the State of Washington Supreme Court ruling in 2017 that floral arrangements are not protected under the First Amendment right to free artistic expression. Another case that is similar is *Fulton v. City of Philadelphia*. In this 2021 Supreme Court case, the City of Philadelphia refused to refer foster children to a catholic foster care agency (CSS) due to the Catholic agency's policy of only sending children to homes of traditionally-married couples. The Supreme Court ruled unanimously that due to foster care services *not* being considered public accommodations, the

City of Philadelphia could not stop sending children to the agency, as the agency is not defying the anti-discrimination laws, and the City's refusal violated the Free Exercise Clause of the First Amendment.

V: The Difference Between Direct Transgressions and Moral Values

One important factor to consider is that in the case of a Jewish person refusing to service a Christain wedding, participation in the wedding would violate more than the Jew's moral beliefs or personal values, which is the premise for most of the cases described previously. As servicing this wedding would cause a direct transgression of biblical law, something clearly spelled out and outlined as prohibited, rather than a disruption of personal beliefs **based** on one's religion, being unable to refuse servicing this wedding is a clear violation of the rights established by the First Amendment.

The First Amendment's Free Exercise clause protects people from laws that run in conflict with direct religious prohibitions and requirements. However, the First Amendment doesn't protect people from conflicted moral values. One still has to comply with the law even when the law conflicts with the more vague of their moral values.

One place where this is seen is in the case of *EEOC v. Abercrombie and Fitch* (2015), a case where a chain store fired its sales employee Samantha Elauf because her hijab violated the dress code. In this case, the Supreme Court ruled that Elauf was protected under the First Amendment, because removing her hijab would be a direct violation of her religion. Therefore, following the logic of that case, Jews should be allowed to refuse to service a Christian wedding. As seen above, according to Jewish law, Christianity is considered a form of idolatry. Entering a house of idol worship is clearly prohibited, as well as receiving monetary benefit from anything associated with a Church. In these circumstances, Jewish vendors under the protection of the First Amendment should have the capabilities to refuse that service.

VI: Concluding Thoughts

The current legal standing of this issue is that most contemporary legal challenges to the religious liberty of wedding vendors have not produced a wide-sweeping court ruling that requires religious vendors to supply all weddings equally. This is a reality we want to maintain, as a more specific rule that would apply to every case might hurt Jews, who may in theory find themselves in a place where they would no longer be able to refuse services due to religious prohibitions. We hope that the Supreme Court will continue determining the legality of each specific case according to the details of that specific case.

Another possible solution would be to categorize the basis for the discrimination as mentioned briefly before in section IV. In situations where the circumstances involve a direct transgression such as removing a hijab or servicing as a photographer in a Christian ceremony, the rights to be selective should always be protected, while circumstances involving

discrimination based off a personal value should be considered discrimination as there is no direct transgression.

While the laws under the Civil Rights Act are still essential in preventing discrimination–which is wrong and unjust before the law–its provisions must have the parameters and boundaries to protect those who are attempting to maintain their religious beliefs. These parameters will aim at limiting discrimination that is truly unjust while allowing individuals to be selective in situations to stand by their religious laws.

It is also interesting to note that in our specific case of a photographer taking pictures, because private artistic services are not defined as public accommodations, the prohibition outlined in the Civil Rights Act would not necessarily apply. In other words, the matter of a photographer offering photography services to people is not necessarily an activity that is covered at all by the Civil Rights Act's requirements against discrimination in public accommodations. However, in terms of other wedding venders, or in general, any circumstance where the discriminatory law clashes with one’s direct religious requirements, one must be able to be protected under the First Amendment, and have the ability to refuse services at their own discretion.

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State Funding for Parochial Schools: An Analysis of *Carson v. Makin* (2022)

By Fayga Tziporah Pinczower

I: Introduction

We are all familiar with the name Besty DeVos, the former secretary of education, after her acclaimed visit to MHS in 2018. But why was she here? Names like Nan Mead, a New York Regent, may not be plastered onto MHS walls, but they too have graced our hallways with a similar mission: to assess the educational standards upheld in sectarian schools, specifically yeshivas. Although New York State's investigation into private schools has been a relatively recent development, government intervention with religious institutions is well-documented in the annals of history.

