

**IN THE
COURT OF APPEALS OF MARYLAND**

No. 74

September Term 2021

FRIENDS OF LUBAVITCH, INC.

v.

ROBIN ZOLL ET AL

**BRIEF AMICUS CURIAE OF
ORTHODOX JEWISH CHAMBER OF COMMERCE**

**IN SUPPORT OF PETITION FOR CERTIORARI OF FRIENDS OF
LUBAVITCH, INC.**

**On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland**

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TABLE OF CONTENTS

Introduction and Interest of Amicus Curiae	5
I. The Federal RLUIPA Complaint Details how the Unlawful Discriminatory Conduct of Baltimore County Officials Resulted in Draconian Decisions of Maryland’s Courts.	7
II. Court-Ordered Demolition of a Building Used for Religious Instruction, Observance, and Worship Would Taint Maryland’s Compelling Historical Tradition of Religious Toleration and Protection of Religious Free Exercise.	11
III. The Jewish People Are Particularly Sensitive to the Demolition of Religious Sites Because Such Violence Has Been Perpetrated against Jewish Communities for more than 2500 Years.	17
Conclusion	18

TABLE OF AUTHORITIES

Constitutions

Constitution of Maryland (1776)	12
Maryland Declaration of Rights (1776), Articles 33 and 35	6

Statutes

Md. Code Ann., Com. Law § 14-905	15
Md. Code Ann., Health-Gen. 5-301(b) (LexisNexis 2010)	15
Baltimore City Council Bill No. 07-0648 (2007)	15

Cases

Barghout v. Mayor & City Council, 325 Md. 311, 322, 600 A. 2d 841, 846 (1992)	15
Esso Standard Oil Co. v. Mullen, 200 Md. 487, 90 A.2d 192 (1952)	9
Ford v. Union Trust Co. of Maryland, 196 Md. 112, 75 A.2d 113 (1950)	9
Ferguson v. Beth Mary Steel Corp., 166 Md. 666, 672, 172 Atl. 238, 240 (1934)	9
Friends of Lubavitch v. Baltimore County, 421 F. Supp. 146, 154-156 (D. Md. 2019)	8
Horace Mann League v. Bd. of Public Works, 242 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97 (1966).	
Murray v. Curlett, 228 Md. 239, 179 A. 2d 698 (1962), rev'd by School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963)	13
Neustadter v. Holy Cross, 418 Md. 231, 13 A.3d 1227, (2011)	16
Schowgurow v. Maryland, 240 Md. 121, 213 A.2d 475 (1965)	13
Talles v. Rifman, 189 Md. 10, 53 A.2d 396 (1947)	10
Torcaso v. Watkins, 367 U.S. 488 (1961)	13
Whitmarsh v. Richmond, 179 Md. 523, 20 A.2d 161	10
State v. West, 9 Md. App. 270, 263 A.2d 602 (1970).	15
Snyder v. Holy Cross Hospital, 30 Md. App. 317, 352 A.2d 334 (1976)	15

Articles

- Kenneth Lasson, “The Gentleman from Hagerstown,” *Baltimore Jewish Times* (Feb. 29, 2008) 13
- Kenneth Lasson, “Passage of Religious Freedom Act Necessary to Fulfill Maryland’s National Leadership Role,” *Baltimore Sun*, March 4, 1998 at 17A 16
- “Md. Gives Waterman Leeway on Sabbath Rule,” *Washington Post*, March 22, 1997, at C3. 16

Encyclopedia

- Encyclopaedia Judaica (2d ed. 2007), Volume 19, p. 356 18

FRIENDS OF LUBAVITCH, INC. v. ZOLL

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The relief ordered by the courts below is drastic and unprecedented. We submit this *amicus curiae* brief to call attention to the extraordinary severity of the remedy that the Circuit Court has prescribed for alleged breach of a restrictive covenant in a 70-year-old deed. Never in the history of the United States has judicial enforcement of a clause in a more-than-half-century-old deed resulted in the demolition of a building used for religious instruction, observance, and worship.

The Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world. The Chamber is concerned over the impact on Jewish communities of the drastic court orders directing destruction of a structure dedicated to conveying to young college-age Jews the lessons of Jewish study and observance.

