No. 106982

IN THE ILLINOIS SUPREME COURT

IN RE ESTATE OF MAX FEINBERG, Deceased. LEILA R. TAYLOR, as Independent Co-Executor of the Will of Max Feinberg, Deceased, Plaintiff, v. MICHAEL B. FEINBERG, Individually and as Co-Executor of the Will of Max Feinberg, Deceased, Petitioner-Appellant; MICHELE TRULL née FEINBERG, Appellee; FIFTH THIRD BANK, as Trustee of the Trusts of Max Feinberg, Deceased; ARON FEINBERG; LISA TAYLOR-SCHROEDER; JON TAYLOR; AIMEE TAYLOR-SEVERE; the UNKNOWN AND UNBORN DESCENDANTS OF LEILA R. TAYLOR, MICHAEL B. FEINBERG, MICHELE TRULL née FEINBERG, LISA TAYLOR-SCHROEDER, JON TAYLOR and AIMEE TAYLOR-SEVERE and the KNOWN DESCENDANTS OF LISA TAYLOR-SHCRODER, JON TAYLOR AND AIMEE TAYLOR-SEVERE, Defendants.	Appeal from the Appellate Court of Illinois for the First Judicial District No. 1-06-2823 Appeal from the Circuit Court of Cook County, Probate Division Nos. 05 P 0173, 04 P 5093 and 04 L 07195 Hon. Susan H. Coleman presiding.

BRIEF OF AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national Orthodox Jewish organization, with constituents and offices throughout the United States, including the State of Illinois. Agudath Israel has a long history of participating in various federal and state litigations, largely through the submission of *amicus curiae* briefs in cases involving religious liberty in general, and the rights of Jews to practice their religion in particular. In so doing, Agudath Israel seeks to protect the rights and advance the interests of observant Jews, and to offer an Orthodox Jewish perspective on contemporary issues of public concern.

National Council of Young Israel ("Young Israel"), founded in 1912, is a national synagogue organization with approximately 150 branches in the United States, including in Illinois. Young Israel has long sought to further the ability of Jews in the United States to freely practice their religion. After World War I and World War II, Young Israel created a free employment service to facilitate Jewish veterans finding employment where they would not be compelled to work on the Sabbath. Over the past several decades, Young Israel has assisted its branches in overcoming obstacles imposed by local zoning restrictions that are discriminatory in effect. Young Israel also seeks to protect the interests of its constituents by submitting *amicus curiae* briefs in cases implicating the ability of Jews to practice their religion.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is an Orthodox Jewish umbrella organization that represents nearly 1,000 synagogues throughout the United States, including in Illinois, which collectively

represent hundreds of thousands of Jews. Among its activities, the Orthodox Union participates in various federal and state litigations, largely through the submission of *amicus curiae* briefs that relate to matters of concern to the Orthodox Jewish community.

These organizations ("*Amici*") have a significant interest in the questions presented in this case. According to Jewish law and tradition, one of the most important tasks that Jewish parents and grandparents can accomplish during their lifetimes, and, through their testamentary directives, even after death, is to ensure (to the extent possible) that their descendants remain committed Jews. From this perspective, a descendant who marries out of the faith has repudiated observant Judaism, endangering the survival of the Jewish people by vastly increasing the likelihood that his or her descendants will not be Jewish, and has forfeited any moral claim to financial support from his or her Jewish ancestor.

One way that Jewish testators seek to discourage their descendants from intermarrying is to condition their bequests upon their descendants not marrying outside the faith.[1] This type of clause also emphasizes the critical importance of Jewish continuity to the testator's descendants. Should this Court sustain the decision below, Jews would be precluded by the State of Illinois from engaging in the religious act of encouraging the continuity of American Jewry by denying testamentary benefits to descendants who repudiate normative Judaism by marrying out of the faith. The outcome of this case will therefore have a profound

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[1] For all purposes of this brief, a post-mortem disposition under a lifetime trust is treated no differently than a bequest in a will.

impact upon *Amici's* constituents, as well as those of many others in the American Jewish community. *Amici*, as representatives of the American Orthodox Jewish community and champions of the rights of freedom of religious exercise for all Americans, can assist this Court by presenting a perspective on the impact of this case on religious exercise that has been largely absent from the arguments presented by the litigants and the decisions below.

QUESTIONS PRESENTED

Based upon the decision below and the Record on Appeal, *Amici* believe that this case presents a number of questions for this Court's determination:

1. May a grandparent exercise his statutory and constitutional right to the free practice of his religion in the State of Illinois by denying bequests to grandchildren who have married outside the faith? The court below answered this question "no." *Amici* respectfully submit that the correct answer is "yes."

2. May Illinois courts invalidate a testamentary condition that does not encourage divorce but instead disinherits descendants who have married outside the testator's faith whether or not they subsequently divorce? The court below answered this question "yes." *Amici* respectfully submit that the correct answer is "no."

3. Is there an Illinois public policy to compel a grandparent to provide a legacy to grandchildren who violate his express religiously-motivated condition that they take under the will only if they do not marry outside the faith? The court below answered this question "yes." *Amici* respectfully submit that the correct answer is "no."

4. If there is such a policy, does it override the Illinois Religious Freedom Restoration Act, the Free Exercise Clause of the U.S. Constitution and its Illinois state constitution counterpart? The court below did not address this question. *Amici* respectfully submit that the correct answer is "no."

PRELIMINARY STATEMENT

In 1984, Max Feinberg, motivated by his religious desire to perpetuate his Jewish heritage and the Jewish people, and by traditional Jewish precepts and practices stressing the importance of his descendants not marrying outside the faith, amended the "Max Feinberg Trust" of 1979 to include Paragraph 3.5(e), which provides: "A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."[2] (C01860)[3] The Appellate Court held the Religious Preference Clause to be void as against Illinois public policy.

Testators should be free to implement their religious convictions by leaving bequests conditioned upon their descendants not marrying outside the faith.[4] This Court should reverse the decision of the Appellate Court which

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[2] Paragraph 3.5(e) will be referred to as the "Religious Preference Clause."

[3] References to the record on appeal are in the form "(C____)".

[4] A testamentary bequest that is conditioned upon a descendant marrying or not marrying within a certain group of individuals is often referred to as a "partial restraint" on marriage. *See, e.g. Bogert on Trusts and Trustees* § 211 (2008) (footnote continued on the next page)

interferes with that religious freedom of testators and abridges their statutory and constitutional rights. Despite being unable to cite a single decision in which this Court has ever struck down a testamentary condition that partially restrained a descendant's ability to marry, the decision below advocates a radical and unwarranted departure from Illinois public policy.

This State's long-standing public policy has strongly favored freedom of testation and non-interference with the free exercise of religion. Additionally, the decision below, which compels the testator to provide legacies that contravene his religious beliefs, would violate the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* (West 2008) ("Illinois RFRA"), Art. I, § 3 of the Illinois Constitution, and the Free Exercise Clause of the First Amendment of the U.S. Constitution. For the reasons set forth below, the decision of the Appellate Court should be overturned.[5]

STATEMENT OF FACTS

The documents relevant to this proceeding are (i) the Max Feinberg Trust, as amended, and (ii) an Appointment by Erla Feinberg. The terms of these

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(continued from previous page) ("a partial restraint on marriage such as to a named individual, or to any member of a small group, or to remarriage, is not invalid"). The term "partial restraint," however, is a misnomer because the descendant is in fact free to marry any lawful spouse of his or her choosing – the only consequence of violating the testamentary condition is that the descendant will not receive the bequest.

[5] The sole concern of *Amici* in this appeal is to vindicate the right of testators to act on their religious conviction that their bequests should be conditioned on their descendants not marrying outside the faith. *Amici* take no position as to the outcome of the other disputes in this litigation.

documents have already been described at length in the record but will be summarized here to the extent relevant to the arguments presented by *Amici*.

