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**IN THE  
DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT**

**CASE NO. 96 CV 2266  
COURT 12  
CHAPTER 60**

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**IN THE MATTER OF THE MARRIAGE OF  
JULIE ANN BERGMANN**

*Petitioner*

v.

**ROBERT SOKOL**

*Respondent*

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**BRIEF OF AMICI CURIAE  
AGUDATH ISRAEL OF AMERICA, THE CENTER ON CHILDREN AND FAMILIES,  
JUSTICE FOR CHILDREN PROJECT, OREGON CHILD ADVOCACY PROJECT,  
AND PROFESSORS CATHERINE J. ROSS, THERESA GLENNON, LESLIE HARRIS,  
JOAN HEIFETZ HOLLINGER, JANA B. SINGER AND MERLE WEINER**

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## **INTEREST OF THE *AMICI CURIAE***

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish advocacy organization, with constituents and affiliated chapters all across the United States, including Kansas, which has a long history of presenting or participating in *amicus curiae* briefs in cases affecting religious liberty in general, and the rights of Orthodox Jews.

The Center on Children and Families (“CCF”) at the Fredric G. Levin College of Law is based at University of Florida, the state’s flagship university. CCF’s mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF’s directors and associate directors are experts in children’s law, constitutional law, criminal law, family law and juvenile justice, as well as related areas such as psychology, sociology, education and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in family courts, dependency and juvenile justice systems.

The Justice for Children Project is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Founded in January 1998, the Project’s mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children’s rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its *amicus* work, the Justice for Children Project strives to advance the cause of children’s rights.

The Oregon Child Advocacy Project at the University of Oregon School of Law pursues systemic legal change to protect children's interests and their relationships with nurturing adults. Faculty and students associated with the project work on legislative proposals and provide research assistance and consultation to attorneys in cases that advance the mission of the Project, as well as sponsoring conferences and other educational activities.

Professor Catherine J. Ross is Professor of Law at the George Washington University Law School,<sup>1</sup> where she teaches courses on children, family and state, family law, and constitutional law. Professor Ross is past-Chair of the American Bar Association's ("ABA") Steering Committee on the Unmet Legal Needs of Children, and currently Chairs the Committee on the Rights of Children of the ABA's Section on Individual Rights and Responsibilities. She serves on the editorial board of the *Family Courts Review*, and has served on the editorial board of the *Family Law Quarterly*. She was the principal author of the landmark ABA report, *America's Children at Risk: An Agenda for Legal Action*, and is the author of *Contemporary Family Law*, St. Paul: Thomson/West, 2006 (with Douglas E. Abrams, Naomi R. Cahn and David D. Meyer) and many scholarly articles on related topics.

Professor Theresa Glennon is the Jack Feinberg Professor of Law at the James E. Beasley School of Law at Temple University. Her areas of expertise involve the legal rights of children and families, with particular focus on family law, education, and disability. Her extensive scholarship focuses on the interests of children and families in the education, child welfare and private family law systems. Most recently, she was a visiting fellow at the Centre for Family research, University of Cambridge, England. She has presented on issues concerning families

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<sup>1</sup> The references to the affiliations of Professors Ross, Glennon, Harris, Heifetz Hollinger, Singer and Weiner are solely for identification purposes.

involved in divorce to the Commission on European Family Law, American Association of Law Schools and Pennsylvania Bar Institute.

Professor Leslie Harris is Dorothy Kliks Fones Professor of Law at the University of Oregon School of Law. She is the co-author of textbooks about family law and children and the law. Professor Harris has also published numerous articles on family law, juvenile law, criminal law, and physician-assisted suicide. She is an elected member of the American Law Institute and serves on advisory boards for Oregon's Juvenile Court Improvement Project and other organizations.

Professor Joan Heifetz Hollinger teaches family and child welfare law at the University of California, Berkeley, Boalt Hall School of Law, and directs its Child Advocacy Program. She is a leading American scholar on adoption, child custody and other family law matters and has appeared as *amicus curiae* on behalf of children in a number of precedent-setting cases, including *Troxel v. Granville*, 530 U.S. 57 (2000), *In Re Bridget R.*, 41 Cal. App. 4th 1483 (1996), *In re Nicholas H.*, *Sharon S. v. Superior Court*, 31 Cal. 4th 417 (2003), and *Elisa B. v. Sup. Ct El Dorado Co.*, 37 Cal. 4th 108 (2005).

