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The Sword and the Scroll: Judicial Enforcement of Religious Contracts

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Notes & Comments

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INTRODUCTION

Most business relationships function with the assumption that if one party fails to live up to its contractual obligations the other party will be able to enforce their contract in court.[i] But, when the business relationship involves religious subjects, the parties may unexpectedly find themselves with a worthless piece of paper.[1] A superficial look would treat all types of contracts involving religious issues equally. This comment will argue that there are distinct levels of First Amendment difficulties with religious contracts and propose a hierarchy for dealing with them. Part I offers a taxonomy of religious contracts;[2] Part II explores the First Amendment framework for enforcing contracts with religious aspects, and briefly reviews relevant Maryland contract doctrines;[3] Part III explores how courts have applied the First Amendment framework when confronted with such contracts;[4] Part IV argues that courts have shied away from properly enforcing such contracts to the fullest extent allowed by the Constitution;[5] and Part V suggests methods for drafting such contracts in a manner that will maximize the likelihood of enforcement in court.[6]

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1. *See infra* Part IV.
2. *See infra* Part I.
3. *See infra* Part II.
4. *See infra* Part III.
5. *See infra* Part IV.
6. *See infra* Part V.

I. A CACOPHONY OF CONTRACTS

There are different types of religious contracts, and not every contract touching on religion is treated the same under the First Amendment.[7] This paper will suggest that the several types of religious contracts can be divided into three distinct categories; each category being on a different level of enforceability. It will be helpful to define them at the outset, in ascending levels of First Amendment difficulty. The first type are contracts that are secular in nature and effect but arise in religious circumstances. Such contracts will be referred to as "religiously situated secular contracts." For example, an Islamic wedding may feature a contract known as "mehr" (sometimes spelled "mahr").[8] This is a contract between the bride and groom requiring the groom to pay a certain amount of money to the bride in the event of divorce.[9] Although such contracts are not inherently religious, and have a secular purpose, they arise in religious, ritual circumstances. Such contracts may have certain cryptic forms which can only be interpreted by using religious parol evidence to explain the parties' intent.[10]

The second type is a contract that calls for performance of a secular act but phrases the terms and definitions in religious language. This type will be referred to as "religiously defined secular contracts." For example, Jewish law dictates that no interest be paid on loans.[11] Someone who wishes to make an investment that complies with this prohibition might sign what is known as a "heter iska."[12] A heter iska is a document that structures a loan as an investment, but includes a condition that guarantees a specified rate of return which may be paid instead of the actual investment profits.[13] An observant Jewish lender may add to the loan agreement a line or document that says,

7. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

8. Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 302 (2011).

9. *Id.*

10. *See, e.g.,* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 783 (2015).

11. Bollag v. Dresdner, 495 N.Y.S.2d 560, 562 (Civ. Ct. 1985).

12. *What Is Heter Iska*, KOSHER FINANCIAL INSTITUTE, https://www.kfikosher.org/iska-more (last accessed Dec. 19, 2021).

13. A sample standard heter iska is available here. *Iska Contract Based on Heter Iska*, ERETZ HEMDA, http://www.eretzhemdah.org/Data/UploadedFiles/SitePages/87-sFileRedirEn.pdf (last accessed Dec. 19, 2021).

"Notwithstanding the terms of the contract, this transaction is an investment that complies with the terms of a heter iska."[14] This would be a document that has a secular effect, but the definitions used are religious terms.[15]

The third type will be called "religious performance contracts." These are the contracts that that have a purpose of specific performance of a religious action. For example, a standard heter iska will require a specific form of religious oath as the standard of proof,[16] or someone may wish to hire someone to perform religious duties. When a party turns to a court to enforce such a contract, the court is faced with the worrying possibility of directly requiring a party to perform a religious action, in addition to the issues inherent in the first two types of contracts.

II. THE LEGAL BACKGROUND TO RELIGIOUS CONTRACT ANALYSIS

A. The Free Exercise Clause Allows Courts to Resolve Religious Disputes When Using Neutral Principles of Law

The Free Exercise Clause is understood by the Supreme Court to require courts to refrain from interfering in disputes involving religious matters; courts are instead constitutionally required to defer to internal ecclesiastical rulings on church matters.[17] This is only true for matters that are wholly religious, any issue that can be decided under a framework of neutral principles of secular law may be decided by a court and is not left to ecclesiastical discretion.[18]

The precise nature of the problem with courts' ruling on religious issues has been discussed at great length. Commentators have raised various types of Free Exercise Clause problems;[19] Establishment

14. *Instructions for Using the Heter Iska*, STAR-K, https://www.star-k.org/articles/kosher-lists/1508/instructions-for-using-the-hetter-iska/ (last accessed Dec. 19, 2021).

15. The overarching goal of the contract may be religious but the immediate effect of the contract (converting a loan to an investment) is secular.

16. ERETZ HEMDA, *supra* note 13.

17. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

18. Jones v. Wolf, 443 U.S. 595, 603 (1979).

19. John E. Fennelly, *Property Disputes and Religious Schisms*: Who Is the Church?, 9 ST. THOMAS L. REV. 319, 353-56 (1997); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 120–21 (1952) ("There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. . . . This under our Constitution necessarily follows in order that there may be free exercise of religion.").

Clause problems;[20] or a "religious question" doctrine that arises out of the First Amendment as a whole,[21] common law,[22] or practical limitations on courts' abilities.[23] While these are all serious issues, the Supreme Court has clearly defined how courts should rule on religious contract disputes in a series of cases stretching back to 1871.[24]

In *Jones v. Wolf*, the Supreme Court clearly laid out the framework for court rulings on religious disputes after an internal schism rocked the Vineville Presbyterian Church in 1973.[25] The majority of the members voted to split off from the larger religious organization the church had previously been affiliated with, and the faithful minority left to another congregation associated with the original organization.[26] The parent body then alleged that it was the rightful owner of the church property, which was deeded to the "Vineville Presbyterian Church" or to "The Trustees of Vineville Presbyterian Church."[27] Learning its lesson from *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,[28] the Georgia trial court applied neutral principles of the law of implied trusts and analyzed the church's charter.[29] Using those principles, the trial court

20. *See, e.g.*, Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, text accompanying notes 334-40 (2013).

21. This is perhaps the favored approach of the Supreme Court, although it occasionally seems like nothing more than an attempt to avoid deciding which specific clause of the First Amendment would prohibit a ruling. *See Presbyterian Church in U.S.*, 393 U.S. at 449 ("Thus, the First Amendment severely circumscribes the role that civil courts may play."); *Jones*, 443 U.S. at 602 ([T]he First Amendments prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.").

22. *See, Presbyterian Church in U.S.*, 393 U.S. at 445 ("The approach of this Court in [Church property dispute] cases was originally developed in Watson v. Jones, 13 Wall. 679 (1872), a pre-Erie R. Co. v. Tompkins diversity decision decided before the application of the First Amendment to the States but nonetheless informed by First Amendment considerations."); Jared A. Goldstein*, Is There A "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 508 (2005).

23. *See* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?,* 84 NOTRE DAME L. REV. 837, 855-56 (2009); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POLICY 119, 134 (2009).

24. Watson v. Jones, 80 U.S. 679 (1871).

25. Jones v. Wolf, 443 U.S. 595, 598 (1979).

26. *Id.*

27. *Id.* at 597.

28. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

29. Jones v. Wolf, 443 U.S. at 599.

found no implied trust for the parent body and ruled in favor of the local churches.[30]

The Supreme Court vacated the Georgia court's ruling, but reiterated that the "neutral principles of law" standard used by the court was correct.[31] The only issue the Supreme Court found with the court's ruling was the creation of a "follow the majority" rule that the Court suspected was not truly a tenet of Georgia property law.[32] Praising the "neutral principles of law" approach, the Supreme Court stressed that this meant a church would be able to ensure that its desire for disposition of property according to church rules could be fulfilled—it just needs to couch its wishes in traditional property law terms.[33]

The dissent pointed out that the majority's requirement that the founding documents of a religious organization be read in secular terms is liable to lead to confusion.[34] Furthermore, even applying "neutral principles" is still a First Amendment violation, since whatever result the church doctrine requires is just as overruled by a contrary "neutral principle" as it is by a religious determination by the court.[35] Relying on *Watson v. Jones*,[36] the dissent called for a rule dictating that a court must always follow the doctrinal ruling of the

30. *Id.*

31. *Id.* at 602.

32. *Id.* at 608-09.

33. *Id.* at 603-04 ("appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.").

34. *Id.* at 612 (Powell, J. dissenting).

35. *Id.*at 617 (Powell, J. dissenting). The dissent may be proposing that a court lacks the capability to rule on such matters because the Establishment Clause would prohibit a court from issuing a ruling affecting religious issues. However, the *Jones* majority was clearly unconcerned with such a blanket Establishment Clause issue, and we must proceed with that holding.

36. Watson v. Jones, 80 U.S. 679, 729 (1871) ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.").

church tribunal.[37] The majority disagreed with the dissent's logic, and argued that "neutral principles" will not overturn church doctrine, rather those principles must be viewed as the background for any decisions the church will make.[38] Viewed in the light of the dissent, the majority seemed to be arguing that requiring churches to create documents that have a secular form does not interfere with First Amendment rights as long as the substance is left to choice.[39]

In *Jones*, the Supreme Court refined the ruling of an earlier case, *Mary Elizabeth Hull.*[40] In that case, two local Presbyterian churches split off from the main church organization.[41] At that time, the law in Georgia indicated that ownership of local church property depended on a finding of whether the parent church had departed from its tenets and practices.[42] If it had not, then the property was considered to have been held in a trust for the parent body.[43] The jury found that the parent church had abandoned its original tenets, thereby terminating the implied trust and thus the church property would belong to the local offshoots.[44] The Georgia Supreme Court upheld the trial court's decision.[45]

The *Mary Elizabeth Hull* Court reversed, holding that "the civil courts [are left] *no* role in determining ecclesiastical questions in the process of resolving property disputes."[46] The Court recognized that freedom of religion is absolute, the "full and free right to . . . practice any religious principle . . . which does not violate the laws of morality and property . . . is conceded to all." [47] If a court were to render a ruling on the religious aspect of the debate between the churches, it would nullify the church body's right to self-determination.[48] In fact, the Court is bound to accept an internal church tribunal's rulings on ecclesiastical matters that cannot be decided without religious

37. Jones v. Wolf, 443 U.S. at 621.

38. *Id.* at 606.

39. As this case pre-dates Emp't Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990), the Court did not say requiring secularly-termed contracts was a permissible burden, but that it is not a burden at all.

40. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441 (1969).

41. *Id.* at 442-43.

42. *Id.* at 443-44.

43. *Id.* at 443.

44. *Id.* at 444.

45. *Id.*

46. *Id.* at 447.

47. *Id.* at 446 (citing Watson v. Jones, 80 U.S. 679 (1871)).

48. *Id.* at 447.

doctrine—even when that affects civil rights—because of the parties' original submission to such bodies.[49] The Court viewed the application of neutral principles of law as the only method of dispute resolution that would not infringe on freedom of religion.[50] This rule still stands and has only been strengthened since its inception.[51]

In sum, the framework that the Court erected is that property debates are not necessarily religious questions, and a ruling on those non-religious issues would not affect First Amendment rights.[52] As such, a civil court is fully entitled to, and therefore must,[53] resolve these issues. The Court held the appropriate framework to resolve the issues was by only using "neutral principles of law," because delving into ecclesiastical questions would violate the church's Free Exercise rights.[54]

B. A Brief Review of Relevant Principles of Contract Law

As the proper method for resolving a religious dispute is using neutral principles of law, and this paper will deal with religious disputes over contracts, it will be helpful to briefly review some of the relevant principles of contract law. [55] Since many of the contracts this paper deals with arise in a ceremonial context—as the "religiously situated secular contracts" do—they may suffer from an unavoidable vagueness.[56] Although sophisticated parties should avoid this issue, many do not.

In Maryland, "A court will presume that the parties meant what they said in an unambiguous contract, without regard to what the parties to the contract personally thought it meant or intended it to

49. *Id.* (citing Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929)).

50. *Id.* at 449.

51. *See, e.g.,* Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich, 426 U.S. 696, 715 (1976) (removing an implied ability for a court to review an ecclesiastical ruling for arbitrariness).

52. Jones v. Wolf, 443 U.S. 595, 602 (1979).

53. Fam. Fed'n for World Peace v. Hyun Jin Moon, 129 A.3d 234, 249 (D.C. 2015) ("[T]he mere fact that the issue before the court involves a church or religious entity does not thereby bar access to our courts. On the contrary, the courts as the ultimate arbiter of disputes short of anarchy and self-help have a constitutional duty to carry out their basic function to the maximum permissible extent.").

54. Jones v. Wolf, 443 U.S. at 604.

55. This paper cannot possibly cover even a portion the relevant rules and doctrines of contract law. However, a brief overview of the rules of introducing extrinsic evidence will help lay the groundwork for the following sections.

56. *See, e.g.,* Helfand, *supra* note 10, at 782-83 (2015).

mean."[57] If a contract is ambiguous as a matter of law, then a court can use extrinsic evidence to determine what the parties intended.[58] When interpreting the contract, the court must consider the contract as a whole, "giving effect to every clause and phrase," using the standard of "what a reasonable person in the position of the parties would have thought it meant."[59]

An additional contract issue that arises frequently in the religious contract arena is the availability of specific performance. In Maryland, there are occasional statutory qualifications for specific performance, although the court has discretion.[60] Specific performance is a rare remedy, and "[t]ypically, specific performance is only granted when money damages are inadequate."[61] These principles, among the many other rules of contract law the legislature and the courts have developed, are what courts should apply when confronted with a religious contract. The First Amendment, however, prohibits a court from setting up a new rule, or applying or interpreting religious law, when faced with a religious contract.[62]

III. COURTS' LIMITED SUCCESS IN APPLYING NEUTRAL PRINCIPLES OF LAW

With the framework for proper analysis of religious contracts in place, this paper will begin to analyze how courts have dealt with these contracts.[63] When faced with the first two types of contracts mentioned above,[64] where the result of the contract is secular, courts

57. Maslow v. Vanguri, 168 Md. App. 298, 318 (2006).

58. Prison Health Services, Inc. v. Baltimore County, 172 Md. App. 1, 9 (2006).

59. Owens-Illinois v. Cook, 386 Md. 468, 496–97 (2005). In the First Amendment context an objective standard is anathema, unless the parties agree on the religious aspect, or the court can define a term through secular parole evidence. *See infra* text accompanying notes 148-151.