A. The Max Feinberg Trust.

The Max Feinberg Trust (C01844), created on June 29, 1979, amended and restated on November 7, 1983, and further amended on September 10, 1984 (C01858) (the "Trust"), was a revocable trust created by Max Feinberg which provided for the disposition of his assets during his life and upon his death.[6] After Max's death, his wife, Erla Feinberg, was the sole beneficiary of both Trust A (C01851 cl.3.2(a)) and Trust B (01858 cl.3.3(a)) during her life. At her death she had a testamentary power to appoint the remaining assets of both Trust A and Trust B by her Will to any one or more of Max's descendants as she saw fit. (C01851 cl.3.2(d)) Her power of appointment over the assets of Trust B was also exercisable by her during her lifetime, not only by Will. (C01858 cl.3.3(c))

To the extent that Erla failed to exercise her powers of appointment, under the terms of the Trust at Erla's death the balance of the Trust A assets (after payment of estate taxes) were to be combined with the assets of Trust B (C01851 cl.3.2(e)), to be disposed of together. The combined Trust A and Trust B were then to be distributed as follows: (i) 50% per stirpes to Max's then living descendants in further trust for their benefit; (ii) 25% per stirpes among the then living descendants of Max's son, Michael Feinberg, in further trust; and (iii) 25%

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[6] Although Max Feinberg also left a Will (C00335), his Will simply "poured" all of his probate assets into the Trust (C00336 cl. 3) and, consequently, the actual disposition of all of Max's assets is governed only by the terms of the Trust as a testamentary substitute.

per stirpes among the then living descendants of Max's daughter, Leila Taylor, in further trust. Each of these continuing trusts would, at the death of the respective beneficiary, be distributed to the beneficiary's then living descendants, per stirpes, or, if there were none, to certain other then living descendants of Max. (C01854 cl.3.4(g))

At Erla's death on October 1, 2003 she was survived by the following descendants who were potential beneficiaries of the Trust: (i) her two children, Michael Feinberg and Leila Taylor, and (ii) her five grandchildren, Aron Feinberg, Michele Trull, Lisa Taylor-Schroeder, Aimee Taylor-Severe and Jon Taylor. During Erla's lifetime, each of the grandchildren except Jon Taylor had married a spouse who was not of the Jewish faith (and who had not converted within one year of marriage). Jon Taylor had also married, but his wife was Jewish. *In re Estate of Max Feinberg*, 383 Ill.App.3d 992, 993, 891 N.E.2d 549, 550 (2008).

The Trust contained the Religious Preference Clause (C01860 cl.3.5(e)) which provided that a descendant of Max, other than a child, who married outside the Jewish faith (unless the spouse converted to Judaism within one year of the marriage) and his or her descendants would be deemed to be deceased for all purposes of the Trust as of the date of the marriage (*i.e.,* prior to Erla's death on these facts). If, as *Amici* argue, the Religious Preference Clause is valid, and applying it to the facts (ignoring for the moment Erla's powers of appointment over the Trusts), Max's grandchildren Aron Feinberg, Michele Trull, Lisa Taylor-Schroeder and Aimee Taylor-Severe are not entitled to any share of the Trust at

Erla's death, because they (and their descendants) were deemed to be deceased for all purposes under the Trust (upon their marriages during Erla's life). Instead, at Erla's death, the disposition of the Trust should be: (i) 50% in further trust for Max's son, Michael Feinberg; (ii) 25% in further trust for Max's daughter, Leila Taylor; and (iii) 25% in further trust for Max's grandson, Jon Taylor.

B. Appointment of Erla Feinberg.

On February 23, 1997, Erla executed an instrument (C01862) by which she exercised her lifetime power of appointment over Trust B by directing that upon her death the trustee distribute the sum of $250,000 (referred to as an "Appointment") to each of her two children and to each of her five grandchildren. While Erla's power of appointment gave her the power to appoint the entirety of the Trust in the manner she wished, her exercise was limited to these seven Appointments.

The instrument of appointment provided that if either of Erla's children "are deceased" at the time of Erla's death then that child's Appointment would pass to his or her children, but "[i]f any of [Erla's] grandchildren are *deemed* deceased [at her death] then the Appointment shall be paid equally to the parents of that grandchild." (*Id.*) (emphasis supplied). The only plausible meaning of Erla's use of the term "deemed deceased," and her direction that in such event the Appointment passes not to the children of the "deemed deceased" grandchild but instead to his or her parents, in this context is an invocation and incorporation of the Religious Preference Clause contained in the underlying Trust. Thus, just as under the Trust itself, under the instrument of appointment any grandchild who had married outside the Jewish faith (and whose spouse did not convert within

one year of marriage) by the time of Erla's death – the effective date of the disposition of the remainders of Trust A and B – is to be *deemed* deceased and not entitled to receive his or her respective Appointment.

ARGUMENT

I. The Religious Preference Clause Does Not Contradict Illinois Public Policy.

Determinations of public policy are not unbounded inquiries, as public policy "is to be found in the Constitution, in statutes and, when these are silent, in judicial decisions." *Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. State of Ill.*, 124 Ill. 2d 246, 260, 529 N.E.2d 534, 540 (1988) (quoting *Barr v. Kelso-Burnett Co.,* 106 Ill. 2d 520, 527, 478 N.E.2d 1354, 1357 (1985); *Palmateer v. Int'l Harvester Co.*, 85 Ill.2d 124, 130, 421 N.E.2d 876, 878 (1981)).[7] As will be discussed below, the First Amendment's Free Exercise Clause, the Illinois Constitution and Illinois RFRA mandate a public policy of not interfering with a testator's right to exercise his or her religious conviction that bequests should not be made to descendants who marry outside the faith.

A. Invalidating the Religious Preference Clause Interferes With Testators' Freedom of Testation.

1. Illinois Public Policy Favors of Freedom of Testation.

The public policy of common law jurisdictions since the enactment of the Statute of Wills, 32 Hen. 8, c. 1 (1540), has been freedom of testation. *See Page*

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[7] The parties do not dispute that this appeal raises a pure question of law, meaning that this Court should review the matter *de novo*. S*ee, e.g. Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 523, 759 N.E.2d 509, 515 (2001) (application of law to undisputed facts is reviewed *de novo*).

on Wills § 2.14 (2003). By contrast, civil law jurisdictions significantly constrain freedom of testation by requiring that specific shares of one's estate must pass to children under the doctrine of forced heirship. *See Bogert on Trusts and Trustees*, § 9 (2008). There is no forced heirship for descendants in Illinois.

The Statute of Wills has been codified by the Illinois legislature. *See* 755 ILCS 5/4-1 (West 2008) ("Every person who has attained the age of 18 years and is of sound mind and memory has power to bequeath by will the real and personal estate which he has at the time of his death."); *see also Illinois Jurisprudence*, *Probate*, § 4:01 (2007) ("Under Illinois law, testators have an absolute right to dispose of their property as they see fit, and every person who is at least 18 years old . . . has the power to bequeath by will their real and personal property."). Freedom of testation is also promoted by the United States Constitution. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) (regulation unconstitutional because it "amounts to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs").

One critical consequence of freedom of testation is that testators in a common law jurisdiction like Illinois are free to disinherit some or all of their descendants if they so choose. *See, e.g.*, *Young v. Whisler*, 19 Ill.2d 501, 506, 167 N.E.2d 191, 192 (1960) ("[I]t was testator's privilege to devise his property among those children he preferred, however inequitable his distribution may be; and this court is obliged to give effect to that expressed intention, and not to draft a new will.").

2. There is No Public Policy in Illinois Against Bequests Conditioned on Descendants' Marriage Decisions.

Although the Appellate Court decision below asserts that Illinois has a common law public policy against "testamentary provisions which *act as a restraint upon marriage* or which encourage divorce," *In re Estate of Max Feinberg*, 383 Ill.App.3d 992, 994, 891 N.E.2d 549, 550 (2008) (emphasis supplied), it does not identify a single decision corroborating the critical "restraint upon marriage" language in this assertion. Rather, it mistakenly interprets and expands without justification decisions of this Court that Illinois public policy bars conditional bequests that encourage *divorce* – entirely inapplicable to this case – as proof that Illinois public policy prohibits bequests that "partially restrain" a descendant's ability to *marry*.