The most recent affair of state intervention began around five years ago, when ex-Chassidim formed a group called Young Advocates for Fair Education (YAFFED) and approached the media complaining that they had received an inadequate education that had left them unequipped to succeed in the "real world." Since then, the New York Regents have been visiting sectarian schools (including MHS) and by the request of Agudath Israel of America have conducted meetings with members of private schools, one of which I was privileged to take part in.

This year, the Regents have concluded that every sectarian school will be closely and continuously monitored by the state to ensure a "substantially equivalent" education for all children. This monitoring may result in unparalleled government intervention and mandated instruction in various subjects. Should a school be deemed inadequate, parents will be required to switch their children to state-approved schools under penalty of fines and even imprisonment. Agudath Israel is on the front lines, combating these measures while simultaneously demanding government funding for private schools to ensure an affordable future for religious parents. Agudah is addressing a prevailing concern that will remain even if the Regents' plan does not succeed and sectarian schools remain a viable alternative. Yeshiva education would remain inaccessible to too many families, as they are required to pay a lofty sum due to a lack of state funding. Therefore, Agudah has backed legal challenges in an attempt to relieve the financial burden of religious families and direct state funding to sectarian schools.

The following analysis delves into the multifaceted case currently pending before the Supreme Court of America, *Carson v. Makin*, determining if religious schools are prohibited, permitted, or required to receive public funding.

II: Background to the Case

Maine is a rural state with vast sparsely-populated areas. Consequently, it is difficult to establish public schools that are accessible to every child in Maine. However, the state constitution requires free public education for every child. According to state statutes in Maine, "[I]t is the intent of the Legislature that every person within the age limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public education."[1] Therefore, the state has decided to provide funding to private schools in areas that do not have a public school, essentially making private schools the "public" alternative. Each school administrative unit (SAU) "shall either operate programs in kindergarten and grades one to 12 or otherwise provide for students to participate in those grades as authorized elsewhere."[2] However, there are criteria that private schools must meet in order to qualify for funding, *inter alia* ("among other things") agreeing to auditing, reporting, and controversially, that each school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[3]

This condition, restricting qualified SAUs to non-sectarian ones only, has prompted parents to bring objections all the way to the Supreme Court, where it has been granted *writ of certiorari* and is currently awaiting a decision.

II: The Question

The question at hand, to quote the Supreme Court brief, is: "Does either the First[4] or Fourteenth Amendment[5] to the United States Constitution require Maine to include sectarian schools in a program designed to provide a free public education to students who live in SAUs which neither operate as public schools nor contract for schooling privileges?"

Attorneys representing the interests of Maine argue that their program is not a "school choice" or any sort of a "voucher" system. Rather, it is a necessary compromise due to the state's

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[1] Me. Const. art. VIII, pt. 1, § 1. Pursuant to Me. Rev. Stat. Ann. tit. 20-A, § 2(1).
[2] Me. Rev. Stat. Ann. tit. 20-A, § 1001.
[3] Me. Rev. Stat. Ann. tit. 20-A, § 2951.
[4] First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
[5] Fourteenth Amendment: Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

inability to establish public schools in every SAU. According to court documents from the petitioners:

> The Legislature endeavors to ensure that each child will be entitled to an opportunity to receive a free public education, not to guarantee children a free education at any public or private school of their choice. Within the statutory scheme, section 5204(4)'s function is limited to authorizing the provision of tuition subsidies to the parents of children who live within school administrative units that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education.[6]

In other words, there is a distinction between private alternatives in SAUs that do not have public schools, and religious schools. Maine guarantees free education to every child but excludes religious schools to avoid a perceived government endorsement of religion.