60. *E.g.*, Maryland's Uniform Computer Information Transactions Act, MD CODE ANN., COM. LAW § 22-811 (2021) ("(a) Specific performance may be ordered: (1) If the agreement provides for that remedy, other than an obligation for the payment of money; (2) If the contract was not for personal services and the agreed performance is unique; or (3) In other proper circumstances.")

61. 8621 Ltd. P'ship v. LDG, Inc., 169 Md. App. 214, 239 (2006); RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981).

62. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

63. There are many cases dealing with such contracts. This paper attempts to cherry-pick examples that demonstrate the general approaches used. However, it does not purport to be a survey of every opinion, or type of opinion, issued in such cases.

64. *See supra* Section I.

have generally effectively applied neutral principles of law.[65] When faced with the third type,[66] however, where the contract results in a religious outcome, some courts have refrained from enforcing the contract for inadequate reasons.[67]

A. Courts' Application of Neutral Principles to "Religiously Situated Secular Contracts"

Maryland courts have recently developed a fully fleshed-out approach towards the first level of religious contracts, "religiously situated secular contracts." The first Maryland case dealing specifically with mehr contracts was as recent as 2008.[68] In *Aleem v. Aleem*, a husband performed a method of Islamic divorce on his wife at the Pakistani embassy, and desired to only provide her mehr payment and keep the marital estate.[69] The Court of Special Appeals held that the mehr contract was too vague to function as a pre-nuptial agreement and the only reason to limit the wife's share would be by applying Pakistani law, which holds as a default position that a wife has no share in the marital estate.[70] The court declined to apply Pakistani law over Maryland state law.[71] The question before the Court of Appeals was whether the lower court erred by holding that comity did not require the application of Pakistani law in this case.[72] The Court of Appeals upheld the lower court, holding that comity does not require a state to apply a foreign law that is against the

65. *See infra* Section IV.A.

66. *See supra* Section I.

67. *See infra* Section IV.B.

68. Aleem v. Aleem, 404 Md. 404 (2008).

69. *Id.* at 407. It is important to note that mehr contracts could be treated as a sort of pre-nuptial agreement. Thus, when the value of the contract is less than the value of the wife's share of the marital estate, then the husband often asks for the contract to be enforced as a pre-nuptial agreement to limit what the wife receives. But if the value of the mehr contract is greater than the wife's share of the marital estate, she will often be the one requesting for the contract to be upheld. However, she may not ask for it to be enforced as a pre-nuptial agreement but instead ask for it to be enforced as a separate contract and receive the mehr in addition to her share of the marital estate. Therefore, when analyzing case law dealing with these contracts, it is important to note which side was asking for the contract to be upheld. Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 594 (2010).

70. Aleem v. Aleem, 175 Md. App. 663, 681 (2007), aff'd, 404 Md. 404 (2008).

71. *Id.*

72. *Aleem*, 404 Md. at 408.

public policy of that state, and that the Pakistani law in question was against the public policy of Maryland.[73] The parties did not appeal the question of the validity of the mehr contract as a contract under American law,[74] and the religious nature of the contract appears to have never been a factor in the decision.[75] It seems Pakistani law—which is based on Islamic law—[76] masked the religious contract law question as a foreign divorce law question.[77]

The implication in *Aleem* is that nothing in the mehr agreement limited what the wife would receive in a divorce—meaning if the mehr were to be enforced as written, the wife could have potentially received it in addition to her share of the marital estate.[78] The question of whether the mehr could be understood as a religious pre-nuptial contract limiting the wife's share came before the Court of Special Appeals in 2020 in *Nouri v. Dadgar*.[79] In that case, the Court of Special Appeals ruled on the claim two wives made that their mehr contracts should be enforced—netting each of the wives a few hundred thousand dollars' worth of gold coins.[80] The husbands argued that the mehr contracts could not be enforced without interpreting religious law, something that the Free Exercise clause prohibits.[81] The Court of Special Appeals held that if the contract could be interpreted with "neutral principles of law" then it could be enforced—but the correct framework would be that of premarital agreements.[82]

The *Nouri* Court thoroughly explained the constitutional issues inherent in interpreting such contracts.[83] The court began by citing *Lang v. Levi*[84] for the proposition that both the Free Exercise and Establishment clauses prohibit a court from reviewing theological questions.[85] The court then clarified that the First Amendment

73. *Id.* at 425-26.
74. *Id.* at 408.
75. *Id.* at 425-26.
76. PAKISTAN CONST. pmbl.; *id.* art. 203D; *Aleem*, 404 Md. at 423.
77. *Aleem*, 404 Md. at 406.
78. Aleem v. Aleem, 175 Md. App. 663 (2007), aff'd, 404 Md. 404 (2008).
79. Nouri v. Dadgar, 245 Md. App. 324, 333 (2020).
80. *Id.* at 337, 340.
81. *Id.* at 343-44.
82. *Id.* at 344.
83. *Id*.
84. Lang v. Levi, 198 Md. App. 154, 169 (2011).
85. *Nouri*, 245 Md. App. at 345. This statement from *Lang* is, logical, but as mentioned *supra* note 35, not entirely clear. A full discussion of this Establishment

prohibits a court from adjudicating church doctrine or any secular case that entangles a court in religious doctrine.[86] But when a question merely arises in a religious context, a court need not refrain from ruling on a question that can be decided with neutral principles of law without weighing on ecclesiastical issues.[87]

The court then implicitly dealt with a serious issue in religiously situated contracts.[88] These contracts are typically vague, drafted in the context of a religious ceremony, and have hundreds of years of religious practice that form the backdrop of the parties' understanding.[89] The court held that although the context for the contract is religious, "a civil court may investigate that context in the same manner as it would for any other contract."[90] The court held that it is feasible to analyze mehr contracts with neutral principles of law in a pre-nuptial agreement framework.[91]

The court then dealt with the husbands' contentions that the contracts should be void as against public policy.[92] The court held that pre-nuptial agreements do not violate public policy, as opposed to the Pakistani law in *Aleem* which did violate public policy.[93] Although both the Pakistani law and the mehr contract at bar were based on the same Islamic foundation,[94] the differing results may be explained by the *Nouri* plaintiffs' focus on the contractual and religious issues that presented the issue to the court in a way that was more in-line with Maryland public policy than the focus on foreign divorce law taken in *Aleem*.

Soon after *Nouri* was decided, the court had the opportunity to refine its mehr doctrine in *Chaudry v. Chaudry*.[95] *Chaudry* presented

Clause question deserves its own article, but while the Supreme Court has stated in Jones that there is a Free Exercise issue with judicial review of theological issues, it is much less clear that there is also an Establishment Clause issue. *See infra* Section IV.B.

86. *Nouri*, 245 Md. App. at 345 (citing Downs v. Roman Catholic Archbishop of Balt., 111 Md. App. 616, 622 (1996); From the Heart Church Ministries v. AME Zion Church, 370 Md. 152, 179 (2002)).

87. *Id.*

88. *Id.* at 348.

89. *See supra* text accompanying note 10.

90. *Nouri*, 245 Md. App. at 348.

91. *Id.*

92. *Id.* at 359.