Jana B. Singer is Professor of Law at the University of Maryland School of Law and has written widely on family law, constitutional law, and children's issues. She is coauthor of *Family Law: Cases, Materials, and Problems* (2d ed., 1998) and coeditor of a forthcoming book on Resolving Family Conflicts. Professor Singer is a member of the American Law Institute, a liaison member of the American Bar Association Commission on Women in the Profession, and a past Chair of the Family and Juvenile Law Section of the American Association of Law Schools.

Professor Merle Weiner is a Professor of Law at the University of Oregon School of Law where she is also the Dean's Distinguished Faculty Fellow. She teaches family law, international family law and domestic abuse law. She is the co-author of the first comparative and international family law casebook, *Family Law in the World Community*. She has written extensively on international child abduction, and has trained judges on international child abduction law for the National Conference of Juvenile and Family State Court Judges, has served as an expert witness in cases involving international child abduction, and attended the Special Session to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction in the fall of 2007 as a delegate of the International Society of Family Law.

The decision of this Court will likely have a direct and substantial impact on the interests which each of the *amici* have long promoted and with which they are deeply concerned. These interests, which vary by *amici*, include the rights of children and their families, religious liberties generally and the rights of Orthodox Jews in particular.

The stakes in this case are high. This Honorable Court will not simply be deciding which parent Ephraim Sokol<sup>2</sup> will live with and which parent will ultimately exercise decisions in respect of his education, care and development. Inextricably intertwined and forming a subtle, yet highly pertinent and important backdrop to the dispute at bar, are broader issues that impact on the fundamental Constitutional rights of adolescents. These sacrosanct rights relate to how these young adults wish to express themselves generally and, specifically, how they may wish to express their religious convictions and practice their faith in accordance with their beliefs. *Amici* seek to protect the rights of teens to freely exercise the faith of their choosing.

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<sup>2</sup> Ephraim Sokol is the name that the Court used in making its orders/directions leading to the present proceedings. *Amici* understand that Ephraim is also known as Yitzchak or Yitz Sokol.



*Amici* fully accept that the law may, in certain circumstances, be applied to circumscribe these free exercise and free expression rights in the case of children because the state's obligations to and authority over children is greater than that over adults. For example, the law may not support a child choosing his or her own school or religion in conflict with the child's parents. None of these circumstances apply here. As such, we are concerned that a ruling in this case which does not acknowledge the rights of the adolescent afforded by both the Kansas Constitution and the U.S. Constitution may have far-reaching consequences damaging to children's rights and religious liberty.

*Amici* take no position whatsoever as to the custody, visitation and other family law issues before the Court. We would not presume to interject ourselves in a custodial dispute, nor to attempt to suggest to this Honorable Court which parent should have custody of Ephraim. We do, however, feel compelled to call upon this Honorable Court to recognize the constitutional rights of children and their rights to free expression and the free exercise of their religious beliefs. It is, of course, at the discretion of this Honorable Court to determine what living arrangement would be in the Ephraim's best interests and, as an extension of this general issue and as a part, and only a part, of the equation in determining this issue, how his rights to observe his religion can best be protected.

Petitioner, through her counsel, has consented to the filing of this brief; Respondent has not.

#### **PRELIMINARY STATEMENT**

The Kansas and U.S. Constitutions protect the personal exercise of free expression, including the right to practice a particular religious faith. Those protections extend to the child who is the subject of this litigation. The arguments set forth below focus exclusively on religious freedom under the Kansas and United States Constitutions. *Amici* take the position that

any decision which does not fully take into account and give deference to the child's religious rights cannot, by definition, be in the child's best interests. *Amici* would urge the Court to consider appointing independent counsel for Ephraim should the Court have any question as to what is in Ephraim's best interest in respect of his religious freedoms.