III: Arguments in Favor of Deeming Maine's System Discriminatory

It is imperative that the state differentiate its *de facto* alternative from a voucher system because the Supreme Court had previously ruled in *Zelman v. Simmons-Harris* (2002), that the Ohio state-sponsored vouchers used for religious schools are, in fact, constitutional, and later in *Espinoza v. Montana Department of Revenue*, U.S. (2020), that "Montana cannot exclude religious schools from receiving tax credit-funded scholarships under its school choice program."[7] If one were to use this ruling as a precedent, the Zelman standard would be that indirect state funding, like a voucher system, is not perceived as a state endorsement of religion.

Both of these cases indicate that Maine has no grounds to suggest that funding private religious schools would be a violation of the Establishment Clause in the First Amendment. Maine, therefore, distinguishes itself from these precedents as its tuition program is not a voucher system while the others were.

In a voucher program, money is allocated for each student, so state funds are not funneled directly into private schools, but merely to individuals. In the words of Chief Justice Rehnquist, who authored the majority opinion in *Zelman*, a voucher program "is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options that are public and private, secular and religious. The

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[6]*Carson* v. *Makin,* 141 U.S. 2883 (2021). However, the prosecution argues that education is not merely an "opportunity" provided by the state, as Maine claims, rather it is mandated, placing an unfair burden on religious individuals who seek to fulfill the state obligation in a manner that aligns with their religious obligations.

[7]"The NCSL Blog." What Espinoza v. Montana Department of Revenue Means for States > National Conference of State Legislatures. https://www.ncsl.org/blog/2020/07/08/what-espinoza-v-montana-department-of-revenue-means-for-states.aspx.

program is, therefore, a program of true private choice."[8] Maine makes a point of distinguishing its system from a voucher program, so they are not subject to the same ruling. Maine's refusal to adopt a voucher system has been hotly contested.

However, there is a similarity in Maine's case and *Espinoza*, regarding the claim that religious affiliation and religious practice can be separated. In the *Espinoza* case, Justice Gorsuch wrote a concurring opinion rejecting this distinction between "religious status" and "religious use." He insisted that it is an untenable and unfounded division to claim that there is a difference between a state supporting a child's belief in prayer versus a child's act of prayer; however, the validity of this claim is still disputed. Regardless, the court clearly ruled in *Espinoza* that "[a] State need not subsidize private education, but once a state decides to do so, it cannot disqualify some private schools solely because they are religious." This very same reasoning would seem to suggest that Maine's current program is discriminatory.

In *Carson v. Makin,* the petitioners seek to further this ruling insisting that Maine must fund sectarian schools, as refusal to do so would be discriminatory toward specific religions. They claim that because specific religions require full-time immersion in religious schools while other religions are satisfied with a weekly Sunday school session, denying subsidies for religious schools is targeting individuals who hold particular sincerely held religious beliefs. Nat Lewin, an attorney frequently representing Agudah's interests, notes:

> This is the only amicus brief to be filed in this case that has noted the unfairness and obvious unconstitutionality of compelling conduct by law – requiring parents to give their children a secular education – and, at the same time, penalizing those who comply with the law – by making them pay privately for that secular education – if they simultaneously give their children a religious education because their faith requires it. It is difficult to imagine any comparable pressure in American law. When is someone who complies with a legal mandate punished for doing so in a manner that complies with his or her religious observance?[9]

Moreover, the Supreme Court ruled in *Thomas v. Review Board of Indiana* (1981) that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program" and that "payment of benefits to petitioner would not involve the State in fostering a religious faith in violation of the Establishment Clause. The extension of benefits reflects no more than the governmental obligation of neutrality, and does not represent that involvement of religion with secular

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[8] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[9] "Jewish Organizations Ask the Supreme Court to Allow State Aid for Students in Religious Schools - Agudath Israel of America." *Agudath Israel of America - Strengthening Torah Life, Serving Each Individual, Advocating for the Community*, 12 Sept. 2021.

institutions which is the object of the Establishment Clause to forestall."[10] In other words, funding a sectarian school is not perceived as an endorsement of any particular religion as forbidden by the Establishment Clause.