93. *Id.* at 359-60.

94. *See supra* note 76

95. Chaudry v. Chaudry, No. 1794, Sept. term, 2019, 2021 WL 2910977, at *1 (Md. Ct. Spec. App. July 12, 2021). Not to be confused with the New Jersey case

a typical issue where the parties disagreed about the essential purpose of a religious contract (determining whether the terms were meant to be the wife's only recompense in divorce or as additional gift beyond alimony), and since the contract was signed as a quick part of a wedding ceremony, there was not much extrinsic evidence clarifying the parties' intent beyond traditional religious explanations of the document.[96] The Court of Special Appeals upheld the trial court's decision that the husband did not carry his burden of proof to show that the contract was meant to be the wife's sole recompense after divorce.[97] All the husband had demonstrated was his explanation of the brief agreement ceremony and this was not enough to show the formation of a valid pre-nuptial contract.[98] The *Chaudry* court viewed the mehr contract solely in the context of a pre-nuptial contract; the contract was not sufficient for those purposes and therefore was void.[99]

B. Courts' Interpretation of "Religiously Defined Contracts"

The second level of religious contracts, "religiously defined contracts," was exemplified above with the heter iska.[100] Generally, courts that have considered such contracts have creatively interpreted the plain language of the contract as a whole to treat the transaction entirely as a loan.[101] Since such agreements are usually an

with the same name in which the New Jersey appellate court upheld a Pakistani divorce order which only granted wife her mehr payment and not a share in the marital estate—conflicting with *Aleem.* Chaudry v. Chaudry, 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978).

96. Chaudry 2021 WL 2910977, at *4-5.

97. *Id.* at *8.

98. *Id.*

99. *Id.*

100. *See supra* text accompanying notes 12-14.

101. *See, e.g.,* Arnav Indus., Inc. Emp. Ret. Tr. v. Westside Realty Assocs., 579 N.Y.S.2d 382, 383 (App. Div. 1992) (quoting Green v. Doniger, 300 N.Y. 238, 245) (holding as a matter of law that writing in a mortgage that complied with a heter iska did not convert the mortgage to an investment since "the explicit language of the promissory note clearly disavows any such intent and 'a contract must be construed according to the expressed intent of the parties'"); Bollag v. Dresdner, 495 N.Y.S.2d 560, 563 (Civ. Ct. 1985) ("An analysis of the substantive terms of the Hetter Iske herein as interpreted by the parties and their witnesses at trial reveals that the transaction was a loan (not an 'investment') and that plaintiff's clear intent was to extract a higher rate of interest on this loan than is permitted by law."); Barclay Com. Corp. v. Finkelstein, 205 N.Y.S.2d 551, 552 (1960) (holding that a heter iska was meant only to comply with Jewish law but did not create a partnership). *But see* Leibovici v. Rawicki, 57 Misc. 2d 141, 145, 290 N.Y.S.2d 997, 1001 (Civ. Ct.

addendum to a full-fledged loan agreement, treating the loan as an investment would contradict the remainder of the document.[102] The courts have not even reached the step of a "neutral principles" analysis, instead holding that the contract was unambiguous.[103] This result is not surprising given that the whole of the contract is unambiguously that of a loan.[104] Interestingly enough, this interpretation appears to be in line with the purpose of both of the secular aspect of the contract and the religious aspect.[105] Although a heter iska, as applied, turns out to be more of a red herring than a religious term, it still shows how neutral principles of contract law can easily be applied to religious contracts, even when the terms used are religious.

Another type of "religiously defined contract," one that straddles the line between religious definition and specific performance of a religious action, are religious vows of poverty.[106] These vows, which are made within certain religious orders, generally involve swearing to transfer all possessions to a religious order, in exchange for the

1968), aff'd, 64 Misc. 2d 858, 316 N.Y.S.2d 181 (App. Term 1969) (treating an iska investment as an investment with a guarantee against loss and a set return rate). Although *Leibovici* treated the *heter iska* differently than other courts did, the court still used neutral principles of law to approach an unfamiliar religious term. *Id.* ("The intent may be gleaned from the instrument or the action of the parties. . . . However, there is nothing in these contracts that spells usury or illegality per se.").

102. *Arnav Indus*., 579 N.Y.S.2d at 383.

103. *See supra* note 101.

104. It is important to note that the cases cited here generally dealt with a heter iska that was tacked on to a larger loan document. Furthermore, the heter iska was not defined using secular terms. It certainly is possible to draft a clear, well-defined, properly enforceable heter iska. For an analysis of the proper method of drafting a heter iska, see 6 J. DAVID BLEICH, *The Hetter Iska and American Courts*, *in* CONTEMPORARY HALAKHIC PROBLEMS (2012).

105. *Explanation,* HETER ISKA *https*://www.heteriska.org/explanation (last visited Aug. 21, 2022) ("A Heter iska is a financing structure that is designed to closely mimic a classic interest-bearing loan while complying with Halacha. It accomplishes this by re-characterizing the transaction as a partnership investment.").

106. I consider this in the category of "religiously defined contracts," not religious performance contracts, for two reasons. First, the religious organizations are usually organized as a legal entity under U.S. law; one could argue that giving money to a secularly defined organization dedicated to religious activities is not performing a religious action. Second, I did not find any cases where the votarist themself attempted to withhold monies from the religious institution and was forced to give the money to the institution. All of the cases enforcing these vows were either brought by legatees of the votarist, or by someone who was attempting to wrest back money or property they had already given the church. Allowing the church to keep money already in its possession is arguably not enforcing a religious action. This second argument seems persuasive.

order providing for all of the votarists' needs.[107] The vows are strongly religious in form and nature, yet courts have had no issues enforcing them as a valid oral contract.[108]

The Supreme Court upheld the enforcement of these vows in *Order of St. Benedict of New Jersey v. Steinhauser*.[109] There, the administrator of the estate of Father Wirth, who had taken the poverty vows of the Order of Saint Benedict, attempted to receive royalties from Father Wirth's books.[110] The Court upheld Father Wirth's vows as a valid contract, exchanging all of his possessions for support and maintenance from the Order and granted the royalties to the Order.[111]

The Court in *Steinhauser* was forced to interpret the meaning of the Order's religious constitution, since the plaintiff argued an Abbot of the Order had granted the decedent the right to keep the royalties in question.[112] The Court did not hold back from parsing the religious document and, although without using the later-developed terms of art, used neutral principles of interpretation to determine that the Abbot had no authority to give away what was owed to the Order.[113]

Later courts have upheld the rule of *Steinhauser* and enforced religious vows of poverty as a contract between the votarist and the organization.[114] For example, the Second Circuit has held that a bequest to a Jesuit was not a tax-deductible, charitable donation to a church because when the Jesuit passed the bequest on to the church, he was merely complying with his own contractual obligations.[115] Although a religious vow of poverty is a deeply religious promise, courts have applied neutral principles of law to interpret and enforce those promises.[116]

107. *See, e.g.*, *Instruction on Stability, Chastity, Poverty, and Obedience in the Congregation of the Mission*, 40 VINCENTIANA No. 1, at 37 (1996).

108. Ord. of St. Benedict of New Jersey v. Steinhauser, 234 U.S. 640, 651-52 (1914).

109. *Id.* at 645.

110. *Id.* at 644.

111. *Id.* at 651-52.