*Amici* assume, for purposes of this brief, that allegations of interference with Ephraim's rights of religious free exercise and free expression state a colorable claim. *Amici* understand that Ephraim was born to two Orthodox Jewish parents and he was raised from birth to be an Orthodox Jew. He attended Orthodox Jewish schools consistently until 2004, when he returned to Kansas pursuant to a Kansas court order compelling him to live with his father. *Amici* understand that Ephraim wishes to adhere to the tenets and practices of Orthodox Judaism. They understand that whenever the child is in his father's care and control he has been limited and, in some cases, even prohibited, with judicial acquiescence, from freely exercising his constitutional rights of free exercise and free expression. Specifically, it is alleged that there are times when the young man is precluded from:

- observing the laws of the Jewish Sabbath, religious festivals and other days of religious significance (when his father organizes activities that violate the religious laws governing actions and behavior on these days);
- adhering to Jewish dietary laws (when compelled to eat in non-kosher dining establishments and denied the right to eat food that he brings to his father's house);
- attending a school offering both secular and religious study and consistent with his religious beliefs;
- praying;
- wearing clothes of his choice and a yarmulke (including at times when his father has forced him to change in the father's garage before entering his house after visitation with his mother and otherwise); and
- generally keeping the tenets of his religion.

*Amici* record their concerns and come before this Honorable Court because of the role that the judiciary may have played in the past in denying Ephraim's ability to practice his religion. *Amici* understand that the current court has shown considerably more deference and sensitivity to the religious dimensions of this case, and has shown far more concern for Ephraim's religious preferences than his predecessors, in, for example, allowing him to spend most Sabbaths and almost all religious holidays in an Orthodox Jewish environment. Nonetheless, the standing court orders could well continue to interfere with Ephraim's religious exercise and liberties when he is in his father's physical custody based on the facts as assumed.

*Amici* believe it is harmful to an adolescent child to be thrust into an environment, in effect under court order, that is not friendly to, and is in part in conflict with, his ability to follow the major tenets of his faith on a consistent basis or to practice his faith in a manner consistent with his desires. No government instrumentality, through the courts or otherwise, may lawfully infringe on such rights of free expression and free exercise of a competent adult. *Amici* respectfully submit that this fundamental rule extends – by operation of the Kansas Constitution, the U.S. Constitution and accepted case law – to children and that the courts may not limit a 13 year old child's rights of free exercise and expression, which are consistent with the choice his parents made together when he was an infant, and to which his father has since become hostile.

## ARGUMENT

### I. THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION PROHIBITS COMPELLING AN ADOLESCENT TO VIOLATE HIS RELIGIOUS BELIEFS.

The Bill of Rights set forth in the Kansas Constitution protects the fundamental rights of all citizens to practice the faith of their choosing. It provides: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; *nor shall any control of or interference with*

*the rights of conscience be permitted.” Kan. Const. B. OF R. § 7 (emphasis added). The constitution does not limit its protections to those who have reached the age of majority.*

Kansas courts have consistently held that the protections afforded by the Constitution extend to minors in many contexts. For example, in *State v. Young*, 220 Kan. 541 (1976), the Supreme Court held that minors were entitled to constitutional protections in criminal matters. The court noted that “the starting point for an analysis of the constitutional rights of juveniles is *In re Gault*.” *Id.* at 552. In *Gault*, the United States Supreme Court noted that children “are possessed of fundamental rights which the State must respect.” 387 U.S. 1, 13 (1967). In a paternity case, the Court of Appeals held that “[i]t is inconceivable to us that a child would not have a due process right.” *Ferguson v. Winston*, 27 Kan. App. 2d 34, 39 (Ct. App. 2000). In *Montoy v. State*, 282 Kan. 9 (2006), the Supreme Court discussed what it termed as “the constitutional right of all Kansas children to a suitably funded education.” *Id.* at 31.

The decisions set forth above are significant and highly instructive in this context. Kansas courts have demonstrated that they will protect the constitutional rights of all Kansas citizens, including those that have not yet reached the age of majority. Religious liberty is no less a fundamental right than are the rights of criminal defendants, the subjects of paternity disputes or a student’s right to an education. The decisions cited above provide an incontrovertible legal basis under Kansas law that minors enjoy the same constitutional rights as adults. In short, those fundamental liberties and protections conferred by the Bill of Rights apply to children just as they do to adults. As such, the Kansas courts must safeguard children’s fundamental liberties and protections in this area.

