# SUPREME COURT OF THE STATE OF NEW YORK
## APPELLATE DIVISION – SECOND JUDICIAL DEPARTMENT

TERRACE VIEW ESTATES HOMEOWNERS ASSOC., INC., *ET AL*,

*Petitioner-Appellant,*

*vs.*

BATES DRIVE CONDOMINIUM III, *ET AL*,

*Respondent-Appellee.*

**Appellate Division Docket No.: 2013-07898**

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**BRIEF OF *AMICUS CURIAE***
**AGUDATH ISRAEL OF AMERICA**
**IN SUPPORT OF PETITIONER-APPELLANT**

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*We thank Joseph Lieberman, a student at Harvard Law School, and Mark Kahn, a student at Georgetown Law School, for their efforts in researching and drafting this brief.*

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## Statement of Interest

Agudath Israel has chosen to file this brief because of its concern that Judiciary Law §5 severely limits the Jewish Citizens of the State of New York's ability to have practical access to Rabbinical arbitration. Jewish law requires, to the extent possible, that Jews arbitrate their claims against one another in a Rabbinical forum ("Bet Din"). Rabbi Yaacov Feit, *The Prohibition Against Going to Secular Courts*, 1 The Journal of the Beth Din of America 1, 30-31 (2012). Any restriction on their access to binding Rabbinical arbitration severely hampers their ability to fulfill this religious obligation. Judiciary Law §5 prohibits any court from holding judicial proceedings on a Sunday. In 1940, the Appellate Division, Second Department extended Judicial Law §5 to prohibit holding arbitration proceedings on Sundays. *See Brody v. Owen*, 259 Ad.2d 720, 721 (2d Dept 1940). This is extremely problematic because, as Judiciary Law §5 recognizes,[1] Saturday is the Jewish Sabbath, and Jews are categorically forbidden from adjudicating disputes on the Jewish Sabbath. Therefore, under *Brody*, New York's Jewish population can only bring its claims in a Rabbinical forum during the regular workweek. As a practical matter, because Rabbinical arbitrators generally have separate, full-time occupations during that time, the result of Judiciary Law §5's limitation is that Rabbinical arbitrators are forced to attempt to meet the needs of litigants appearing before them with less time. Rather than adjudicating their claims over the weekend, when all parties to the litigation are not tied down to

[1] Judiciary Law § 5 provides:

> A *court* shall not be opened or transact any business on Sunday, nor shall a *court* transact any business on a Saturday in any case where such a day is kept as a *holy day* by any party to the case, except to receive a verdict or discharge a jury and for the receipt by the criminal court of the city of New York or a court of special sessions of a plea of guilty and the pronouncement of sentence thereon in any case in which such court has jurisdiction. An adjournment of a *court* on Saturday, unless made after a cause has been committed to a jury, *must be to some other day than Sunday*. (emphasis added)

their jobs, *Brody's* interpretation of Judiciary Law § 5 precludes Rabbinic arbitrations on both Saturdays *and* Sundays. Thus, Rabbinical courts are forced to make the hard choice of dedicating less time to their constituents or forcing those constituents to violate Jewish law by bringing their claim to State Court. Agudath Israel files this brief as a representative of a concerned Jewish Community that hopes to see Judiciary Law §5 interpreted to allow Jewish Arbitrations to proceed on Sundays. Agudath Israel takes no position whatsoever with regard to any of the other issues involved in the dispute between the parties in this case. We do not support or oppose either party. Our sole interest in this case is in challenging the position that Rabbinic courts cannot hear cases on Sundays.

## Questions Presented

**1) Whether New York law prohibits arbitrators from sitting on Sunday; or only prohibits courts from doing so.**

**2) Whether *Brody's* extension of Judiciary Law §5 to arbitration violate the First Amendment of the United States Constitution, and the Free Exercise Clause of the New York Constitution.**

**2) Whether the public policy favoring arbitration in New York dictates that Rabbinic arbitral proceedings should be allowed on Sunday.**

**3) Whether the court should vacate a Rabbinic arbitral award when both parties to the dispute freely consent to Sunday proceedings, thereby waiving their right to protest Sunday process.**

## Summary of the Argument

Judiciary Law §5 provides that judicial proceedings may not be held on Sunday. In *Brody v. Owen*, the court extended this statute to arbitral proceedings. *See Brody v. Owen*, 259 App. Div. 720 (2d Dept 1940) (holding arbitral hearing and award were "illegal and void, because both occurred on a Sunday"). For the reasons set forth below, this court should find that Judiciary Law §5 does not apply to Rabbinic arbitration, and *Brody*'s ruling should be reversed. In the alternative, the court should permit waiver of Judiciary Law §5's prohibitions when both parties to the dispute freely consent to the proceedings taking place on Sunday.