112. *Id.* at 646.

113. *Id*. The Court also determined, as a general rule, that contracts to give away all of one's property are not against public policy, as long as the parties can end the contract at will. *Id.* at 648-49.

114. *See, e.g.*, Wisconsin Province of Soc'y of Jesus v. Cassem, 373 F. Supp. 3d 378, 385 (D. Conn. 2019).

115. Cox v. Comm'r, 297 F.2d 36, 38 (2d Cir. 1961); *accord* Estate of Barry v. Comm'r, 311 F.2d 681, 683 (9th Cir. 1962).

116. *Ord. of St. Benedict*, 234 U.S. at 652.

C. Some Courts Have Refrained from Enforcing Specific Performance of a Religious Contract

Another aspect of the heter iska, assuming the courts would find it to be a valid contract or element of a contract, leads to the third type of contract where the result is specific performance of a religious issue. A common condition in a heter iska is that evidence of loss of funds must be admitted before a religious authority with a specific religious oath.[117] What would happen if a party tried to enforce specific performance of that provision, or any other provision requiring religious actions? A comparative type of contract that can shed light on this question is a pre- or anti-nuptial contract for religious upbringing of children.[118]

In *Zummo v. Zummo*, the Pennsylvania Superior Court took up the question of this rare type of agreement.[119] In *Zummo,* the parents had agreed to raise their children in the Jewish faith, and following a divorce, the father wished to teach his Catholic faith to the children.[120] The court dismissed the agreement entirely for three reasons: vagueness, enforcement of the contract would violate the *Lemon* test,[121] and enforcement of the contract would violate the public policy principle embodied in the First Amendment regarding freedom of religious choice.[122]

The first problem, vagueness, happened to be present in that case since the parties did not fully flesh out their deal.[123] Although not present in every instance, as is the case with "religiously situated contracts," it is a common problem that parties in religious or

117. *See, e.g.*, KOSHER FINANCIAL INSTITUTE, *What Is Heter Iska*, (last accessed Dec. 19, 2021) https://www.kfikosher.org/iska-more.

118. *See e.g.,* Zummo v. Zummo, 574 A.2d 1130 (1990).

119. Zummo v. Zummo, 574 A.2d 1130, 1144 (1990). Although *Zummo* is not binding precedent on most courts in the country, such cases are exceedingly rare and *Zummo*'s analysis seems to be well accepted. Additionally, the holding in *Zummo* turned on principles of family law that are inapplicable to other contracts. However, the First Amendment analysis contained in *Zummo* seems fairly representative of a certain strain of thought and was therefore chosen as an example here. *But See* Ramon v. Ramon, 34 N.Y.S.2d 100, 112 (N.Y. Dom. Rel. Ct. 1942) (enforcing a pre-nuptial agreement to raise children as Catholic).

120. *Zummo*, 574 A.2d at 1141.

121. The *Lemon* test is the much-maligned, and potentially no longer defining, general test for Establishment Clause violations. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), *overruled* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (distilling Supreme Court precedent into a three-pronged test).

122. *Zummo*, 574 A.2d at 1144 (1990).

123. *Id.* at 1146.

ceremonial contracts fail to elaborate on the relevant details and rely on tradition or other sources for the fine print of the contract.[124]

The *Zummo* court also posited that enforcing such a contract would violate the *Lemon* test.[125] That Establishment Clause test says a government action must have a secular purpose, must not have an effect of inhibiting or advancing religion, and must not foster an excessive entanglement with religion.[126] The court seemed to think enforcing the contract in this case would violate all three prongs but did not explain its reasoning in depth, beyond noting that ensuring the children's upbringing comported with religious standards would entangle the court in day-to-day religious decisions with the children's upbringing.[127]

Finally, the court turned to vague notions of public policy.[128] The court conflated the First Amendment and public policy arguments by reasoning that there is a public policy need to allow people to change their beliefs.[129] The court seemed to be arguing that locking the father into his contract would violate both the public policy principle exemplified in the First Amendment, and the First Amendment itself by not allowing him to teach his children in the religious tradition he would prefer.[130]

Conclusively, when interpreting contracts that involve religious disputes, courts are required to use the same neutral principles of law they would use to determine a secular contract dispute.[131] Courts have easily done so when the contract arose in a religious situation,[132]

124. *See, e.g.*, Helfand *supra* note 10, at 783-84.

125. *Zummo*, 574 A.2d. at 1144.

126. *Lemon*, 403 U.S. at 612-13.

127. *Zummo*, 574 A.2d at 1146.

128. *Id.* at 1146.

129. *Id.* This idea reached its apotheosis in the recent California case Bixler v. Superior Ct. for the State of California, Cnty. of Los Angeles. No. B310559, 2022 WL 167792, at *11 (Cal. Ct. App. Jan. 19, 2022), review denied (Apr. 20, 2022) (unreported). In *Bixler*, the California Court nullified an arbitration agreement between the Church of Scientology and some of its former members. *Id*. at 1. The court reasoned that enforcing the arbitration agreement against the ex-members would violate the Free Exercise Clause by binding the ex-members to their old religion. *Id*. at 12. While the plaintiffs in *Bixler* were sympathetic, and there may have been public policy grounds to nullify their arbitration agreements—such as problems with the arbitrator or the undesirability of lifelong arbitration agreements—the *Bixler* Court's decision effectively nullified the ability of any religious organization to enter into a long-term contract.

130. *Zummo*, 574 A.2d at 1146.

131. Jones v. Wolf, 443 U.S. 595, 602-03 (1979).

132. Nouri v. Dadgar, 245 Md. App. 324, 348-49 (2020).

and even when the contract was framed in religious terms.[133] Out of fears of violating the First Amendment, some courts have refrained from applying neutral principles of law when solving the dispute would require the court to enforce specific performance of a religious action.[134]

IV. COURTS ARE NOT ENFORCING RELIGIOUS CONTRACTS TO THE FULLEST CONSTITUTIONAL ALLOWANCE

Although courts have properly applied neutral principles of law to adjudicate religiously situated contracts, care must be taken to ensure the correct neutral principles of law are being applied, and the judge must not blind himself to the nuances of the contract by assuming it aligns perfectly with typical secular contracts. Additionally, *Jones* requires courts to adjudicate religious contracts whenever neutral principles of law are applicable,[135] and to bow to ecclesiastical decisions when neutral principles cannot be justly applied.[136] Courts should not precipitously refrain from fulfilling their duty to adjudicate disputes with vague notions of public policy or First Amendment protections.

A. Courts Must Ensure They Are Applying the Correct Neutral Principles of Law

Applying neutral principles of law and treating a mehr agreement like any pre-nuptial agreement sounds like a fair and balanced approach that respects the religious and civil rights of all parties, something everyone can support. What courts have occasionally failed to consider, however, is that the neutral principles of law used to

133. Ord. of St. Benedict of New Jersey v. Steinhauser, 234 U.S. 640, 651-52 (1914).

134. *Zummo*, 574 A.2d at 1148.

135. *Jones*, 443 U.S. at 604.