In the first of the cases cited by the Appellate Court, *Ransdell v. Boston*, 172 Ill. 439, 440, 50 N.E. 111, 112 (1898), a married beneficiary sought to set aside a testamentary condition that provided him with only a life use of property until "becom[ing] sole and unmarried," in which event he would receive the property outright. He argued that the condition was the result of the fact that the testator was "unduly prejudiced against the wife of complainant . . . and was desirous that he should procure a *divorce* from her." *Id.* (emphasis added). Although this Court explained that generally public policy bars testamentary gifts "which are calculated to . . . bring about the *separation or divorcement* of husbands and wives," in this case the testamentary condition was valid, as the

parties had already been separated for several years. *Id.* at 445-46, 50 N.E. at 114 (emphasis added).[8]

This Court reached a similar result in *Gerbing v. Grigg*, 61 Ill.2d 503, 504, 337 N.E.2d 29, 31 (1975), the second case cited by the Appellate Court decision below. *Gerbing* considered a testamentary provision that if a son and his wife "are divorced and remain divorced for a period of two years . . . [then] this trust shall terminate" and the son was to receive the trust property and accrued dividends. This Court concluded that the provision was an "inducement to obtain a divorce," explaining that "a condition annexed to a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy, and the condition is void." *Id.* at 507, 337 N.E.2d at 31, 32. *See also Tripp v. Payne*, 339 Ill. 178-79, 183, 171 N.E. 131, 132-33 (1930) (invalidating testamentary condition rewarding petitioner if he "shall cease to live with his present wife" because it "could have had no other purpose than to induce a separation between these two people, who, so far as disclosed by the evidence, are living together in the greatest of harmony and marital felicity"); *Winterland v. Winterland,* 389 Ill. 384, 387-88, 59 N.E.2d 661,

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[8] This Court's comment in *Ransdell*, more than a century ago, about public policy prohibiting "testamentary gifts which are calculated to prevent lawful marriages," 172 Ill. at 446, 50 N.E. at 114, is *obiter dicta* that should be discarded, as the litigation in *Ransdell* involved a condition that provided an incentive for divorce from a specific woman, not a more general condition that restrained the beneficiary's ability to marry (to the contrary, in view of the lengthy separation of the parties, a divorce would have facilitated remarriage to a second spouse of each party's choice). *See, e.g. Illinois Consol. Tel. Co. v. Illinois Commerce Comm'n.*, 95 Ill. 2d 142, 151, 447 N.E.2d 295, 299 (1983) (appellate court erroneously relied upon *obiter dicta*).

663 (1945) (voiding testamentary condition rewarding petitioner if "his present wife shall have died or been separated from him by absolute divorce" because "[t]he natural tendency of the provision of the testator's codicil giving to his son . . . the corpus of the trust estate upon his becoming divorced from his wife is to encourage divorce").

Thus, even the most cursory review of the facts in the cases on which the court below relied demonstrates that none of those cases involved testamentary conditions that were designed to discourage unmarried descendants from marrying outside a specific group. The public policy for voiding testamentary conditions that promote divorce has no relevance to testamentary clauses that encourage marriage within the testator's faith community. This Court has explained that Illinois public policy invalidates testamentary conditions that promote divorce because:

> It has been said that the vice of such a condition as that contained in this will is not so much that it will encourage a wronged husband or wife to seek the remedy of divorce provided by law as that it tends to aggravate normal differences until they assume serious proportions and supply the grounds for divorce.

Gerbing, 61 Ill 2d at 508, 337 N.E.2d at 33.

This "vice," of course, has nothing at all to do with a testamentary condition that encourages marriage within the testator's faith community in language that is unaffected by divorce. Specifically, in this case, the Religious Preference Clause cannot possibly encourage divorce because divorce would have no effect upon the operation of the Trust under any circumstances. Under the clause, a descendant who either does not marry, marries a Jewish spouse or marries a non-Jewish spouse who converts within one year of marriage, is an

eligible beneficiary and has no incentive to divorce. By contrast, a descendant who marries a non-Jew who does not convert within one year is "deemed to be deceased for all purposes of this instrument as of the date of such marriage," a condition that by definition cannot be remedied by any means, including divorce, once again providing no incentive to divorce.[9]

Indeed, sociological evidence demonstrates that provisions like the Religious Preference Clause actually *promote* marital harmony because couples where only one spouse is Jewish are statistically much more likely to divorce than intra-faith Jewish couples. *See* Barry A. Kosmin et al., *Intermarriage, Divorce and Remarriage Among American Jews 1982-1987* (North American Jewish Data Bank and Graduate Center of the City University of New York 1989) (Jews who intermarry are 85% more likely to divorce than Jews who marry within the faith); Sylvia Barack Fishman, *Double or Nothing* 44 (Brandeis Univ. Press 2004) (citing Sidney Goldstein, *Profile of American Jewry, Insights from the 1990 National Jewish Population Study*, 92 American Jewish Year Book 77 (1992) (Jews who intermarry are twice as likely to divorce as Jews who marry within the faith) and Barry A. Kosmin et al., *American Religious Identification Survey 2001* (Graduate Center of the City University of New York 2001) (study of other

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[9] The concurring opinion in the Appellate Court engages in baseless speculation about the possibility of "resurrection" under the Religious Preference Clause. The definition of "deceased" is clear – "that has departed this life, dead" (Oxford English Dictionary (2nd ed. 1989)). Deeming an erstwhile beneficiary deceased is a common legal idiom in the field of trusts and estates as shorthand for an irrevocable waiver or disqualification from taking a legacy. *See, e.g.*, 755 ILCS 5/2-7(d) (West 2008) (effect of a disclaimer is "as if the disclaimant had predeceased" the decedent, the date of the transfer or the event which determines the interest).

religions has similarly concluded that intermarriage increases the incidence of divorce; interfaith couples are three times as likely to divorce as intra-faith couples)).

3. The Authority on which the Court Below Relied Does Not Provide a Basis for an Exception to the General Freedom of Testation.

The decision below would adopt a novel Illinois public policy, which supposedly prohibits testamentary conditions that partially restrain a descendant's ability to marry, from the Illustration 3 of Comment j of Restatement (Third) of Trusts ("Restatement (Third)") § 29(c) (2003). This position has no basis in Illinois jurisprudence, and should be rejected.

First, where this State's constitution, statutes and judicial decisions are silent, other authorities such as a Restatement may be useful for filling in an interstitial gap in operative common law resolution of garden-variety disputes between parties. *Cf. Am. Fed'n*, 124 Ill. 2d at 260, 529 N.E.2d at 540, *supra* p. 8. But where, as here, appropriate sources of public policy – the U.S. Constitution, the Illinois Constitution and Illinois statutory law – all strongly favor enforcement of the Religious Preference Clause, this Court should not look to the Restatement's illustration's academic proposal – divorced from any basis in Illinois law – for what this State's public policy should be. *See id.* ("The public policy of a State or nation must be determined by its constitution, law and judicial decisions, -- not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.") (quoting *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 193, 91 N.E. 1041 (1910)).

Second, the Restatement (Third) § 29(c) has never been cited by this Court, and, with the exception of the decision below, has never been used by any court anywhere as a basis for invaliding a testamentary condition similar to the Religious Preference Clause. The only reported decisions citing the Restatement (Third) § 29(c) are in other jurisdictions and deal with unrelated issues. *See United States v. McBirney*, 261 Fed.Appx. 741, 744-45 (5th Cir. 2008) (challenging criminal conviction for fraudulent activities involving concealing assets in a spendthrift trust); *Nacovsky v. Hall*, 2008 Mich.App. LEXIS 2402, at *5 (Mich. Ct. App. Dec. 2, 2008) (challenging no-contest clause in trust); *Tunstall v. Wells,* 144 Cal.App.4th 554, 567 (2006) (challenging no-contest clause in testamentary trust); *In re Milton Hershey Sch.*, 867 A.2d 674, 685 (Pa. Commw. Ct 2005) (dispute involving charitable trust).

Third, Illustration 3 of Comment j of Restatement (Third) § 29(c), on which the decision below rests, has no basis in the common law of *any* jurisdiction. This Illustration reverses Restatement (Second) Trusts § 62 cmt. h (1959), which provides that "a provision divesting the interest of the beneficiary if he . . . should marry a person of a particular religious faith or one of a different faith from that of the beneficiary, is not ordinarily invalid." The drafters of the comment and illustration in the Restatement (Third) do not cite any intervening judicial decisions justifying their proposal that partial restraints on marriage – especially testamentary conditions similar to the Religious Preference Clause – are invalid. The drafters simply cite no authority for this novel, unsupportable and, we submit, entirely incorrect proposition.