While Maine has distinguished itself from the *Zelman v. Harris* ruling by rejecting a voucher system that sends funds directly to parents, Lewin and the *Thomas* ruling precedent seem to suggest that the Zelman standard, which states that state funding does not infringe upon the Establishment Clause, can be applied to all public benefits and funding regardless of intermediaries.

IV: Other Approaches

Another challenge Maine faces is its inconsistency in distributing tuition funding. Prior to January of 1980, some religious schools received state tuition funding until the Attorney General decided to review the procedure and determined that the funding violated the Establishment Clause. Years later, parents have decided to challenge this decision. Both the Maine Law Court and the Court of Appeals for the First Circuit have upheld the Attorney General's ruling that rejected the funding. While the Supreme Court has ruled on many cases since 1980 that support the petitioners, cases like *Locke v. Davey* (2004) favored Maine, as the court ruled that "a scholarship program in Washington State that did not allow a student to use his publicly funded scholarship to major in theology did not violate his First Amendment rights of free exercise of religion or free speech."[11]

However, the petitioners in our case, in the state of Maine, must address a conflicting precedent in *Lemon v. Kurtzman* (1971), where the court ruled that a statute must pass a "three-pronged test" in order to avoid violating the Establishment Clause. The statute must have a secular legislative purpose, its principal or primary effect must be one that neither promotes nor inhibits religion, and it must not foster "excessive government entanglement with religion."[12] State funding for textbooks, curriculum, and teachers' salaries for secular subjects was deemed to be over-entanglement in religious affairs and threatened to politicize religion. Consequently, the petitioners should insist that *Lemon v. Kurtzman* be overturned, as it prohibits state funding to religious schools. Nat Lewin maintains that *Lemon* should be overturned by our current case.[13]

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[10] Burger, Warren Earl, and Supreme Court Of The United States. U.S. Reports: Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707. 1980. Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/usrep450707/>.

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[13] "Jewish Organizations Ask the Supreme Court to Allow State Aid for Students in Religious Schools - Agudath Israel of America." *Agudath Israel of America - Strengthening Torah Life, Serving Each Individual, Advocating for the Community*, 12 Sept. 2021.

In our case, both the state and petitioners have precedent to support their stance, making *Carson v. Makin* a monumental case. *Carson v. Makin* walks a thin line between state prohibitions outlined in the Establishment Clause and the right to practice religion without consequence. Allowing state funds to directly support religious institutions may violate the Establishment Clause. On the other hand, forcing parents who want to educate their children in religious schools to lay out an exorbitant amount of money to do so may be seen as a penalty for following their religious convictions, thereby threatening to infringe upon their right to the Free Exercise Clause and their right to Equal Protection. *Carson v. Makin* also grapples with the question: is refusal to subsidize religious exercise inherently penalizing religious exercise?

This question was previously explored in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017)[14] but instead of a school, the pending service was for a church. Trinity is a religious preschool and daycare that had applied for funding to receive used tires for their playground, as the state has done frequently for other institutions through Missouri's Playground Scrap Tire Surface Material Grants. However, the state denied their request, citing Article I, Section 7 of the Missouri Constitution that states, "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion." The church sued, claiming that the state's denial violated the Fourteenth Amendment and freedom of speech and religion in the First Amendment–precisely the constitutional issues presented in *Carson v. Makin*.

In *Trinity*, Justice Roberts issued the majority opinion supporting the church's case that the "exclusion of churches from an otherwise neutral and secular aid program violates the First Amendment's guarantee of free exercise of religion." In his concurring opinion, (former) Justice Breyer shrewdly noted that religious institutions are not prevented from accessing government-sponsored services such as the police and fire departments, as they preserve the health and safety of individuals, which the Establishment Clause was surely not intended to infringe upon. Similarly, playground resources serve the health and safety of children and therefore, cannot be denied by the state on the basis of religion. Justice Gorsuch, however, prophetically predicted that the majority opinion's footnote limiting the ruling to "express discrimination based on religious identity with respect to playground resurfacing" was too narrow and would rarely have an opportunity to be applied again, essentially leaving the issue of the Establishment Clause versus Freedom of Religion unresolved. As predicted, the court is now grappling with specifically this issue in *Carson v. Makin,* and while categorical rulings are preferable for lower courts, the petitioners hope a case-specific ruling may alleviate concerns the Justices have voiced regarding excessive government entanglement in religious affairs.