The court should find that Judiciary Law §5 does not apply to Rabbinic arbitration for the following three reasons: (a) the text of Judiciary Law §5 only prohibits court from convening—not arbitral bodies; (b) *Brody's* interpretation of Judiciary Law §5 violates the Establishment Clause of the United States Constitution and the Free Exercise clause of the New York State Constitution; and (c) public policy favoring arbitration in New York dictates that Rabbinic arbitral proceedings should be allowed on Sunday, particularly where all parties consent to Sunday proceedings

First, the text of Judiciary Law §5 only prohibits *courts* from convening; it does not address *arbitral* proceedings at all. *See* NY CLS Jud §5. In fact, the statute mentions the word "court" seven times, and does not mention "arbitration" even once. *See Id.* Furthermore, subsequent to *Brody*, the highest court in New York stated that comparing arbitration to judicial proceedings is "not very meaningful." *See Astoria Medical Group v. Health Ins. Plan*, 11 N.Y.2d 128, 136-137 (Ct App 1962) (explicitly rejecting the reasoning of *Brody*, stating comparing arbitration to judicial proceedings is "based on nothing more than a remote resemblance"). The

plain meaning and text of this statute, therefore, does not prohibit Sunday arbitration proceedings.

Second, *Brody's* interpretation of Judiciary Law §5 violates the Establishment Clause because it does not have a legitimate secular purpose, and it inhibits the practice of religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (holding a governmental practice that inhibits religion or does not have a secular purpose violates the Establishment Clause). Judiciary Law §5's origins and initial purpose were undoubtedly religious. *See People v. Abrahams*, 40 N.Y. 2d 277, 281 (Ct App 1976) (stating that Blue Laws derive their historical origin from religious laws instituted in the year 321 C.E.). Though the United States Supreme Court has held that Blue Laws now have a secular purpose of providing citizens with a day of rest, *see McGowan v. State of Maryland*, 366 U.S. 420, 423 (1961), *Brody*'s interpretation of Judiciary Law §5 is easily distinguishable. Unlike the holding in *McGowan*, where the court held the applicable statute was unconstitutional, the statute in *Brody* is constitutional. At issue here is whether Brody's *extension* of the statute to arbitration proceedings is constitutional. Under *Brody*'s extension of Judiciary Law §5, the statute discriminates against adherents of the Jewish faith. Therefore, a "secular purpose" cannot be imputed onto it. Furthermore, Judiciary Law §5's effects on religious practices are so substantial that it has the unconstitutional effect of advancing or inhibiting religion. *See Locke v. Davey*, 540 U.S. 712, 720 (2004). Because Judiciary Law §5 limits Jews' access to arbitration in a way that makes it practically inaccessible, it forces Jews to choose between their religious beliefs and a government benefit. *See Locke v. Davey*, 540 U.S. 712, 720 (2004) (holding laws forcing citizens to choose between religious beliefs and a government benefits violates the Establishment Clause, *per se*). By so doing, it violates the Establishment Clause of the United States Constitution.

Additionally, *Brody's* interpretation of Judiciary Law §5 violates the Free Exercise Clause of New York's Constitution. The New York Constitution prohibits even those statutes that have an incidental effect on the free exercise of religion, if that effect poses an "unreasonable interference with religious freedom." *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). The Court of Appeals established that, to decide whether an interference is unreasonable, the interest of the law must be balanced against the religious interference. *Id*. Here, Judiciary Law §5, under *Brody's* interpretation, fails this balancing test. The law imposes a heavy burden on the free exercise of religion by severely limiting Jewish litigants' access to Rabbinic arbitration, with no equivalent legislative purpose. Moreover, as stated below, allowing arbitration on Sunday furthers the public policy favoring arbitration.

Third, the public policy favoring arbitration in New York dictates that Rabbinic arbitral proceedings should be allowed on Sunday. New York courts do not interfere with the freedom of consenting parties to submit disputes to arbitration. *See Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 50 (1997). This policy is a product of New York State's encouragement of arbitration "as a means of conserving the time and resources of the courts and the contracting parties." *See Smith Barney*, 91 N.Y.2d at 50. Prohibiting Rabbinic arbitration on Sunday will curtail this prudent policy favoring arbitration. Courts should be very hesitant, therefore, to interfere with integrated, speedier, and less costly alternative dispute resolution modalities. *See Id.*

Finally, and in the alternative, if the court reads arbitration into Judiciary Law §5's prohibition of courts convening on Sunday, the court should still allow for waiver when both parties to the dispute freely consent to Sunday proceedings. New York law expressly allows for waivers of procedural defects in an arbitral proceeding, *See* CPLR §7511 (b)(1)(iv). The

convening of Rabbinic arbitral proceedings on a Sunday is nothing more than a procedural defect. Furthermore, other New York Sunday laws allow for waiver. *See* N.Y. Gen. Bus. Law § 11 (McKinney). It would be illogical, therefore, to permit waiver in those cases while forbidding waiver under Judiciary Law §5

For the reasons stated above, the court should read Judiciary Law §5 under its plain meaning, and limit its applicability to judicial proceedings. If the court reads arbitration into the statute, however, then in the alternative the court should narrowly tailor Judiciary Law §5 to allow for voluntary waiver.