If a bulldozer now razes the Chabad House in Towson pursuant to a court judgment, the image of that demolition will indelibly remain. It will clash with Maryland's uniquely lustrous history of religious toleration beginning with a 1639 law recognizing the special status of religious rights and liberties. Maryland's Jewish residents will relive the aggressive hostile assaults that stain tragic centuries of Jewish history in inhospitable and discriminatory lands.

The full story of the harassment that Friends of Lubavitch has suffered at the hands of Baltimore County's zoning officials, ultimately resulting in the erroneously based decisions below, is recounted in the Amended Complaint filed in federal court in *Friends of Lubavitch, Inc. v. Baltimore County*, United States District Court for the District of Maryland, Civ. No. GLR-18-3943, and in an opinion of the federal judge in that case. We summarize those events in Part I of this *amicus* brief.

Part II reviews the history of religious toleration in Maryland and the important role Maryland played in the development of modern American principles of religious liberty. The Declaration of Rights of 1776, the grant of full political rights to Unitarians and Jews in 1826, and the 1851 amendment of the Declaration of Rights were all historical milestones in Maryland's guarantee of religious freedom.

Part III recounts some of the razing, demolition, and destruction of structures with religious significance that have been experienced by Jewish communities over

the ages. Obliteration of Towson's Chabad House is not, of course, comparable to these sad chapters of Jewish History. But it explains the sensitivity that the Jewish community may feel if it experiences the destruction, under color of law, of a structure that Jews use for religious teaching.

I.

THE FEDERAL RLUIPA COMPLAINT DETAILS HOW THE UNLAWFUL DISCRIMINATORY CONDUCT OF BALTIMORE COUNTY OFFICIALS RESULTED IN DRACONIAN DECISIONS OF MARYLAND'S COURTS.

The record before this Court does not include the history of Baltimore County's obstruction of what should have been routine expansion of the residence on the property purchased by Friends of Lubavitch ("FOL") years before the restrictive covenant in the 1950 deed was discovered in August 2016. The Zolls portray this case as one in which Lubavitch and Rabbi Rivkin repeatedly violated zoning restrictions and then expanded the structure on the property in violation of a setback covenant. The courts below swallowed this false history. It is far from the truth. In fact, as alleged in a complaint filed in federal court, the rulings of the Maryland trial judges and the Court of Special Appeals were drawn from a well that was poisoned by, and resulted from, biased maladministration of local zoning regulations that began in 2011.

The truth, as alleged in the federal complaint, is recited in the opinion of the federal court. *Friends of Lubavitch v. Baltimore County, Maryland*, 421 F. Supp. 146, 154-156 (D. Md. 2019). Arnold Jablon, then Baltimore County's Director of Permits, Approvals, and Inspections, deliberately impeded and delayed approval that should have been given to an expansion application had it not been requested by a religious group that Jablon disliked. (An Amended Complaint filed in the federal court specifies that Jablon told FOL, "Don't try to convert me. I'm Reform," and that he referred to Chabad as "extreme Jews like evangelical Christians.") Encouraged by the support of FOL's hostile neighbors, Jablon imposed unnecessary and burdensome processes on FOL, prescribing two administrative hearings, issuing a false "Code Enforcement Correction Notice" that accused Rabbi Rivkin and FOL with violating local zoning regulations, and testifying against the building's expansion on specious grounds.

After FOL and Rabbi Rivkin had been tarred by Baltimore County's illegal tactics and construction of an approved expansion was finally underway, the Zolls discovered the setback covenant and sought to have it enforced in Circuit Court. During a hearing held on March 30, 2017, before Judge Souder on the Zolls' request for a preliminary injunction, Rabbi Rivkin's credibility was challenged with the phony charges that had been made against him. See pp. 142-150 of the Transcript.

Judge Souder believed the attack on the rabbi, rejected FOL's defenses, and directed on April 13, 2017, that the setback covenant be enforced.

Almost five months *after* Judge Souder's decision was published, on September 5, 2017, a biased Board of Appeals majority issued an opinion that falsely declared that Rabbi Rivkin had used his residence "as a community center" since "soon after" his family moved in. The Board's condemnatory findings were quoted at length (pp. 8-11) by the Court of Special Appeals in its March 5, 2101 opinion that is the subject of the petition for certiorari. Circuit Judge Cox also relied on the untrue findings of the Board of Appeals when she held (1) that "FOL has been using the property without obtaining necessary approvals or complying with regulations," (2) that Rabbi Rivkin had "unclean hands," and (3) that sustaining FOL's position would "tacitly endorse that which has been repeatedly found to be a violation of existing restrictions in the residential community."