V: Conclusion

Agudah has a long history of fighting for state funding for religious schools and *Carson v. Makin* presents a compelling case to ensure just that. While a victory for the petitioners would

[14] *Oyez,* www.oyez.org/cases/2016/15-577. Accessed 28 May.

create a precedent for other states, thus making a yeshiva education affordable to countless families, we must consider the potential repercussions of accepting state funds. Government funding would mean abiding by additional educational state requirements that could conceivably include curriculum changes, mandatory instruction in subjects that are antithetical to religious beliefs, and less autonomy in hiring processes. Accepting a voucher system opens the door to state funding, yet at the same time, it also opens the door to strict state monitoring. This strict state monitoring may result in unforeseen dangers to religious instruction, but will also guarantee accessibility to many families.

Carson v. Makin wrestles with complex considerations that only our *Chachamim* can ultimately decide. In the interim, we must await the Supreme Court's decision, which will be released this June.

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When Protest Becomes Harassment: An Analysis of *Gerber v. Herskovitz* (2021)

By Naomi Hymowitz

I: Introduction

This is an analysis of the *Gerber v. Herskovitz* case, which was decided at the Federal Court of Appeals level in 2021. The case is a lawsuit of Marvin Gerber and Dr. Miriam Brysk, congregants of the Beth Israel synagoge in Ann Arbor, Michigan, against a group of anti-Zionist protesters who regularly gather in front of the synagogue. Gerber and his fellow plaintiffs claim that the protesters are infringing on the First Amendment rights of free exercise of religion of the synagogue members by causing disruptions to prayer services which amount to an uncomfortable and unsafe environment for the congregants. Herskovitz, on the other hand, representing several other defendants, has rebutted that the protesters are exercising *their* First Amendment rights of freedom to protest. The Court of Appeals ruled in favor of Herskovitz in 2021, and currently, protests continue weekly in front of the synagogue. Although the Supreme Court denied a request to revisit the case as of late May, 2022, this article will analyze why the Supreme Court should have re-examined the case.

In this case, we must weigh whether the practice of religion is disrupted enough to overrule freedom of protest in a case where two parties' First Amendment rights are potentially in conflict with one another. We must also analyze if these protests are legal in the first place, considering the content, context, and location of these demonstrations. As we will also see, determining the line between protest and harassment has a number of other potential applications beyond the Beth Israel Synagogue.

Any evaluation of the case at hand requires a proper understanding of the nature of the protests that are under discussion. The protests have been held every Saturday since 2003. The protesters carry anti-Israel signs that read: "Resist Jewish Power," "Jewish Power Corrupts," "Fake News: Israel Is a Democracy," "Stop Funding Israel," and "End the Palestinian Holocaust." The plaintiffs claim that these signs are not only anti-Israeli and anti-Zionist, but also cross the line into being antisemitic. According to the US State Department, attempts to delegitimize Israel are included as antisemitism.

II: Plaintiffs' Reasoning

The protesters of Beth Israel Synagogue show up specifically Saturday morning, which directly coincides with the Sabbath morning prayer services. Considering the perspective of Gerber and the plaintiffs on behalf of the Beth Israel congregation, the protesters deliberately choose a holy prayer time during which the highest number of Jews will show up, many bringing their wives and children, because the purpose of their protest is to apparently impede the services, or make a statement to the worshippers. This becomes disruptive to the prayer services and to the men, women, and children who are simply there to practice their religion and hold no political ties to Israel. Because of this, the plaintiffs argue that the nature of the protests should not be constitutionally protected because they amount more to acts of harassment than to acts of statement of viewpoint.