136. *Id.* at 602. It is difficult to imagine that the *Jones* Court meant that the judicial abstention required by the presence of an ecclesiastical question should result in a "might makes right" system. The *Jones* principal seems to be that either a court or a church tribunal should resolve a dispute. The essential remaining question is what should happen in cases where there are ecclesiastical questions but no religious tribunal to pick up the slack, should no one resolve the dispute? Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 879 N.E.2d 1282, 1286 (2007) (Smith, J. dissenting) ("But in cases like this one, there is no religious tribunal to defer to, and the rule becomes one of justiciability; the majority here does not accept the decision of a religious tribunal as binding, but simply refuses to decide the case at all. Such a refusal is a drastic measure, because when a case is nonjusticiable it means the wrong committed, if there is one, cannot be remedied anywhere.")

interpret and enforce the contract must align with the goals of the contract drafter, not with the biases of individual judges. Because such contracts arise in an unusual, religious basis, courts must take care that they are using the correct principles of law to achieve the goals of the contract drafter.

Consider this. The mehr agreement is a traditional Islamic agreement that the parties may consider to be a necessary part of a marriage ceremony.[137] Islam does not recognize marital property, rather, whatever each spouse earned during the marriage belongs to them after the marriage ends.[138] Although the state can certainly impose a split of the marital property on religious Muslims,[139] forcing a wife to forfeit the mehr for a share in the marital property (as an invalid pre-nuptial agreement), or a husband to pay both the mehr and the marital property, may not align with what the parties had in mind when they signed the mehr. Professor Nathan Oman convincingly argues that the historical and religious context influencing the signers of a mehr agreement are radically different than the neutral principles of pre-nuptial law that the *Chaudry* court applied, based on its cultural experiences of seemingly similar contracts.[140] This does not mean that a court must turn away any case involving a mehr agreement, as this is not what the Constitution requires[141] and is unfair to both parties to the contract. Rather, courts should develop frameworks that allow judges to rule on a religious contract given the parties' contexts and understandings, in the same way the court would use the classical rules of contract interpretation to develop an approach to interpret and enforce an unfamiliar type of secular contract. The fact that an atheistic couple signing a mehr for cultural reasons may have a vastly different intent than an Islamically educated couple signing it out of their religious understanding should not deter a court from facing the contract head on.

Some mehr contracts may be read, according to the terms of the contract and whatever necessary parol evidence, as a pre-nuptial agreement where both parties understood it to be determinative of the entire payment to the wife.[142] However, other mehr contracts may be read as some sort of nuptial contract, but perhaps not one

137. Oman, *supra* note 8, at 302.
138. *Id.* at 306.
139. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).
140. Oman, *supra* note 9, at 322.
141. *Jones*, 443 U.S. at 604.
142. Nouri v. Dadgar, 245 Md. App. 324, 348 (2020).

that should be interpreted through the principles of modern, Western pre-nuptial agreements. Such a reading may not fulfill the will of the drafters if it limits the wife's share of the marital property.[143]

In this regard, religiously defined contracts appear to pose less difficulties to courts. Although those contracts would appear to be more problematic, as a court is prohibited from ruling on matters of doctrine[144] and the religious terms defining the contract may be a matter of doctrine, in practice courts have not been fazed by these contracts.[145] Courts have easily interpreted religious vows in neutral contract terms.[146] Even highly specialized terms like "heter iska," which—as a religious term—should be incomprehensible to the court, have been interpretable with secular extrinsic evidence that explains how the parties relied on and personally understood the terms they used.[147]

This is not to say that every religiously defined contract is interpretable in court. If a contract called for, say, a church building to belong to a group that adhered to "the true tenets" of a religion, a court could not interpret that contract to decide who was properly adhering to the religion.[148] Religiously defined contracts may need a determination of "ecclesiastical matters" that courts are constitutionally prohibited from ruling on.[149] The Supreme Court has stressed that merely using religious terms does not mean a court must make a religious determination to interpret and enforce the contract.[150] As long as the court can use "neutral principles" of law to understand the contract in a secular way, without making a religious

143. Oman, *supra* note 8, at 322.

144. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969).

145. Ord. of St. Benedict of N.J. v. Steinhauser, 234 U.S. 640 (1914).

146. *Id.* at 647.

147. *See e.g.,* Steiner v. Am. Friends of Lubavitch (Chabad), 177 A.3d 1246, 1254 (D.C. 2018) ("Years of performance on the contract demonstrate that the parties well understood the meaning of organizing "Shabbos" dinners and "shiurim" for students.").

148. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. at 447.

149. Jones v. Wolf, 443 U.S. 595, 604 (1979).

150. *See e.g.* Meshel v. Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005) (Rejecting a contention that a civil court's consideration of the action to compel arbitration would impermissibly entangle the court in ecclesiastical matters because the court would have to interpret religious terms such as "Beth Din," "Din Torah," and "Orthodox rabbis," since there was no material dispute between the parties over the meaning of any of these terms).

ruling, courts are fully entitled to enforce a contract that uses religious definitions.[151]

An example from the area of employment law will help demonstrate this. The D.C. Court of Appeals had no First Amendment issue with enforcing a non-compete contract barring a Rabbi from religious duties.[152] Because the terms in the contract were clear from the party's prior performance, the court did not have to make a religious determination when interpreting the contract's duties.[153] Comparatively, the Indiana Court of Appeals withheld from determining if a professor's firing from a religious college was improper or not.[154] The court interpreted the employment contract in question to include a reference to imposing discipline under the "Church's canon law," and held that to determine if the firing was just under the contract, the court would be required to interpret canon law—which it could not do.[155] The operative question is if the court will have to rule on ecclesiastical law in order to enforce the contract, or if the religiously defined terms can be understood and enforced without ruling on religious law.[156] In theory, if the employment provision at issue in *McEnroy* had pointed to a specific dictate of canon law, the court should have heard evidence on how the parties understood that rule. Likely, it was the sheer broadness of the term "canon law"[157] that made the court view the issue as one subject to religious interpretation.

There should almost always be *an* area of "neutral principles" of law that can help a court understand an agreement, but Maryland mehr caselaw neatly illustrates how "religiously situated" contracts can present serious difficulties when a court tries to translate an unfamiliar type of contract into principles of law that are more familiar to it.[158] Once the courts grasp the nature of the contract, religious terms used to define the parties' obligations have not presented inordinate difficulties which could not be solved using the general rules of parol evidence.[159] However, the courts must take care

151. *Jones*, 443 U.S. at 604.
152. *Steiner*, 177 A.3d at 1249.
153. *Id.* at 1254.
154. McEnroy v. St. Meinrad Sch. of Theology, 713 N.E.2d 334, 335 (Ind. Ct. App. 1999).
155. *Id.* at 337.
156. *Jones*, 443 U.S. at 604.
157. *McEnroy*, 713 N.E.2d at 335.
158. *Supra* Section IV.A.
159. *Supra* Section III.A.

that they do not try to rule on an ecclesiastical question when enforcing the contract.[160]

B. Enforcing Specific Performance of a Religious Action May Be Unconstitutional

As exemplified by *Zummo*, courts have assumed that enforcing a "religious performance" contract would be unconstitutional.[161] Therefore, courts have abstained from dealing with such contracts at all.[162] Although this may be a correct interpretation of the First Amendment in certain situations, it unfairly leaves parties without any recourse to enforce their contracts, and whenever possible courts should act to enforce these contracts.