Had there been no unfounded accusation that FOL and Rabbi Rivkin violated zoning laws, the discovery of the 1950 setback covenant in July 2016 would not have disrupted FOL's expansion of its building. There is ample precedent in Maryland law for setting aside similar aged covenants when neighborhood conditions change so that old conditions should not apply. See *Esso Standard Oil Co. v. Mullen*, 200 Md. 487, 90 A.2d 192 (1952) (45-year-old covenant); *Ford v. Union Trust Co. of Maryland*, 196 Md. 112, 75 A.2d 113 (1950) (24-year-old

covenant); *Talles v. Rifman*, 189 Md. 10, 53 A.2d 396 (1947) (34-year-old covenant); *Whitmarsh v. Richmond*, 179 Md. 523, 20 A.2d 161 (34-year-old covenant). These precedents were not cited to Judge Souder or considered by her.

In the years that followed 1950 there had been highly relevant changes in the Towson neighborhood of 14 Aigburth Road. In 1953 Goucher College, which had not been located in Towson but had occupied buildings in downtown Baltimore, moved to a 287-acre plot of land in Towson close to the Aigburth Road property. Ten years after 1950 Towson University began an arts and sciences program resulting in bachelor's degrees. Enrollment at Towson climbed from 3,537 to 13,399 between 1964 and 1974. See "Towson University," Wikipedia. No one contemplated in 1950 that there would be large student populations very near Aigburth Road.

A governing principle of Maryland law articulated in *Ferguson v. Beth Mary Steel Corp.*, 166 Md. 666, 672, 172 Atl. 238, 240 (1934), and often repeated is: "[S]ound public policy favors the free and unrestricted use of land by the legal holder, and therefore alleged restrictive covenants should be construed strictly against the establishment and effect of such covenants, and liberally in support of the free use of the land."

Moreover, the "doctrine of comparative hardship" would have influenced Judge Souder or Judge Cox had they not believed the false charges that FOL and Rabbi Rivkin were guilty of lawlessness and duplicity. Had the Circuit Judges

weighed (a) the substantial financial loss to be suffered by FOL if completed construction were demolished against (b) the importance of implementing a 1950 setback covenant written before the neighborhood became a center of student life, they would have determined that “comparative hardship” required a decision in favor of FOL and Rabbi Rivkin.

II.

COURT-ORDERED DEMOLITION OF A BUILDING USED FOR RELIGIOUS INSTRUCTION, OBSERVANCE, AND WORSHIP WOULD TAINT MARYLAND’S COMPELLING HISTORICAL TRADITION OF RELIGIOUS TOLERATION AND PROTECTION OF RELIGIOUS FREE EXERCISE.

Perhaps more than any other place in America, from its earliest days as a colony to its present position as an influential and thriving State, Maryland has shown an abiding concern for the religious liberty of its inhabitants. The importance of preserving this most precious and profound of individual rights – an elusive freedom the protection of which proves the necessity for eternal vigilance – is amply illustrated by the case at hand.

The Jewish minority population of Maryland has had a long and provocative history in the struggle to secure religious liberty.

Lord Baltimore’s charter for Maryland protected “anyone who was Truly Christian.” There were then no Jews in England because all had been expelled in

1290. The first Jew to arrive in America was probably Jacob Lumbrozo, a Portuguese doctor who came to Maryland to escape persecution in his homeland and had heard about the tolerant society being set up on the shores of the Chesapeake. He arrived in 1654 only to become one of the first tried for blasphemy, then punishable by death, for refusing to recognize the divinity of Jesus. Before his trial, however, the governor of Maryland, celebrating the accession in 1658 of Richard Cromwell (Oliver's son) as Lord Protector of England, issued a pardon to all who "stood indicted, convicted or Condemned to dye." Lumbrozo's case was dropped.