The plaintiffs' complaint was dismissed by the district court saying that their emotional distress was not sufficient to maintain a standing in this case. However, the Court of Appeals declared that "the congregants have standing to sue because they have credibly pleaded an injury – extreme emotional distress – that has stamped a plaintiff's ticket into court for centuries."[15]

III: Another Issue that May Impact the Protests' Legality

It is possible that this case can be won in favor of Gerber by a mere technicality of not having a permit granting permission to protest. While the First Amendment protects one's rights of assembling a protest, there are still certain restrictions which can be made by police or government officials. The protesters in this case do not have a permit to place their signs on the grass sections, and likely won't qualify for one. The City Defendants, however, believe the Code does not prohibit the protestors' activities, nor does it require them to obtain a permit.[16] We will not further dissect the issue of the permit as it is detail-oriented and must be looked over along with the written laws of the state of Michigan.

IV: Defendants' Reasoning

According to the argumentation of the defendants and their legal allies at the American Civil Liberties Union of Michigan, it seems that the purpose of the protests from the perspective of the protesters is to express their opinions regarding Israel, and bring attention to Israel's policies. It is not unconstitutional for a person to have personal beliefs that are odious or even factually wrong.

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[15] Pet. App. 8, "Supreme Court of the United States."

[16] "Gerber v. Herskovitz, Case No. 19-13726." *Casetext*, 19 August 2020, https://casetext.com/case/gerber-v-herskovitz-2. Accessed 24 May 2022.

The demonstrators deliberately choose a house of worship to protest against these political matters, the only correlation being the religion being practiced in the synagogue to the religious state of the country against which they are protesting.

This is a summary of the argument of the ACLU. While the ACLU agrees that many of the signs do maintain and encourage antisemetic rhetoric, and condemns the protesters for it, this is not enough for the freedom to protest to be taken away. Because First Amendment rights like freedom of speech are indivisible, they cannot be infringed upon whenever officials don't like what is being said. To do so would give the government the power to draw the line wherever they like on where freedom of speech ends and censorship begins.

While the ACLU makes a sound point, it does not fully consider the impact of current antisemitism through anti-Zionist protesting and organizations like BDS. If Gerber does not win this case and the protests continue, we will have to find other ways to try to decrease antisemitism and anti-Zionism in our country and in the world. According to Malcolm Hoenline, the executive vice chairman of the Conference of Presidents of Major American Jewish Organizations, the best we, Jews, can do for our case is to educate ourselves and others about Israel.

V: Additional Arguments of Behalf of the Beth Israel Synagogue

The protesters choose their ideal spot of political activism to be in a sacred prayer area during services. Demonstrating in front of people who are irrelevant to the cause being advocated crosses over from the line of activism into nuisance–if not borderline harassment. If, as most people claim, anti-Zionism is indeed different from antisemitism, then why do the anti-Israel protests take place at a synagogue? Where do we draw the line between anti-Zionism and antisemitism, and how far are we willing to let it go? Does it stop at synagogues, or can protesters also gather in front of religious schools?

From a moral perspective, political matters belong in political forums. Protesting in front of a community synagogue prevents people from freely and safely practicing their religion. If the protesters truly disapproved of Israel's policies, they would choose a place of protest where a difference could be made, like the Israeli embassy or Congress. Moreover, they would carry well-researched and informative signs instead of the ones they currently have, which only perpetuate Jewish hatred. From a legal standpoint, the ACLU's claim that freedom of speech is indivisible is false. We have countless cases where freedom of speech is abridged for reasons of safety. In *Chaplinsky v. New Hampshire* (1942), freedom of speech was curtailed by restricting fighting words. Additionally, *New York Times v. Sullivan* (1964) limited freedom of the press by ruling that libel and slander are not protected under the First Amendment.

VI: Conclusion and Applicability to Other Issues

The legal reasoning laid out in this essay therefore demonstrates that the right to protest finds its limits when the protests target a place that is actually irrelevant to the content of the protest. Therefore, while anti-Israel protests should be constitutionally protected in certain places, they are not constitutionally protected when they are targeting a specific Jewish community, as in the case of *Gerber*.