Any persuasive influence of Illustration 3 is vitiated by its status as an outlier view that is contradicted by virtually all other (and equally "modern") authorities on wills and trusts. *See Page on Wills* § 44.25 (2003) ("Restraints against marrying people belonging to specified classes . . . have been held valid."); *Bogert on Trusts and Trustees* § 211 (2008) ("a partial restraint on marriage such as to a named individual, or to any member of a small group, or to remarriage, is not invalid"); *Powell on Real Property* § 78.02 (Michael Allan Wolf ed. 2008) ("Under this criterion of 'reasonableness' most attempted partial restraints are found to be valid. This result (validity) has been reached when the restraint took the form of a requirement that the recipient marry a person of non-Catholic, or of the Jewish faith."); *Scott on Trusts* § 62.6 (2001) ("The courts have upheld provisions tending to restrain marriage with particular classes of persons, as, for example, Roman Catholics, domestic servants, Scotsmen, persons other than Jews or Protestants or Quakers."); *Am. Jurisprudence*, *Marriage* § 115 (2d ed. 2008) ("Provisions in wills prohibiting or penalizing marriage to any person of a particular religious faith have been held not to be invalid on the ground that they violate constitutional or statutory provisions."); *Am. Law Reports*, 50 A.L.R.2d 740 § 2 (1956 & Supp. 2008) ("restriction of a beneficiary's marriage to persons of a designated faith is generally regarded as not unreasonable"); *Corpus Juris Secundum*, *Wills* § 1395 (2008) ("at common law . . . a condition in partial and reasonable restraint of marriage, such as a condition against marriage to a particular person, or one of a specified class, or religion . . . may, as far as public policy is concerned be validly imposed by a testator having an interest in the

future marriage and settlement of the legatee or devisee"); 19 *Illinois Practice Series*, *Estate Planning & Admin.* §188:11 (4th ed. 2008) ("[T]estamentary conditions restricting the beneficiary's marriage to a person of a specified faith . . . are generally upheld.").

In short, Illustration 3 of Comment j of Restatement (Third) § 29(c) is not a statement of this State's law or public policy, and is not derived from court decisions regarding validity of testamentary conditions that partially restrain a descendant's ability to marry. It is contradicted by essentially every other authority and has never been cited to strike down a clause such as the one at issue in this case. This Court does not owe any deference to this comment of the Restatement (Third) and should not adopt it.

B. Invalidating the Religious Preference Clause Interferes With Testators' Freedom of Religious Exercise.

1. Under Jewish Religious Law, Structuring Bequests to Encourage Descendants to Marry within the Faith is a Religiously Significant Act.

For a Jew to condition a bequest on his or her descendants not marrying outside the faith is an act of religion conviction. A core component of Jewish religious law and tradition is that one of the most significant duties of any Jewish parent or grandparent is to teach Jewish religious law to his or her descendants and to transmit his or her heritage to subsequent generations. By contrast, Jewish religious law prohibits intermarriage and treats it as an abandonment of the faith – recognizing that the descendants of an intermarried couple are either unlikely to maintain their Jewish identity or will not even be Jewish at all. *See* 2 J. David Bleich, *The Prohibition against Intermarriage, in* Contemporary Halakhic

Problems 268 (Ktav Publishing House 1983) (discussing the Scriptural and other sources for this prohibition).

For a descendant who marries outside the faith to be treated as "deceased" (the language of the Religious Preference Clause) is squarely within the practice that used to exist in some families to undergo formal mourning rituals, normally reserved for a child who is deceased, when a child intermarries. Erich Rosenthal et al., *Mixed Marriage, Intermarriage,* in 14 Encyclopedia Judaica 373, 377 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference USA, 2d ed. 2007). While this particular practice is discouraged by contemporary Jewish religious leaders, Jewish parents and grandparents are still encouraged to do what they can to promote and ensure Jewish continuity. It is therefore not uncommon for Jewish parents and grandparents to use conditional bequests as a means to limit their testamentary generosity to descendants who have remained faithful to their Jewish heritage.

2. Heightened Jewish Concern with Encouraging Children to Marry Exclusively within the Faith Because of Declining Jewish Population.

Promoting marriage exclusively within the faith has become a particularly urgent matter for many Jews because demographic data demonstrate that the American Jewish population has been declining for years. From 1990 through 2005, the Jewish population dropped by 4%, from 5.5 million to 5.28 million, despite the arrival of 200,000 Jewish immigrants during this period. Usiel Oscar Schmelz & Segio DellaPergola, *Demography,* in Encyclopedia Judaica 553, 560 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference USA, 2d ed. 2007). By contrast, the general population of the United States grew by 18%

during the same period. (U.S. Census Bureau Population Estimates, http://www.census.gov/popest/states/NST-ann-est2007.html and http://www.census.gov/popest/archives/1990s/nat-total.txt.)

The drop in the population of Jews in the United States has been largely attributed to the rising rate of intermarriage, which has more than tripled over the last thirty years. United Jewish Communities Research Dept., *National Jewish Population Survey 2000-01* (United Jewish Communities 2003) ("NJPS 2000-2001"). Of Jews who married between 1985 and 2001, more than half married outside the faith, compared to 6% from 1941 to 1960. Fred Massarik et al., *National Jewish Population Survey 1971* (Council of Jewish Federations 1973) ("NJPS 1971"). Surveys have demonstrated that children of intermarried parents are far less likely to identify as Jews (Erich Rosenthal et al., *Mixed Marriage, Intermarriage, in* Encyclopaedia Judaica 373, 378 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference USA, 2d ed. 2007)) and participate in the Jewish community. According to one study, only approximately one-third of children of intermarried parents are being raised as Jews, compared to 96% of children with two Jewish parents. (NJPS 2000-2001) Children of intermarriage also are substantially less likely to participate in Jewish communal activities. *Id*. Finally, three out of four children of intermarried parents are likely to intermarry themselves, as opposed to 22% of children with two Jewish parents. *Id*.

This decline in the American Jewish population resulting from intermarriage is of particular concern in the wake of the murder of one-third of world Jewry in the Holocaust. For Jews concerned about the survival of Judaism

in America, providing an incentive for their descendants to marry within the faith is a means of trying to reverse this existential threat to the American Jewish community.

3. Max Feinberg Wrote the Religious Preference Clause as an Act of Religious Conviction.

Max Feinberg inserted the Religious Preference Clause in his Trust for many of the reasons discussed above, namely as an expression of his religious desire to perpetuate his Jewish heritage and to encourage his grandchildren to not follow in the footsteps of the large numbers of American Jews who intermarry. This is confirmed by the Circuit Court, which found that the Religious Preference Clause was intended by Max Feinberg to serve as a "way of promoting through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk." (C02800)

The trial court's finding is well-grounded in the record. Max held "strong feelings about the preservation of Judaism." (C01880) "Jewish heritage and the perpetuation of Jewish family life were very important to him, and . . . he desired that they be important to his children and grandchildren as well." (C01890)

Max's attachment to his religious heritage was informed by his experiences with anti-Semitism. His parents fled from Russia in the beginning of the twentieth century in order to avoid widespread pogroms against Jews. (C01879) When he was a teenager, he was aware of Ku Klux Klan marches in Chicago, as well as the anti-Semitic broadcasts of Father Coughlin during the 1930s. (*Id.*) As a young adult, Max learned, along with the rest of the world, of the Holocaust. (*Id.*)

Max was also involved in Jewish communal life. He and his wife, Erla, were affiliated with a synagogue. (C00366) He also focused his charitable giving on Jewish charities and Jewish causes. (C01880)

Max worried that his Jewish heritage would not be passed down to succeeding generations because of the rising rate of intermarriage. After becoming aware that more than fifty percent of Jews were intermarrying, he told his family that he feared "potential extinction of the Jewish people." (C01880) Max acted on his desire to perpetuate his Jewish heritage and to encourage his grandchildren to marry into the faith by including the Religious Preference Clause to incentivize his grandchildren to marry only Jewish spouses.[10]

4. Illinois Public Policy Strongly Favors Free Exercise of Religion.

The Appellate Court's decision is flawed because in creating novel public policy that would interfere with the religious exercise of testators such as Max Feinberg, it impermissibly failed to consider more fundamental sources of Illinois public policy: the Free Exercise Clause of the First Amendment; Article I, § 3 of

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[10] Contrary to Justice Quinn's suggestion in his concurring opinion below that Max Feinberg did not write the Religious Preference Clause as an act of religious exercise, nothing can be inferred about Max's religious desire to perpetuate his Jewish heritage from the fact that he did not include his two children in the Religious Preference Clause. When Max amended this clause in 1984, he had no reason to think that including his children in the class to whom this clause applied would help to perpetuate his heritage, as he could not include Leila Taylor, who had been married since 1962 (C00226), and he must have thought Michael Feinberg, who had recently divorced, was approximately 47 years old and already had two children (C00363, C00059, C00360-1, C00410-12), would not be likely to remarry and sire additional children (as he did not).

the Illinois Constitution; and Illinois RFRA, which together vigorously protect the freedom of religious exercise against encroachments such as the decision below.