"Religious performance" contracts may have the same issues of interpretation and understanding present in the other two types of contracts.[163] The unique issue for this type of contract is when a court must require a party to perform a religious act in performance of the contract. Specific performance in general is a rare remedy; only imposed when monetary damages would be inadequate.[164] Therefore, this type of issue is relatively rare, as courts should generally try to impose monetary damages even when the contract explicitly calls for performance of a religious act.[165] On the other hand, religious actions should be some of the hardest contractual duties to quantify in monetary terms, so religious contracts may be ripe for imposition of specific performance more often than other types of contracts.[166] Still, this type of contract should be the rarest of the three categories in this paper.

160. *Jones*, 443 U.S. at 604.

161. Zummo v. Zummo, 574 A.2d 1130, 1144 (1990).

162. A court must enforce an ecclesiastical decision in some situations. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969). However, unlike church property disputes, contracts between two private parties with a goal of specific performance of a religious activity will likely not fall under the jurisdiction of any ecclesiastical authority and if a court does not rule on the contract no one will.

163. Helfand, *supra* note 10, at 782-83 (2015).

164. *See supra* text accompanying notes 60-61.

165. *Id.*

166. For example, if Jim pays Bob 100 dollars to pray for him, and Bob breaches, a court should simply require Bob to disgorge the money. However, if Bob agrees to pray for Jim in consideration of Jim's prayers, and then Bob breaches, the court will either have to figure out a way to quantify the value of the prayers to assess monetary damages, or be faced with the possibility of required Bob to perform the contracted-for prayers.

The *Zummo* court argued that enforcement of a "religious performance" contract would fail the *Lemon* test.[167] This seems mistaken. First, enforcing a contract has a substantial secular purpose, that of reliable and predictable contract making.[168] Even if the result involves religious action, that is not the same thing as not having a secular purpose.[169]

Second, enforcing a religious upbringing would not inhibit or advance religion impermissibly. To violate this prong of the *Lemon* test, the state must provide support to a religion to the extent that a viewer would think the religion is propped up by the state.[170] When enforcing a pre-existing contract that parties freely entered into, from the state's perspective it is irrelevant if the result is transferring ownership of a car or of a church.[171] The court is not advancing, inhibiting, or providing anything to a religion beyond what the parties already agreed to.[172] Although the effect would involve the court requiring a religious action, that should not advance religion since the court is not *sua sponte* requiring religious actions, rather just forcing the parties to follow through on what they obligated themselves to do.[173]

Third, enforcing such a contract would not excessively entangle the court in religion. Courts routinely rule on religious matters in custody disputes (as the court did in *Zummo* itself);[174] it is a weighty decision that must consider the best interests of the child, but if such a

167. *Zummo*, 574 A.2d at 1144.

168. 1 CHARLES CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.1 (Mathew Bender ed., 2021). Furthermore, the courts do not act for a purpose the same way the legislature does for there to be a "purpose" of advancing religion. The *Lemon* test does not translate perfectly from legislative action to judicial action.

169. Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (Permitting the erection of a Christmas creche by a governmental body and stating, "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.").

170. *See e.g.,* Lambeth v. Bd. Of Comm'rs, 407 F.3d 266, 271 (4th Cir. 2005) (holding that for a religious display to constitute endorsement of religion, such advancement or endorsement must be a display's principal or primary effect, that is to say, a reasonable observer must view the display as an endorsement).

171. *See supra* Section II.A.

172. *See e.g.,* Avitzur v. Avitzur, 58 N.Y.2d 108 (1983) (requiring parties to submit to contracted-for religious arbitration despite the existence of the First Amendment).

173. This can be derived from the enforcement of ecclesiastical rulings mentioned in Jones v. Wolf. 443 U.S. 595, 604 (1979).

174. *Zummo*, 574 A.2d at 1130.

decision is automatically unconstitutional then a court could never do it. While child custody is its own realm of law, one still wonders how the *Zummo* court could so casually state that the contract was unenforceable but still issue its own order affecting the child's religious upbringing[175]

There may be a valid argument that in child custody cases a court cannot step back from the case, but in the average business contract a court would be better off not ruling and leaving the parties without a remedy. But even in contract cases where a court is not already considering a religious issue, there is no excessive entanglement with religion. Excessive entanglement requires the government to have to supervise and engage with religion.[176] Simply ruling that a contract is valid should not be excessive entanglement; but this may depend on to what extent a court will have to engage in enforcing the religious fulfillment of the contract. Only in the rare cases where a court would have to monitor or impose precise conditions on the specific performance of the contract is there a danger of excessive entanglement.

The *Zummo* court also turned to vague notions of public policy surrounding the freedom to change beliefs.[177] In *Zummo*, the court was confronted with the parents' contract that would have completely controlled the religious life of their children, and that of the parent himself to some extent.[178] Whereas if a court is confronted with a contract that would result in a single, or limited, religious action, like the heter iska oath example, the infringement on any freedom of religion is much smaller and should be outweighed by the public policy benefit of enforcing contracts.[179] In fact, refusing to enforce such contracts may discriminate against religion—violating the Free Exercise clause.[180] According to this analysis, nothing in the

175. *Id.* at 1158.

176. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) *overruled* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required.").

177. *Zummo*, 574 A.2d at 1144.

178. *Id.*

179. There is indeed such a public policy in favor of allowing people to change beliefs. Ord. of St. Benedict of N.J. v. Steinhauser, 234 U.S. 640, 647 (1914). But, as is always true in First Amendment jurisprudence, that right must be carefully balanced. *Cf. Supra* ftnt. 36. This is a difficult question.

180. For more on the freedom to change beliefs in regard to contracts binding the parties to religious arbitration, *see generally*: Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 549 (2012); Skylar Reese Croy, *In God We Trust (Unless We Change Our Mind): How State of Mind Relates to*

First Amendment should prohibit specific enforcement of a contract even if the performance is religious.

However, there is a greater First Amendment issue with this type of contract. Although the *Lemon* test is inapt, the Supreme Court has posited that the First Amendment completely bars the government from "coerc[ing] anyone to support or participate in religion or its exercise."[181] Although it is logical that a contract to fulfill a religious obligation waived the parties First Amendment rights, it is possible these rights cannot be waived.[182] In any event, the strong prohibition against the government forcing religious activity or inactivity—combined with the higher bar for requiring specific performance of a contract in general[183]—should likely serve to dissuade a court from ever requiring specific performance of a religious activity required in a contract. As noted in the family agreements context, sometimes a court must decide between enforcing one of two religious actions, and in that case the contract should override the court's vague feelings of First Amendment freedoms and public policy.[184]

This limitation does not extend too far. If the performance of the contract can be understood as requiring a secular act, even if religiously motivated, then the contract should be enforceable.[185] Courts have almost unanimously upheld agreements to bind parties to religious arbitration, and enforced the arbitrators decision, even

Religious Arbitration, 20 PEPP. DISP. RESOL. L.J. 120 (2020); Michael J. Broyde & Alexa J. Windsor, *In Contracts We Trust (and No One Can Change Their Mind)! There Should Be No Special Treatment for Religious Arbitration*, 21 PEPP. DISP. RESOL. L.J. 1 (2021); *infra* note 188.