Part of what is interesting about *Gerber v. Herskovitz* is that it touches upon issues that are relevant in a number of other newsworthy controversial contexts, relating to protests that seem to border upon harassment. Is it a constitutionally-protected protest, or is it harassment, to protest a government official outside their home? Following the legal reasoning of the *Gerber* case, since the judge's home is not relevant to the issuing of a Supreme Court, the protest would seem to have a purpose that is more about targeted harassment than about expressing a viewpoint, and should not be protected.

As the Supreme Court is currently not interested in taking on a further appeal of the *Gerber v. Herskovitz* case, it seems that American law gives far greater protection to the rights of protesters–no matter how objectionable their signs may appear–than to the subjects who are impacted by the protest. While it may appear to many that the government condones harassment, perhaps the United States government just wishes to empower the public's voice of dissent. It's up to us, the people, to use the voice of dissent in the correct way.

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Freedom of Speech on Social Media Platforms

By Batsheva Benitzhak and Chavi Weiner

I: Introduction

The First Amendment includes many foundational freedoms such as freedom of speech, religion, press, and assembly. These freedoms are core values for all Americans. However, today some feel that their free speech rights are being violated, especially in the context of social media platforms. Certain platforms, such as Twitter, have recently banned certain users due to statements they have made on the platform. Twitter's actions here meet legal standards and do not violate the First Amendment, *if* one is willing to classify Twitter as a private platform rather than as a "public square." However, if one does classify Twitter as a private platform, this opens up further legal ramifications regarding Twitter's responsibility for the content on its site.

II: If Twitter is the "Public Sphere"

As freedom of speech is a fundamental American ideal, companies cannot restrict users' exercise of the First Amendment. This can be seen by Elon Musk's strong response to how Twitter has been handling content moderation on its platform. Musk explains how "Twitter has extraordinary potential," and he wishes to "unlock it." What Musk means by this is that Twitter has the potential to be the platform for "free speech around the globe"; however, instead, he feels that the platform stifles free speech.[17] Musk wishes to use his position over the company to fight against content moderation rules so that users can exercise their First Amendment rights. He adds that "having a public platform that is maximally trusted and broadly inclusive is extremely important to the future of civilization." Musk wants a Twitter on which anyone can say anything and feels it is within the American spirit to obtain this freedom. However, notice that Musk highlights this freedom as essential to the *American spirit, not American law.*

What does American law say about the matter?

Ira Robbins analyzes this issue in the *Federal Courts Law Review*. Robbins feels that private companies have a right to filter out unwanted content from their platform. According to our understanding, this is legally correct as generally, companies restricting and filtering the content on their platforms does not violate one's constitutional rights. According to the First Amendment, "Congress shall make no law… abridging the freedom of speech." A private company is *not* congress and therefore should be allowed to filter what they want from their platform.[18] Twitter is a private company which therefore has the right to set up rules in place for

[17] Hawkins, John and Walsh, David. "What will Elon Musk's ownership of Twitter mean for 'free speech' on the platform?" *The Conversation*. April 27, 2022.
[18] Robbins, Ira P. "What is the Meaning of Like: The First Amendment Implications of Social

its users. For example, they can decide that users cannot use the word 'flower' on the platform, as it is their company. Since it is a private company and not a public venue, the restrictions don't take away from a person's rights under the First Amendment. In actuality, these restrictions usually allow people to remain safe and to be heard online. Companies are completely allowed and encouraged to set up their own rules.