All Kansas citizens have inviolable rights to worship and conscience that are guaranteed by the Kansas Bill of Rights. No Kansas court action may compel a Kansas citizen, including a

minor, to violate the tenets of his or her faith. Regardless of how this Honorable Court resolves the pending dispute of custody and visitation, *amici* respectfully submit that this Honorable Court should take all necessary steps to ensure that its authority is not used to support one parent's efforts to compel Ephraim to violate his religious beliefs and practices, which he shares in common with his other parent. Conversely, *amici* believe that this Honorable Court's authority should be invoked to protect his right to exercise his religion freely without "interference with the rights of conscience." Ephraim's rights to exercise and express his religious beliefs may well flow initially from his parents' protected rights to teach their children the tenets and practices of their religion. However, he enjoys his rights independent of his parents' rights, irrespective of the fact that the parents' rights and Ephraim's rights may well be inextricably linked.

Given the language of the Kansas Bill of Rights and in light of the consistent application of constitutional protections to the rights of minors, *amici* respectfully submit that this Court is duty-bound to allow a mature child who holds a sincere religious belief to practice his chosen faith. To do otherwise would not be consistent with the child's best interests. The significance of this result is all the more pronounced because Ephraim, within a matter of weeks, will reach the age of religious and cultural majority and will be treated as an adult for all intents and purposes under the laws that define his religious beliefs and practices.

While he will remain a minor for purposes of the laws of the State of Kansas, the views of a 13-year-old – including those that relate to religious belief, practice and expression – should be given weight in decisions about custody and the terms that govern custodial arrangements. Indeed, K.S.A. 1999 Supp. 60-1610(a)(2)(A) provides that courts should consider all the relevant factors, including the following: "The desires of the child as to the child's custody or residency." *See also Greene v. Greene*, 201 Kan. 701, 704, 443 P.2d 263 (1968) ("[a] child's preference in

custody matters may, of course, be considered as an aid to the court in making a proper [custody] order”); accord *Hehman v. Hehman*, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (N.Y. Sup. Ct. 1958) (although believing the 13-year old child should be raised a Catholic, the court made its determination subject to the child’s wishes).

## **II. THE UNITED STATES CONSTITUTION PROHIBITS COMPELLING AN ADOLESCENT TO VIOLATE HIS RELIGIOUS BELIEFS.**

The United States Supreme Court has clearly and consistently ruled that children are entitled to the protections afforded by the United States Constitution and that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *In re Gault*, 387 U.S. 1, 13 (1967). In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) the Supreme Court claimed that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.” In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the Supreme Court further clarified that “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights.”

The freedom to exercise one’s religion is among the panoply of constitutionally-protected rights enjoyed by children. As early as *Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court expressly held that children could not be compelled to engage in activity in school that ran contrary to their own personal religious beliefs. The court found the “compulsion of students” to violate their own personal beliefs to be repugnant to the Constitution. *Id.* at 631. Similarly, in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165 (1944) the Supreme Court stated that “[t]he rights of children to exercise their religion . . . as against preponderant sentiment and assertion of state power voicing it, have had recognition here . . .” Justice

Murphy observed in his dissent that the Constitution protects the rights of children, even an 9 year old, to practice their own religion:

The record makes clear the basic fact that . . . the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. . . . Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare.

321 U.S. at 171-172.

Justice Murphy was clearly concerned that the majority did not afford sufficient protection, let alone any protection, to the Constitutional rights of an 9 year old engaged in “religious evangelism” in 1943. If Justice Murphy recognized that an 9 year old had her own serious religious beliefs that should be accorded respect in 1943, long before the advent of children's rights, all the more so in 2007. Recently, a lower federal court summarized the law, noting that “[c]ourts have regularly upheld the right of a mature minor not emancipated; *to pursue his or her own choice of religion regardless of parental attempts to exercise their Constitutional right to raise their children in their own faith.*” *Whalen v. Allers*, 302 F. Supp. 2d 194 at 204 (S.D.N.Y. 2004) (emphasis added).