Freedom of religious exercise is protected by the United States Constitution. "The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that Congress shall make no law respecting an establishment of religion, or prohibiting *the free exercise thereof* . . . ." *Church of the Lukumi Babalu Aye v. City of Hialeah* ("*Lukumi*"), 508 U.S. 520, 531 (1993) (emphasis in original) (quoting U.S. Const. Amend. I). The Free Exercise Clause prevents government from "in a selective manner impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 531.

Article I, § 3 of the Illinois Constitution similarly provides that "free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed."

Illinois RFRA supplies an additional layer of protection for religious exercise beyond what would be otherwise guaranteed by the First Amendment. In *Employment Division v. Smith*, 494 U.S. 872, 879, 886-87 (1990), the Supreme Court held that under the First Amendment, the government need not demonstrate a compelling interest before requiring an individual to comply with a law of general applicability, even if that law burdens the individual's religious exercise. Congress sought to reverse *Smith* by passing the federal Religious Freedom Restoration Act ("federal RFRA"), 42 U.S.C. § 2000bb *et seq*. After the Supreme Court determined that federal RFRA could not be applied to acts of state

governments, *see City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), this State enacted Illinois RFRA. *See* Tr. Ill. 90th Gen. Assembly, 107th Legis. Day, Apr. 1, 1998 at 289 ("An Illinois RFRA is necessary . . . because the United States Supreme Court recently overturned the federal RFRA, determining that laws protecting religious freedom should be enacted at the state level and that federal lawmakers did not have the power to pass such a law."). The purpose of Illinois RFRA was:

> To restore the compelling interest test as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), and to guarantee that a test of compelling governmental interest will be imposed on all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free exercise of religion is substantially burdened.

775 ILCS 35/10(b)(1) (West 2008). *See also* Tr. Ill. 90th Gen. Assembly, 107th Legis. Day., Apr. 1, 1998 at 289 ("the purpose of [Illinois RFRA] is to insure that individuals from all religious denominations are fully protected in their right to practice religion").

C. Bequests Conditioned Upon the Descendant's Spouse's Religious Affiliation Have Been Widely Upheld.

The decision below did not cite to a single reported case in which a court interfered with a testator's right to condition a bequest on his or her descendant not marrying out of the faith. The only case it cites as general support for its position in which such a condition was present is *In re Keffalas' Estate*, 426 Pa. 432, 233 A.2d 248 (1967). In *Keffalas' Estate*, the court sustained the invalidation of clauses that provided bequests "to any child who originally married a non-Greek but later, as a result of death or divorce, remarried a Greek" on the grounds that they were conducive to divorce. 429 Pa. at 434-436, 233

A.2d at 250-51. But *Keffalas* explicitly reversed a similar invalidation of a separate legacy of business interests that had no divorce or remarriage component but was merely conditioned on marriage to someone of "true Greek blood and descent and of Orthodox religion." Unlike conditions that encourage divorce, the pure "marriage conditions" were held valid and did not violate public policy. *See id.* Thus, *Keffalas* does not support the decision below at all, but rather makes exactly the distinction for which *Amici* here argue and supports the validity of the Religious Preference Clause.

Unlike the decision of the Appellate Court in this case, many other courts have enforced testamentary bequests conditioned upon the religious affiliation of the descendant's spouse.[11] For example, in *United States National Bank of Portland v. Snodgrass*, 202 Or. 530, 275 P.2d 860, 862 (1954), the Oregon Supreme Court considered the validity of a bequest conditioned upon plaintiff not marrying a Catholic. The court found this provision valid, explaining that "[t]he weight of authority . . . is to the effect that a testator has the right to make the enjoyment of his bounty dependent on the condition that the recipient renounce, embrace, or adhere to a particular religious faith." *Id.*, 202 Or. at 548, 275 P.2d at 869. Other examples include *Shapira v. Union National Bank*, 39 Ohio Misc. 28, 33, 315 N.E.2d 825, 829 (Ct.Com.Pl. 1974) ("The great weight of authority in the

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[11] Justice Quinn's argument that the validity of these cases is diminished by their age is unpersuasive, as he has not identified any decisions or other authority or legitimate policy casting doubt on the validity of these cases. Moreover, the relevant comment and illustration of Restatement (Third) § 29(c) cannot call these cases into question because, as discussed above, it has not been adopted by this Court and is nothing more than a proposal for what the law should be.

United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable.") (upholding bequest conditioned on descendant marrying a Jewish woman); *In re Silverstein's Will*, 155 N.Y.S. 2d 598, 599 (Sur. Ct. 1956) (same); *Gordon v. Gordon*, 332 Mass. 197, 206-208, 124 N.E.2d 228, 233-34 (1955) (same); *In re Liberman*, 279 N.Y. 458, 464, 18 N.E.2d 658, 660 (1939) ("Conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy."); *see also* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. Ill. L. Rev. 1273, 1321 (1999) (cited in the decision below, *In re Estate of Max Feinberg* 383 Ill.App.3d at 996, 891 N.E.2d at 552 (2008)) (noting that "it is hard to find courts that actually find a partial restraint [on marriage] to be unreasonable . . . . the most recent American case striking down such a condition was the 1939 case of *In re Liberman*, although religion was only a tangential factor in the case").[12]

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[12] In *Liberman*, although the court found that a provision designed to encourage a descendant to marry within the faith was generally valid, the clause in question was void because the descendant could only inherit if the estate's trustees approved of his wife, and the trustees stood to benefit if they withheld consent. 279 N.Y. at 467, 18 N.E. 2d at 660-61. The provision was therefore invalid because "[i]ts natural tendency might be to induce the beneficiary to live in either celibacy or adultery," *id.* at 458, 18 N.E.2d at 662 – an outcome that could not be engendered by a provision similar to the Religious Preference Clause. It appears that the only American case that might be read to have actually voided a testamentary condition against marrying outside the faith was *Maddox v. Maddox's Admin.*, 52 Va. (11 Grat.) 804, 808-09 (1854), but even that case "could rest on the ground that in the circumstances the restrictions of the beneficiary's choice of spouse to the Society of Friends would operate as a complete prohibition of marriage." *Gordon*, 332 Mass. at 206, 124 N.E.2d at 234.

Thus, the decision below not only abrogates the constitutional and statutory rights of the testator as indicated above, but also sets aside the decision of every court that has considered the matter, based only on a newly-concocted proposed public policy that conflicts with essentially every other authority on point as well as the more fundamental public policy identified above.

D. Illinois Law Restrains the Right to Pick a Spouse of One's Choosing.

Contrary to the Appellate Court's suggestion that there is an unlimited "right of individuals to marry a person of their own choosing," *In re Estate of Max Feinberg*, 383 Ill.App.3d at 997, 891 N.E.2d at 552, Illinois law places a variety of partial and total impediments upon the selection of a spouse, and invalidates marriages between certain pairs of individuals. *See, e.g.,* 750 ILCS 5/212 (West 2008).

By contrast, a potential beneficiary of a trust containing a provision similar to the Religious Preference Clause is in no way legally constrained from selecting a lawful spouse of his or her choosing. He or she can properly and voluntarily choose to marry outside the faith and forfeit the legacy.

II. Illinois RFRA Precludes This Court from Voiding the Religious Preference Clause.

Because the Religious Preference Clause is consistent with Illinois public policy, this Court need not consider any further issues. Nonetheless, even if this Court were to rewrite Illinois public policy generally to bar testamentary conditions containing partial restraints on marriage, and assuming that it found (contrary to our argument) that the Religious Preference Clause was in fact a partial restraint on marriage, this Court would be required by Illinois RFRA to

maintain an exception for provisions such as the Religious Preference Clause that are inserted by the testator as a form of religious exercise.

A. Illinois RFRA Applies to Common Law Decisions.

Illinois RFRA applies to common law determinations of this Court, as it was meant to apply to all organs of state government. The purpose of Illinois RFRA is sweeping: to "restore the compelling interest test . . . to "all State and local . . . laws, ordinances, policies, procedures, practices, and governmental actions *in all cases* in which the free exercise of religion is substantially burdened." 775 ILCS 35/10 (West 2008) (emphasis supplied). Its scope is similarly broad, encompassing "all State and local . . . laws, ordinances, policies, procedures, practices, and governmental actions and their implementation, *whether statutory or otherwise*." *Id.* at 35/25 (emphasis supplied). *See also id.* at 35/5 (defining "Government" as "a branch, department, agency, instrumentality and official (or other person acting under the color of law) of the State of Illinois or a political subdivision of the state").