However, in a discussion of the suspension of the Twitter account of former President Donald Trump, an alternate legal argument can be made based on court rulings that defined Trump's Twitter account in a different legal categorization, and *not* just as a user account on a privately-owned and managed platform. Courts *themselves* have previously made rulings that have clarified the unique legal status of the president's Twitter account. In 2018, Trump banned seven accounts that posted tweets in response to his own tweets, which he didn't agree with. Since his account wasn't private, but rather a government outlet, courts ruled that he shouldn't have had the right to block U.S. citizens.[19] This is because the Supreme Court holds that "where a private entity is completely "entangled" or "entwined" with the government, or has a "symbiotic relationship" with the government, it can be subject to the Constitution."[20] According to the reasoning of this court ruling, Twitter accounts of government officials cannot restrict the speech of others, suggesting that these accounts are subject to the First Amendment and freedom of speech. However, if they are subject to freedom of speech because they are government entities, it would make sense that they are *protected* by freedom of speech. The notion that a private company may censor a government official is illogical. Consequently, following this legal argument, the Trump twitter account should be protected from the private censorship of the Twitter administration.

III: If Twitter is a Private Entity

If Twitter claims to be a private entity that can exercise its rights to censor users, it must take full responsibility for what is said on its platform. Just as Twitter wishes to make rules, it must enforce them as well.

However, Twitter's claim is not consistent with Section 230. Section 230 "enabl[es] digital platforms to host a never-ending flow of user-generated content without the burden of acting as gatekeeper for each and every comment."[21] In other words, it frees private institutions from any responsibility for published content on their platform. It also allows corporations to monitor their platform for harmful content. If they're allowed to censor, then they should be

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Media Expression". *The Federal Courts Law Review* (2013), 25.

[19] Briggs, Samantha. "The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine." *Columbia Journal of Law and Social Problems* (2018), 10.

[20] Jacobson, Loren. "Does Twitter Have to Respect My First Amendment Rights?" *Accessible Law*. 26 Apr. 2021.

[21] Hermes, Jeff. "Section 230 as Gatekeeper: When Is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?" *Litigation*, vol. 43:3 (2017), 34.

obligated and responsible to prevent other forms of would-be illegal speech. According to Michael D. Smith and Marshall Van Alstyne in the *Harvard Business Review*, Section 230 is outdated and must be changed. They explain that when Section 230 was written, in 1996, there was very different technological experience with issues that could be solved with Section 230. However, with the evolution of the internet, Section 230 must be clarified and refined. Smith and Alstyne explain how "today there is a growing consensus that we need to update Section 230."

Some of the supporters of updating Section 230 include Facebook's Mark Zuckerberg, Senator Lindsey Graham, former Congressman Christopher Cox, and President Joe Biden. Zuckerberg even told Congress that it "may make sense for there to be liability for some of the content," and that Facebook "would benefit from clearer guidance from elected officials."[22] As former Congressman, Christopher Cox, a co-author of Section 230, puts it, "the original purpose of this law was to help clean up the Internet, not to facilitate people doing bad things." Klon Kitchen, Director of The Heritage Foundation's Center for Technology Policy, further explains that Section 230 must be revised "to ensure that markets and civil discourse remain free and fair."[23] Kitchen explains how "Google, Facebook, Twitter, and other tech firms have squandered the public trust with inconsistent and often political moderation and censorship of user content," and that "Section 230 must be carefully refined to better fit the statute's original intent and to restrain potential abuses of its protections" as there is a growth in "concerns about political bias online.[24]

IV: Conclusion

Companies should have the right to regulate their own entity, but should then be responsible for what is said on their platforms. Companies cannot simply regulate what is said, and not claim any responsibility, as that can lead to the creation of biased or unnecessary regulations. This is why companies should claim responsibility for what is said on their platform. This enforced responsibility will then lead to companies having distinct rules on what can or can't be said, thereby eliminating the bias factor. Once that bias is removed, people will feel that their freedom of speech is being upheld and protected. When companies embrace their true role in society and properly service their users, they will be more careful with their content and regulations, leading to a safer and more illustrious society.

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[22] Smith, Michael D. and Van Alstyne, Marshall. "It's Time to Update Section 230." *Harvard Business Review*, 16 Aug. 2021.

[23] Kitchen, Klon. "Section 230-Mend It, Don't End It." *The Heritage Foundation*. 22 Oct. 2020.

[24] Ibid.

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