In 1776, when Maryland adopted its own Constitution, Article 33 of its Declaration of Rights granted equal protection of law to "all persons professing the Christian religion." Article 35 stated "No other test or qualification ought to be required on admission to any office of trust or profit than such oath of support and fidelity to the State . . . and a declaration of belief in the Christian religion." Maryland's Jewish citizens could vote in federal elections, hold federal office, and serve in the armed forces (they fought at Fort McHenry in 1814) but they could not serve as lawyers or jurors in their own state.¹

¹ *Maryland Declaration of Rights*, original document *microformed* on Maryland State Archives MSA MSA SC M 3145, pg. 228, available at <http://aomol.net/megafile/msa/speccol/sc4800/sc4872/003145/html/m3145-0228.html>.

A remarkable campaign by an obscure politician named Thomas Kennedy granted the Jewish citizens of Maryland full civil liberties. A Scottish Presbyterian from Hagerstown, Kennedy said that there were no Jews in his county, that he was not personally acquainted with any Jew, and that none asked him to advocate on the Jews' behalf. But he did, at considerable personal sacrifice. One of his first acts after being elected to the General Assembly in 1818 was to introduce an act to ensure Jewish equality. It was ridiculed as the "Jew Bill" and "Kennedy's Jew Baby," and went down to defeat by a vote of 50-24. He reintroduced the measure in 1822, and it lost again.²

In 1824 Kennedy once again urged passage of a bill on behalf of the 150 Jews of Maryland. (There were then 6,000 in all of the United States.) After a long and impassioned speech he gave on the floor of the Maryland State House, Kennedy's "Jew Bill" finally passed in 1825 by a vote of 26-25, with 80 legislators absent. Almost immediately the Baltimore City Council elected its first Jewish member.³

Landmark decisions have been handed down by this Court and by the Supreme Court of the United States involving test oaths, school prayer, grants to sectarian colleges, clergy disqualification provisions, autopsies, religious headgear,

² See Kenneth Lasson, "The Gentleman from Hagerstown," *Baltimore Jewish Times* (Feb. 29, 2008).

³ *Id.*

Sunday closing laws, legislation to support religious dietary laws and divorces, and the erection of religious symbols on public property.⁴

Like many states, Maryland has enacted statutes to protect all people (but particularly Orthodox Jews) who abide by Biblical laws pertaining to the slaughtering of fowl and animals and the consumption of kosher foods. The Maryland Code gives particular protection to the Orthodox Jewish method of slaughtering animals, describing it as “humane.” Maryland has also enacted consumer legislation to protect the purchasers of specific religious articles such as phylacteries and doorpost parchments (mezuzohs) from misrepresentations by sellers.⁵

Maryland’s special constitutional history regarding religious tolerance both embodies and ennobles the strong presumption that in our proudly pluralistic society, the fundamental right freely to exercise one’s sincerely-held religious beliefs should not be denied because of concerns of efficiency or convenience (legitimate as they may be).

⁴ See *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Schowgurow v. Maryland*, 240 Md. 121, 213 A.2d 475 (1965); *Murray v. Curlett*, 228 Md. 239, 179 A. 2d 698 (1962) rev'd sub nom. by *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Horace Mann League, Inc. v. Board of Public Works*, 242 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97 (1966).

⁵ Md. Code Ann., Com. Law § 14-905 (LexisNexis 2010). Local jurisdictions have also sought to preserve religious liberties. Most recently, the Baltimore City Council passed an ordinance prohibiting actions that might prohibit or deny reasonable accommodation for religious practices of occupants of multiple-family dwellings. Baltimore City Council Bill No. 07-0648 (2007).

Maryland’s Court of Special Appeals said in 1970, “The Free Exercise Clause recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the State.” *State v. West*, 9 Md. App. 270, 263 A.2d 602 (1970).³

In a case involving the labeling of kosher food this Court, after reviewing the State’s long and storied history of religious tolerance, pointed out that Maryland’s “pronouncements favoring freedom to worship as one pleases predate the nation’s Bill of Rights by more than a century” and “found expression again in the Maryland Constitution ... more than a decade before its federal counterpart.” *Barghout v. Mayor & City Council*, 325 Md. 311, 322, 600 A.2d 841, 846 (1992).