The Illinois legislature frequently makes statutory declarations of public policy, *see, e.g.,* 5 ILCS 140/1 (West 2008) ("it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government"), which would undoubtedly be subject to Illinois RFRA if any such public policy substantially burdened religious practice. There is no reason that judicial pronouncements of public policy should be treated any differently. The Supreme Court of Texas reached exactly this result, explaining that under Federal RFRA, "[o]ne seeking an exemption based on faith from a facially neutral, generally applicable statute, regulation, *or common law*

principle must first demonstrate to the court that the application thereof would substantially burden his or her free exercise of religion." *Tilton v. Marshall*, 925 S.W.2d 672, 677 (Tex. 1996) (emphasis supplied). Illinois RFRA, modeled after federal RFRA, should similarly apply to common law principles of public policy articulated by this Court.

Marsaw v. Richards, 368 Ill.App.3d 418, 431, 857 N.E.2d 794, 803 (2006) is not to the contrary, as it involved an ordinary dispute between competing factions of a church, where defendants invoked Illinois RFRA as a basis for thwarting the court's ruling in plaintiffs' favor. The court explained that Illinois RFRA did not apply because it "expressly authorizes a judicial proceeding to resolve a claim; it is thus difficult to perceive how such a judicial proceeding itself would violate the Act." *Id.* at 431, 857 N.E.2d at 804. The reasoning of *Marsaw*, where the court did not articulate any common law principles of public policy, is inapplicable to this case, where this Court is being asked to promulgate new public policy barring so-called "partial restraints" on marriage that would certainly be subject to Illinois RFRA had a similar determination been made by the Illinois legislature. Furthermore, because the court was called upon to resolve a dispute between two apparently religiously-motivated parties, Illinois RFRA was irrelevant because the court had no choice but to hinder the religious exercise of one of the litigants. By contrast, this Court is now asked to make a public policy determination that interferes with the decedent's religious exercise where upholding the Religious Preference Clause would not infringe on anyone's

religious belief or practices – exactly the situation in which Illinois RFRA is intended to apply.[13]

B. Under Illinois RFRA, This Court Cannot Void the Religious Preference Clause and Similar Religiously-Motivated Testamentary Conditions.

1. Voiding the Religious Preference Clause Would "Substantially Burden" Max Feinberg's Free Exercise of Religion.

A public policy determination voiding testamentary conditions that partially restrain a descendant's choice of spouse (by providing that a descendant who has repudiated the religion by marrying outside the faith shall not inherit) would "substantially burden" "the exercise of religion" of Max Feinberg and other testators who inserted similar testamentary conditions as a means of fulfilling their religious duty to encourage descendants to marry exclusively within the faith. *See* 775 ILCS 35/15 (West 2008).

Under Illinois RFRA, a party can show "substantial burden" by "demonstrat[ing] that the governmental action prevents him from engaging in conduct or having a religious experience that his faith mandates." *Marcavage v. City of Chicago*, 467 F. Supp. 2d 823, 833 (N.D. Ill. 2006). It is irrelevant whether the religious conduct is viewed by the actor as mandatory, because Illinois RFRA precludes the court from inquiring as to "whether . . . the religious

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[13] The authority of *Marsaw* is diminished by the fact that the applicability of Illinois RFRA was not fully briefed, as "the parties' arguments on this point [were] not well developed due to plaintiffs' failure to respond to defendants' contentions on appeal as to [Illinois RFRA]." *Id.* at 431, 857 N.E.2d at 803.

exercise is compulsory or central to a larger system of religious belief." 775 ILCS 35/5 (West 2008) (defining "exercise of religion").

For the reasons discussed above, for Jewish testators such as Max Feinberg, conditioning bequests upon descendants marrying only within the faith is the fulfillment of a religious commandment to perpetuate their Jewish heritage and to encourage their descendants not to intermarry. (We have also shown that this is a well-grounded practice designed to address an existential challenge to the survival of American Jewry.) If Illinois public policy were to void such testamentary conditions, these testators would be unable to engage in this religiously-motivated conduct, meaning that their religious exercise would be "substantially burdened."

2. Even If There Were a Public Policy Determination Voiding the Religious Preference Clause, It Could Not Withstand "Strict Scrutiny."

Under Illinois RFRA, a governmental act that "substantially burdens" religious exercise can only survive if it meets the "strict scrutiny" test. This test is sustained only if the burden imposed by government "(i) is in furtherance of a *compelling governmental interest* and (ii) is the *least restrictive means* of furthering that compelling governmental interest." 775 ILCS 35/15 (West 2008) (emphasis supplied).

A public policy barring testamentary conditions that disinherit descendants who marry outside the faith does not survive the compelling interest branch of the strict scrutiny test because it would leave intact many other ways that an individual could seek to influence his or her descendant's choice of spouse. As the Supreme Court has explained:

> Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.

Lukumi, 508 U.S. at 546-47.[14] Here, the purported rationale for barring testamentary conditions such as the Religious Preference Clause is that they "seriously interfere[] with and limit[] the right of individuals to marry a person of their own choosing." *In re Estate of Max Feinberg*, 383 Ill.App.3d at 997, 891 N.E.2d at 552. (Note that the arguably stronger state interest in not encouraging divorce is not even advanced at this point in the decision, and rightly so because it is not implicated by the Religious Preference Clause.) Yet, never mind that no testator can actually ever interfere with his descendant's choice of a lawful spouse of his or her choosing, a parent or grandparent can, even under the Appellate Court's ruling, "seriously interfere[] with" a descendant's choice of spouse in other ways, by providing different testamentary incentives or disincentives.

First, because there is no forced heirship for descendants in Illinois, testators can inform their descendants that they find intermarriage unacceptable and that they do not plan to support, or provide any legacies for, any descendants who intermarry. Such a testator may then disinherit, by name or class, descendants who intermarried during the testator's lifetime (or, to the same effect,

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[14] The Supreme Court's strict scrutiny analysis is appropriate for consideration when analyzing Illinois RFRA because the stated purpose of Illinois RFRA was "[t]o restore the compelling interest test as set forth in *Wisconsin v. Yoder* . . . and *Sherbert v. Verner*." 775 ILCS. 35/10(b)(1) (West 2008).

provide legacies only to those who had not intermarried). Thus, for example, Erla could have phrased her appointment by specifying that $250,000 (and, had she felt the need to reinforce the default provision of the Max Feinberg Trust, the entire Trust remainder at her death) would pass to each of her children and to her grandson Jon, to the same effect as the language she actually used and without violating the new public policy asserted by the decision below.

Second, even the Restatement (Third) agrees that so long as there is no "dead hand" control, it is permissible to try to influence the conduct of a beneficiary by conditioning a bequest on the legatee not having already married out of the faith prior to the effective date of the disposition. *See* Restatement (Third) of Trusts, cmts. on Clause (c)(i)(2) and Point V, *infra*. Thus, the public policy purportedly adopted by the Appellate Court still permits a testator to condition a promise of a testamentary gift on a descendant not marrying outside the faith as long as the clause is phrased properly (as is the Religious Preference Clause, *see* Point V, *infra*).

The state's interest in barring benefactors from disincentivizing beneficiaries from marrying outside the faith by a testamentary condition cannot be "compelling" if the state allows benefactors to achieve substantially similar results through other means.

III. Voiding the Religious Preference Clause Would Violate the Free Exercise Clauses of the U.S. Constitution and the Illinois Constitution.

The Religious Preference Clause is valid when analyzed purely under Illinois statutory and common law and therefore there should be no need for an inquiry into the constitutional rights of a testator who makes a testamentary

condition as an act of religious exercise, as argued above. If the Court should not reach this conclusion, however, it should hold that the decision below conflicts with both the Free Exercise Clause of the First Amendment to the U.S. Constitution and Article I, § 3 of Illinois's Constitution.