The free exercise protections afforded to minors under the Supreme Court’s jurisprudence have been the subject of much discussion among scholars and commentators. *See e.g. Note, Children As Believers: Minors’ Free Exercise Rights and The Psychology of Religious Development*, 115 Harv. L. Rev. 2205, 2205-2206 (2002) (“in the free exercise context, courts have largely ignored issues of maturity, instead treating child and adult plaintiffs more or less identically”); Catherine J. Ross, *An Emerging Right for Mature Minors To Receive Information*, 2 U. Pa. J. Const. L. 223, 265 (1999) (“By a null hypothesis, the Supreme Court has accepted the notion that even elementary school children can develop deeply held religious beliefs that

command respect under the Constitution”). The role of ideology and religion in custody disputes, and particularly the free speech and free exercise implications of such decisions, has also been the subject of an exhaustive scholarly review. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 NYU L. Rev. 631 (2006).

*Amici* respectfully submit that the Constitutional protections afforded by the Free Exercise clause of the First Amendment are applicable to this action. Ephraim is an intelligent adolescent who the record suggests has his own religious beliefs consistent with the way he was raised and shaped by his life experiences. This Honorable Court should hear his views and should ensure that its actions are in line with the young man’s religious beliefs. Whatever decision the Court takes on the issue of custody, Ephraim should be allowed to live his life in accordance with his religious convictions, which means allowing him to keep religious dietary laws, observe the laws of Sabbath, or receive an education in an environment that is consistent with his religious beliefs and in other ways.

The U.S. Constitution, the Bill of Rights and the rulings of the Supreme Court and lower level courts all mandate that the religious views and beliefs of Ephraim be respected and that the Court not force him to act in a manner inconsistent therewith. A ruling to the contrary would effectively bring the state’s power to bear to leave the child no choice but to violate his religion and would amount to a violation of the free exercise clause. *See Lee v. Weisman*, 505 U.S. 577 (1992); *Board of Education v. Mergens*, 496 U.S. 226, 258 (1990) (Kennedy, J., concurring); *see also Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy J., concurring in part and dissenting in part) (stating that “government may not coerce anyone to support or participate in any religion or its exercise”). Of course any ruling that protects the minor’s free exercise rights should not interfere with either parent’s freedom to express his or her own beliefs and



preferences to their children in a manner that is consistent with the child's general welfare generally and, specifically, cannot be deemed to be harassing the child. *See generally* Volokh, *supra*.

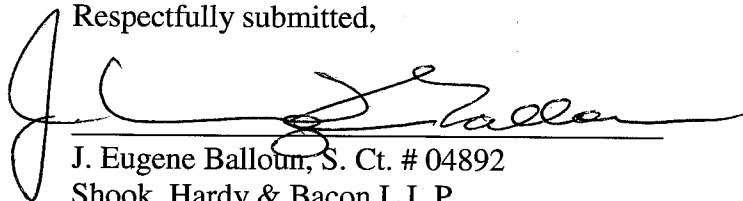
In sum, based on the unambiguous rulings of the Supreme Court set forth above, the U.S. Constitution demands that the wishes of a 13 year old child raised as an Orthodox Jew to live in accordance with his faith be respected. Further, the notions of fundamental fairness and equity further underscore the compelling need to respect the religious choices of a child who seeks to practice his chosen religion.

### CONCLUSION

For the reasons set forth above, *amici* respectfully submit that the constitutions of Kansas and the United States require that the child's religious choices be respected and protected. Therefore, this Honorable Court has a constitutional duty to ensure that he be able to live his life in accordance with the tenets of the faith that he has chosen.

Dated: May 18, 2007

Respectfully submitted,



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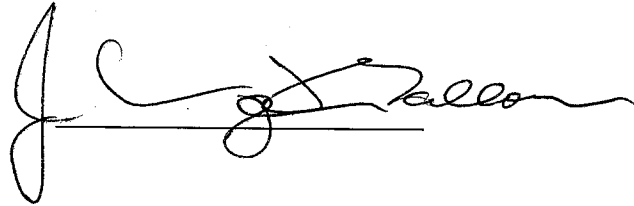
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**CERTIFICATE OF SERVICE**

On May 18, 2007, I served all counsel of record, listed below, with the foregoing Brief of Amicus Curiae by e-mail transmission and Federal Express delivery:

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A handwritten signature in black ink, appearing to read "Robert A. Sokol", written over a horizontal line. The signature is cursive and stylized.