181. Lee v. Weisman, 505 U.S. 577, 587 (1992).

182. Many constitutional rights are waivable. Although there appears to be no valid reason Free Exercise Clause rights cannot be waived, a discussion of this issue is beyond the scope of this Comment. Additionally, if the *Lee* issue stems from the Establishment Clause—which implicates limits to governmental power instead of individual's rights—it perhaps should apply even in the absence of an infringement on individual's rights. *See generally* Jocelyn E. Strauber, *A Deal Is A Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971, 1010 (1998).

183. 20 MD. L. ENCYC. *Specific Performance* § 3 ("As a general rule, specific performance will not be granted except under circumstances from which it clearly appears that proper relief cannot otherwise be had.").

184. *See supra* text corresponding with note 176.

185. For example, walking somewhere is a secular act, but one can easily imagine a situation where the walking is done as a pilgrimage and becomes a religious act. In such a case, the walking is a religious performance, but the contract can be phrased in secular terms. This is the conceptual opposite of a "religiously situated" contract where the action is entirely secular but phrased in religious terms.

when such agreements explicitly call for the arbitrator to use religious law in its ruling.[186] Although this result appears to conflict with the idea that courts should not, or will not, impose specific performance of religious actions, this is not so. *Jones v. Wolf* explicitly called for courts to impose the decision of church authorities in ecclesiastical disputes.[187] The line must be drawn between situations where a party binds itself to something that can be considered religiously neutral (such as an arbitration panel) where the court is not presented with a doctrinal decision nor with the responsibility to order a religious action, and situations where a court blatantly and directly forces a religious action.[188] Only the latter case is limited by the First Amendment issue presented in *Lee v. Weismann*.[189] Therefore, any contract where the performance is a religiously motivated, facially secular act (like property division or attending arbitration) and the court does not have to investigate ecclesiastical law to interpret the contract, should be enforceable.[190]

186. *See e.g.,* Avitzur v. Avitzur, 58 N.Y.2d 108 (1983); Nachum v. Ezagui, 899 N.Y.S.2d 61 (Sup 2009), aff'd on other grounds, 922 N.Y.S.2d 459 (2d Dep't 2011); Congregation B'Nai Sholom v. Martin, 382 Mich. 659, 173 N.W.2d 504 (1969). Of course, if the arbitrator's decision requires specific performance of a religious action, the court will be back to square one in regard to enforcing the decision.

187. 443 U.S. 595, 604 (1979).

188. Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *11 (11th Cir. Nov. 2, 2021) (unreported) (holding that the Church of Scientology's lifelong arbitration agreements could be enforced against ex-members, and the Free Exercise Clause requires religious arbitration panels to be treated the same as secular arbitration panels); *with* Bixler v. Super. Ct. Cal., Cnty. L.A., No. B310559, 2022 WL 167792, at *11 (Cal. Ct. App. Jan. 19, 2022), review denied (Apr. 20, 2022) (unreported) (holding that enforcing the same type of arbitration agreement against ex-Scientology members would violate the Free Exercise Clause by binding the ex-members to their old religion). Note that in both cases the arbitration agreement called for the arbitration panel to apply Scientology precepts. The Eleventh Circuit case seems to be the generally accepted approach.

189. 505 U.S. 577, 587 (1992).

190. Of course, this is only true if no ecclesiastical determination is required. Obviously, if one party tries to allege that the other party's performance did not completely fulfill religious standards, and the other party's response is that it did, then a court should not be able to enforce such a contract without making an ecclesiastical determination, and therefore cannot enforce the contract. However, it seems that in most specific performance cases the party is either trying to claim the contract is completely void, which is incorrect, or the parties agree on what the religious condition requires but one party no longer wishes to comply. A savvy contract-breaking defendant would claim that they did fully comply with the religious requirement and a court would have very limited oversight over that response. There would still be common-law fraud claims if the plaintiff could show

Unfortunately, there have been instances in which courts maintain a reflexive fear of producing a ruling on contracts that would, however peripherally, involve the First Amendment.[191] While precedent should be reliable, these are delicate issues and certain fact specific varietals of contracts of the types dealt with here may be treated differently in subsequent litigation. For example, mehr contracts[192] and pre-nuptial agreements that structure the religious upbringing of children[193] have been treated differently in various state courts; it is very possible one of these cases could be granted certiorari by the Supreme Court at any time, resulting in a decision that may radically shake up religious contract jurisprudence.

V. CONTRACT DRAFTING GUIDELINES

As this paper has demonstrated, the following principles will be helpful to keep in mind to help avoid potential litigation when drafting a contract that may have First Amendment implications. First, use specific conditions as opposed to just stating that the contract will comply with a religious law.[194] For example, instead of relying on a religious phrase and stating a loan will comply with the tenets of the heter iska, state that the loan will not bear interest. If you must use a religious term, stipulate that the parties agree to a certain definition of the religious term. As much as possible, avoid vagueness in the contract that would require the court to decide exactly what you meant with a religious term.[195] Second, as is always a good idea, be precise about what the contract is and what the goals are.[196] Religiously-based contracts may be unfamiliar to the court, and the clearer the drafter is on the goals of the contract, the more likely it is that the court will refrain from inserting its own assumptions as to the meaning.[197] Finally, do not make a contract with specific performance

the defendant was deliberately lying about their own religious beliefs and standards.

191. *See*, *e.g.,* Helfand, *supra* note 10, at 773 (2015).

192. *Compare* Aleem v. Aleem, 404 Md. 404 (2008); *with* Nouri v. Dadgar, 245 Md. App. 324 (2020). It is true that Aleem presented a religious contract as a foreign law comity question, but that is not exceptional when dealing with countries that have religious law as their state law.

193. *Compare e.g.,* Zummo v. Zummo, 574 A.2d 1130, 1144 (1990); *with* Ramon v. Ramon, 34 N.Y.S.2d 100, 112 (N.Y. Dom. Rel. Ct. 1942).

194. *See supra* text accompanying note 148.

195. *See supra* text accompanying note 151.

196. *See supra* Section IV.A.

197. *Id.*

of an overtly religious action as the goal.[198] Use secular conditions and responsibilities that mimic the religious outcome, but avoid blatantly requiring a religious action. A good way to accomplish this is by inserting a religious arbitration clause so religious authorities will decide the question, not a court.[199] When that is not possible, keep the religious features clear and simple, so a court will only entangle itself in a minimum of religious decision making when enforcing the contract; and explicitly note that the parties waive all Free Exercise rights.[200]

CONCLUSION

Not all religious questions are created equal. Although anytime a court deals with a religious disagreement and there is a potential for running afoul of the First Amendment, most contracts that arise in religious circumstances have been easily dealt with by courts applying neutral principles of contract law.[201] Even when the contract defines itself in religious terms, courts have found ways to use secular parol evidence to discern the contract's meaning.[202] Besides ecclesiastical determinations, there is only a small subset of contracts that a court would be prohibited from enforcing, specific performance of a religious action, and even that is not an absolute prohibition.[203] This prohibition should only apply when a court directly orders performance of a religious action, not a secular action with religious ramifications.[204] Although the First Amendment is not to be taken lightly, religious contracts are often enforceable, and a court should take care to not nullify the parties' intent due to its fear of the First Amendment.

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i. 1 CHARLES CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.1 (Mathew Bender ed., 2021).

198. *See supra* Section IV.B.
199. *See supra* text accompanying note 186.
200. *See supra* text accompanying note 182.
201. *See supra* Section III.A.
202. *Id.*
203. *See supra* Section IV.B.
204. *Id.*