A. Common Law Determinations of Public Policy Are Subject to the Constraints of Federal Constitutional Law.

A common law determination of public policy is potentially subject to First Amendment scrutiny, because when analyzing whether constitutional rights are violated, the Supreme Court does not distinguish between statutory law and common law. For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), the Supreme Court rejected the argument that a common law libel judgment was immune from First Amendment review because it involved a common law dispute between private parties. The Supreme Court explained that defendant's constitutional rights were implicated because the state court "applied a state rule of law which [defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press," meaning that "[i]t matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute." *Id. See also Hughes v. Superior Court of Cal.,* 339 U.S. 460, 466-467 (1950) ("The fact that California policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial . . . . Rights under [the Fourteenth] amendment turn on the power of the State, no matter by what organ it acts.") (citations and quotations omitted).

B. Religious Exercise is Selectively Burdened by Application of a Public Policy Determination Barring the Religious Preference Clause.

The Appellate Court's common law determination that the Religious Preference Clause is void "under Illinois law and under the Restatement (Third) of Trusts . . . because it seriously interferes with and limits the right of individuals to marry a person of their own choosing," *In re Estate of Max Feinberg*, 383 Ill.App.3d at 997, 891 N.E.2d at 552, is invalid under the Free Exercise Clause of the First Amendment because it selectively burdens religiously-motivated conduct.

According to the Supreme Court, even if a law appears to be one of general applicability, if its implementation imposes, in a "selective manner . . . burdens only on conduct motivated by religious belief," then the Free Exercise Clause demands that the governmental act must satisfy "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 543, 546. For this reason, if "an official action . . . targets religious conduct for distinctive treatment," the government cannot avoid strict scrutiny "by mere compliance with the requirements of facial neutrality." *Id.* at 534. Furthermore, government cannot "decid[e] that secular motivations are more important than religious motivations," *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002), even if the government's motivation is not "based on animus." *Shurm v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.).

The Supreme Court addressed the selective targeting of religious activity in *Lukumi*. After members of the Santeria church announced plans to perform animal sacrifices, the city of Hialeah passed several ordinances that were designed

to prevent this practice. 508 U.S. at 527. The Supreme Court found that despite the fact that these ordinances never singled out Santeria worship, they were nevertheless not neutral, but rather impermissibly targeted the Santeria's religious practice for the following reasons:

> The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

Id. at 542. Several Federal appellate courts have similarly found that government action was unconstitutional because it selectively targeted religious practices. *See Shrum*, 449 F.3d at 1144 (police chief could violate the Free Exercise rights of officer where officer was allegedly "moved to the day shift precisely before of [the police chief's] knowledge of [the officer's] religious commitment"); *Tenafly Eruv*, 309 F.3d at 167-68 (municipality violated Free Exercise clause by granting exemptions to ordinance barring placing items on poles for secular purposes while seeking to remove objects from poles because they were of a religious nature); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.) (police department violated Free Exercise clause by allowing individuals with a skin condition to wear beards but prohibiting Muslims to wear beards because it "makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons").

As is evident from a review of the last century of case law as well as the Restatement (Third) itself, the novel public policy articulated by the Appellate

Court, although seemingly neutral, would in practice prohibit only the religious expression of testators – often, although not exclusively, Jewish – who, as a means of religious exercise, condition bequests upon descendants not marrying outside the faith. For example, Restatement (Third), § 29(c) cmt. j, which the Appellate Court seeks to adopt, contains several illustrations of so-called "partial restraints" on marriage. Only one is prohibited, Illustration 3, a testamentary condition that results in forfeiture of trust benefits if the beneficiary marries out of the religion. By contrast, each of the Restatement's other illustrations of restraints on marriage, all of which are purely secular in nature, are deemed permissible. Indeed, in Comment k to § 29(c), the Restatement (Third) specifically explains that it disapproves of testators exercising their religious beliefs that their bequests should be used to influence "the future *religious* choices of beneficiaries" (emphasis supplied).[15] The Free Exercise Clause of the First Amendment precludes this Court from giving effect to the anti-religious position of the Restatement (Third).

The selective burden that the Appellate Court's decision would impose on religious practice is confirmed by the fact that the decision below does not identify a single case where a court invalided a testamentary condition for being too burdensome on a beneficiary's choice of spouse where the condition was inserted for secular reasons. (Invalid provisions designed to induce divorce from an existing spouse violate a much narrower and different public policy and have

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[15] In fact, the Religious Preference Clause looks only at a descendant's choice of spouse and otherwise has no impact upon a descendant's religious practice (or lack thereof).

nothing to do with the Religious Preference Clause.) Because the public policy articulated by the Appellate Court, although facially neutral, would in fact selectively target religious practice, it must withstand strict scrutiny, which it cannot do for the reasons discussed above.

C. A Public Policy Determination Interfering with First Amendment Free Exercise Rights Also Interferes With Testator's Rights Under the Illinois Constitution.

Because a common law determination barring so-called partial restraints on marriage violates the Free Exercise Clause of the First Amendment insofar as it is applied to religiously-motivated provisions like the Religious Preference Clause, *see* Section IV.B, *supra*, it also violates Article I, § 3 of the Illinois Constitution. The free exercise rights under Article I, § 3 of Illinois's constitution have been found identical to those provided by the First Amendment's Free Exercise Clause. *See Mefford v. White*, 331 Ill. App. 3d 167, 178, 770 N.E.2d 1251, 1260 (2002) ("While the text of Illinois' constitutional guarantee of free exercise is different from that in the United States Constitution, the resulting analysis is the same."). Thus, the Illinois Constitution precludes adoption of a public policy determination that would void the Religious Preference Clause for the same reason that such public policy would be prohibited by the First Amendment to the U.S. Constitution.

IV. Enforcement of the Religious Preference Clause Does Not Run Afoul of Any Constitutional Restrictions on State Action.

A. Enforcing the Religious Preference Clause Does Not Implicate the Establishment Clause.

The Establishment Clause is not at issue unless there is state action. *See, e.g. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("With a few

exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."). Illinois' enforcement of the Religious Preference Clause in a donative testamentary instrument does not constitute state action. The United States Supreme Court has found that judicial enforcement of a private arrangement constitutes state action only when it involves racial discrimination – *see Shelley v. Kraemer*, 334 U.S. 1 (1948), and this Court, like others throughout the nation, has been unwilling to apply *Shelley* outside that context. *See People v. Brown*, 169 Ill.2d 94, 107, 660 N.E.2d 964, 970 (1995) (noting that "courts and commentators have viewed the *Shelley* Court's finding of State action with suspicion"); *see also Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("The holding of *Shelley*, however, has not been extended beyond the context of race discrimination."); *Parks v. "Mr. Ford"*, 556 F.2d 132, 136, n.6a (3d Cir. 1977) ("*Shelley* . . . has been limited to cases involving racial discrimination."); *Golden Gateway Center v. Golden Gateway Tenants Assoc.*, 26 Cal. 4th 1013, 1034 111 Cal.Rptr.2d 336, 352 (2001) (noting that *Shelley* "has largely [been] limited" to cases involving racially restrictive covenants).[16]

More directly, the argument that the Establishment Clause is violated by judicial enforcement of testamentary conditions that involve religion has been considered and rejected by several state supreme courts. For example, in *In re*

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[16] The absence of state action is also fatal to Michele's claim that enforcing the Racial Preference Clause would violate Art. I, § 3 of the Illinois Constitution. *See In re Adoption of K.L.P.*, 198 Ill.2d 448, 465, 763 N.E.2d 741,751 (2002) ("[T]his court has repeatedly expressed reluctance to base a finding of state action on the mere fact that a state court is the forum for the dispute.").

Estate of Laning, 462 Pa.157, 168, 339 A.2d 520, 525-26 (1975), the Pennsylvania Supreme Court concluded that "Pennsylvania law providing for the judicial enforcement of testamentary conditions, whether religious or otherwise, do[es] not constitute a 'law respecting an establishment of religion'" because "the courts stand ready to effectuate the testator's intention without regard to what religious or irreligious doctrine he wishes to advance." *See also United States Bank of Portland v. Snodgrass*, 202 Or. 530, 543, 275 P.2d 860, 866 (1954) (bequest conditioned upon beneficiary marrying within the faith did not violate the Establishment Clause because the First Amendment "has no effect upon the transactions of individual citizens and has been so interpreted").

Finally, the absurdity of the argument that the Establishment Clause applies to this case is belied by the fact that it leads to the conclusion that judicial enforcement of any bequest with a religious motive, such as a charitable bequest to a religious institution, would be impermissible – a position that no one has advocated.[17]

B. Enforcing the Religious Preference Clause Will Not Lead to Judicially Approved Racial Discrimination or an Equal Protection Violation.