The Maryland legislature was quick to prescribe a remedy when a court permitted infringement upon the religious sensitivities of its citizens. In *Snyder v. Holy Cross Hospital*, 30 Md. App. 317, 352 A.2d 334 (1976), the Court of Special Appeals found against a father who for religious reasons wished to prevent his son’s autopsy. The General Assembly responded with a measure providing that if the family of the deceased objects to an autopsy on religious grounds, the procedure “may not be performed unless authorized by the state’s chief medical examiner or his designee.” Md. Code Ann., Health-Gen. 5-301(b) (LexisNexis 2010).

In 1997 Maryland lawmakers liberalized crab-fishing limits on the

Chesapeake Bay in order to accommodate watermen who observe the Sabbath on days other than Sunday by excepting Chesapeake Bay crabbers who are Seventh Day Adventists.⁶

After lower courts refused to postpone a trial so that the petitioner could observe a Jewish holiday, this Court found that the judges below had abused their discretion in denying requests for a continuance. By failing to accommodate the petitioner's timely request to suspend the trial for two days so that he could observe Shavuot, the lower courts provided a particularly troubling illustration of how casually Maryland's deeply-rooted struggle to achieve religious tolerance can be dismissed if not completely ignored – not to mention how an individual right, long protected by both the First Amendment to the federal Constitution and Article 36 of the state's own Declaration of Rights – could be ignored by a court more concerned with docket efficiency than fundamental liberty. See *Neustadter v. Holy Cross*, 418 Md. 231, 13 A.3d 1227, (2011).

⁶ See Kenneth Lasson, "Passage of Religious Freedom Act Necessary to Fulfill Maryland's National Leadership Role," *Baltimore Sun*, March 4, 1998 at 17A. See also "Md. Gives Waterman Leeway on Sabbath Rule," *Washington Post*, March 22, 1997, at C3.

III.

THE JEWISH PEOPLE ARE PARTICULARLY SENSITIVE TO THE DEMOLITION OF RELIGIOUS SITES BECAUSE SUCH VIOLENCE HAS BEEN PERPETRATED AGAINST JEWISH COMMUNITIES FOR MORE THAN 2500 YEARS.

The late Lord Rabbi Jonathan Sacks, who was Chief Rabbi of the United Kingdom and was knighted by Queen Elizabeth, described the darkest period of Jewish history in his Passover Haggadah: “It is difficult at this distance in time to realize the depth of the crisis represented by the destruction of the Second Temple in the year 70 CE, and the later suppression of the disastrous Bar Kokhba revolt (132-35 CE). The very foundations of Jewish existence had been destroyed. . . . Jerusalem had been razed to the ground and rebuilt as a Roman city, Aelia Capitolina, in which Jews were forbidden to live.”⁷

Demolition of buildings sacred and revered by the Jewish people has been the historic motif of the faith’s worst disasters. Both temples were razed by enemies of the Jews, the first in 586 BCE. The Crusaders not only decimated the Jewish populations of European cities in the Eleventh, Twelfth, and Thirteenth Centuries, but also destroyed synagogues and Jewish study halls. The Cossack hordes that terrorized Jewish communities in the massacres of 1648 burned Jewish chapels. And the Nazi perpetrators of the effort to eradicate the Jewish people burned, demolished,

⁷ THE JONATHAN SAKS HAGGADA, Koren Publishers (2013).

and razed all structures that were used to practice the Jewish faith and to transmit its teachings to future generations.

Volume 19 of the *Encyclopaedia Judaica* (2d ed. 2007), p. 356, under the heading “Desecration and Destruction of Synagogues (Holocaust Period)” reports: “The desecration of synagogues and Jewish cemeteries during World War II by the Germans and their collaborators was a carefully planned operation, executed with utmost thoroughness. It was accompanied not only by vandalism and looting, but by cruelty and malice. . . . Synagogues were destroyed in thousands of communities in Eastern Europe The comparatively sparse documentary evidence on the destruction to be found in various archives includes actual destruction orders, the names of those who issued and executed them, and the dates of destruction.”

An official demolition order directed to a building that teaches the Jewish faith – executed under color of law – is reminiscent of the horrors of Jewish history. With this *amicus curiae* brief we are asking this Court to prevent what many may see as a contemporary replication of historic tragedies.

CONCLUSION

This Court should grant the petition for a writ of certiorari and stay the order directing that the Chabad House be razed.

Respectfully submitted,

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