In his concurring opinion in the decision below, Justice Quinn cites *Shelley* in conjunction with his speculation about the possibility that enforcement of a testamentary condition such as the Religious Preference Clause would lead

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[17] This case does not require this Court to determine "who is a Jew," as it is not disputed that Michele married a non-Jewish spouse. *See In re Estate of Max Feinberg*, 383 Ill.App.3d at 993, 891 N.E.2d at 550. Thus, any suggestion that the Establishment Clause might be triggered by such a question is not before this Court.

"the courts to being required to enforce the worst bigotry imaginable." *In re Estate of Max Feinberg*, 383 Ill. App. 3d at 999, 891 N.E.2d at 554. Justice Quinn's reference to *Shelley* suggests that he is concerned about a testamentary condition that promotes racial discrimination. That issue, however, is not before this Court, because the Religious Preference Clause turns on the religious – not racial – identity of a descendant's spouse. Judaism, like most world religions, has practitioners of every racial background including, for example, Beta Israel and Falashmura Jews from Ethiopia, Kaifeng Jews from China, Bene Israel, Bagdadi and Kochin Jews from India, and converts to Judaism from a panoply of ethnic and racial origins. Usiel Oscar Schmelz & Segio DellaPergola, *Demography*, in 5 Encyclopedia Judaica 553, 571 (Michael Berenbaum & Fred Skolnik eds., Macmillan Reference USA, 2d ed. 2007). Moreover, discouraging marriage of a descendant outside of one's religion, as a means to preserve one's faith heritage, is entirely different from discouraging marriage to those of a specific, other race, based on racial animus (e.g., a case in which the will of a white supremacist were to cut off any descendant who marries an African-American). In any case, this Court need not address the enforcement of a racially discriminatory testamentary condition until such a matter is before it.

Additionally, Justice Quinn's citation to *Shelley* seems to be part of his discussion of public policy. Even he does not suggest that there are any Equal Protection issues in this case, and are course there are none (wholly apart from the absence of state action as demonstrated above). By analogy, in the employment context, discrimination against religion is generally prohibited by Title VII of the

Civil Rights Act of 1964, but Section 702 of that Act specifically exempts a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Similarly, enforcing religiously-motivated testamentary bequests conditioned on descendants not marrying outside the faith does not run afoul of the Equal Protection Clause.

V. The Religious Preference Clause is Valid Even Under Restatement (Third).

A. The Religious Preference Clause Only Applies to Past Conduct, Which is Permitted by Restatement (Third).

While it is true that Restatement (Third) prohibits imposing certain restrictions on marriage as a condition to a donative disposition (wrongly, in our view), it also is clear that its prohibition applies *only* to a condition which is dependent on the future conduct of a potential beneficiary (that is, after the effective date of the disposition). The "scope note" to § 29(c) of the Restatement (Third) states:

> The policies restraining deadhand control in Clause (c) of this Section [i.e., the section which invalidates trust conditions that are contrary to public policy] do not apply to outright dispositions conditioned on conduct prior to the death of the testator, or prior to the time a revocable trust becomes irrevocable. *See* Restatement Second, Property (Donative Transfers) § 6.1, Comment *c*; although the Property Restatement's rules on behavior restraints apply to nontrust as well as trust dispositions in various forms, those rules (as here) *only address restraints on future conduct*.

Restatement (Third) of Trusts § 29 cmts. on Clause (c)(i)(2) (emphasis supplied).

The Restatements are clear that in order for a provision to be within the scope of the prohibition, it "must be dependent upon the future conduct of the

devisee or legatee which the disposition is designed to influence." Restatement (Second) of Property: Donative Transfers § 6.1 cmt. c (1983). Even Restatement (Third) § 29(c), comment j, illustration 3 itself, on which the decision below rests, involves a forfeiture of *future* trust benefits upon marriage out of the faith *after* the beneficiary's rights in the trust have become fixed.

If, however, by the time that the disposition becomes effective the conduct which has been proscribed by the testator already has taken place, then the condition will be valid even if the *same* condition otherwise would be invalidated if it relates to future conduct. Thus, with regard to past conduct in the context of a testator providing for a beneficiary only if he or she was unmarried at the time of his death, the Restatement of Property states "[t]he status is fixed; either the beneficiary meets the description set forth in the will as an unmarried person, or does not meet that description." *Id.* The Restatement goes on to state that "[t]his is equally true where the limitation is not restricted to the period prior to death, but the devisee or legatee has actually married within that period. Under such circumstances, no prospective operation of the restraint is normally possible as the devisee or legatee has already placed the benefit beyond his or her grasp." *Id.*

Even assuming that Restatement (Third) § 29(c) should be applied to decide the validity of the Religious Preference Clause in this case, the Appointments by Erla of $250,000 outright to each of her grandchildren at her death subject to compliance with the Religious Preference Clause clearly would be upheld under the rule set forth in the Restatement (Third) because the condition applied only to past conduct. Erla's appointment became effective only

at her death and at that time the disposition was absolute and outright. At the time of her death, the marital and beneficiary status of each of the grandchildren would already be fixed: either the grandchild was unmarried or had married only a Jewish spouse (or a non-Jewish spouse who converted within a year of the marriage), in which case the grandchild would be entitled to the Appointment, or the grandchild had already married outside the Jewish faith, in which case he or she did not meet the condition for receiving his or her Appointment. No future conduct was necessary by the grandchildren in order to qualify for or lose the Appointments.

In fact, at Erla's death all of her grandchildren had married and four of them had married outside the Jewish faith. *See In re Estate of Max Feinberg*, 383 Ill.App.3d at 993, 891 N.E.2d at 550. It is clear under the notes to § 29(c) of the Restatement (Third) Trusts, and under § 6.1 of the Restatement (Second) Property, Donative Transfers, which is incorporated into Restatement (Third) Trusts, that under these facts the Religious Preference Clause is valid and the four grandchildren who had already married non-Jewish spouses properly should be deemed deceased for purposes of the Appointments. The Appellate Court, which held otherwise, simply applied the wrong rule of the Restatements to the undisputed facts.

The same analysis applies to the disposition of the balance of the remainder of Max's Trust as well. First, the grandchildren had no entitlement or present interest in the Trust so long as either Max or Erla was alive. The effective date of their entire remainder interest was Erla's death, by which time they had all

married. Second, the existence of Erla's power of appointment over all of the Trust assets suspended during her life any expectancy of each grandchild to receive the remainder that might otherwise have arisen at Max's death. The power of appointment permitted her to insist on compliance with the condition of the Religious Preference Clause, or not, or disinherit any of the grandchildren for any reason or for no reason, as she chose. *See, e.g., Young v.* 19 Ill.2d at 506, 167 N.E.2d at 192. While ultimately she exercised her power of appointment only with respect to part of the Trust (represented by the sum of the seven Appointments), the existence of the power alone – that is, Erla's ability to alter the dispositive scheme of the entire Trust – means that the disposition of all of the remaining Trust assets at her death pursuant to the Trust remained revocable and mutable, and speaks as of the moment of her death.[18] Since at her death four of her grandchildren had already married outside the Jewish faith, the condition imposed on them by the Religious Preference Clause related to their past conduct which already made them ineligible as beneficiaries as of the moment of Erla's death, and accordingly their right to any assets from the Trust has been properly vitiated.

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[18] The Restatements expressly recognize that their concerns about conditions placed on the gift arise only after a gift becomes irrevocable such that the person in control of the gift no longer has any ability to change its terms to reflect changed circumstances or changed wishes. *See* Restatement (Second) of Prop. § 6.1 cmt. c. It follows that where any person – even not the original testator – still has the ability to change the terms of the gift by a power of appointment granted by the original testator, the gift is not deemed irrevocable for purposes of application of the Restatements' rules until after the person with that power no longer can exercise it.

Erla could have exercised her power of appointment more completely and specified that of her grandchildren only Jon would inherit a portion of the balance of the Trust. By choosing not to disturb the Religious Preference Clause of the Trust, which had exactly the same effect, she ratified it effective as of the date of her death.

CONCLUSION

For all the foregoing reasons, *amici curiae* Agudath Israel of America, National Council of Young Israel and Union of Orthodox Jewish Congregations of America respectfully urge this Court to reverse the decision of the Appellate Court and affirm that testamentary conditions that are contingent upon a descendant not marrying within the faith are valid.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 47 pages.

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One of the attorneys for Agudath Israel of America, National Council of Young Israel and Union of Orthodox Jewish Congregations of America