## Argument

**1. New York Law Does Not Prohibit Arbitrators From Sitting On Sunday; It Only Prohibits Courts From Doing So.**

New York law does not prohibit arbitrators from sitting on Sunday; it only prohibits courts from doing so. Judiciary Law §5 states that a court may "not sit on Sunday except in special cases." NY CLS Jud § 5. The lower court in this case held that arbitration falls under this statute, and is therefore prohibited. Yet, the text of Judiciary Law §5 only prohibits *courts* from convening, however. It does not address *arbitral proceedings* at all. *Id.* In fact, the statute mentions the word "court" seven times, and does not mention "arbitration" even once. *See Id*. Hence, the text of Judiciary Law §5 does not explicitly prohibit arbitration proceedings on Sunday.

In 1940, however, this court extended the prohibition of Judiciary Law §5 to arbitral awards and proceedings. *See Brody v. Owen*, 259 A.D. 720, 721 (2d Dept 1940); *see also Katz v. Uvegi*, 18 Misc.2d 576 (N.Y. Sup. 1959), *affm'd* 11 A.D.2d 773 (2d Dept 1960); *Jones v. East Meadow Fire Dist.*, 21 A.D.2d 129, 131 (2d Dept 1964) (overturning a Sunday arbitral proceeding based on the precedent from *Brody*). In *Brody*, the court reasoned that "[a]rbitration is a judicial proceeding and arbitrators perform a judicial function." *Brody*, 259 A.D. at 721. Therefore, the court held, the Sunday proceedings and award in that case were "in violation of section 5 of the Judiciary Law." *Id*. This extension is no longer warranted, however, and was an error in the first instance for two reasons: First, the two cases that *Brody* cites for support are easily distinguishable, and not precedential. *See Id*. Second, two decades after *Brody* the highest court in New York explicitly rejected *Brody's* comparison of arbitration to judicial proceedings as "based on nothing more then a remote resemblance." *See Astoria Medical Group v. Health Ins. Plan*, 11 N.Y.2d 128, 136-137 (Ct App 1962).

In rendering its decision, *Brody* relied on two cases, *Story v. Elliot* and *In re Picker*. *Brody*, 259 A.D.2d 720, 721. In *Story v. Elliot*, 8 Cow. 27, 28 (N.Y. Sup. Ct. 1827), the court held that an actual arbitration award could not be granted on Sunday. The court did not, however, prohibit arbitral proceedings themselves from taking place on Sunday. *See Story*, 8 Cow. at 28 ("the *award* of the arbitrators was void, *being made and published* on Sunday") (emphasis added). Similarly, in *In re Picker*, 130 A.D. 88, 91 (First Dept't 1909), the court pointed to the fact that one of the parties objected to the Sunday proceedings. *See In re Picker*, 130 A.D. at 91 ("to proceed with the hearing of the arbitration on Sunday, in the face of the objections and protest of one of the parties to it, was illegal"). In *Brody*, by contrast, the parties did not object to the Sunday proceedings. *See Brody*, 259 A.D. at 721. Accordingly, *Brody's* reliance on *Story* and *Picker* as precedent for the conclusion that *any* (especially voluntary) arbitral proceedings are prohibited on Sunday, was misplaced.

Furthermore, the highest court in New York subsequently stated regarding comparing arbitration to judicial proceedings:

> Although the courts have, on occasion, "judicialized" arbitration (see, e.g., *Matter of Brody*, 259 App. Div. 720, 721) and referred to an arbitration board as a "quasi-judicial tribunal" and to arbitrators as "judges of the parties' choosing" or "officers exercising judicial functions," we are reminded … that *such references are based on nothing more than "remote resemblances" and are "not very meaningful."*

*Astoria Medical Group v. Health Ins. Plan*, 11 N.Y.2d 128, 136-137 (Ct App 1962) (emphasis added) (internal citations omitted). Indeed, the Second Department itself rejected its prior reasoning in *Brody*. In *Meehan v. Nassau Community College*, 243 A.D.2d 12, (2d Dep't 1998), this Court, in a decision by Justice Bracken, held that "the tendency on the part of the courts, steeped as they are in notions of due process and basic fairness that have their roots in the common law, to 'judicialize' arbitration" [citing *Brody*] must "be resisted, because the analogy

between Judge and arbitrator, and arbitration and trial, are simply 'not very meaningful'". Accordingly, the statute, which only refers to "courts," did not intend, and certainly should not be construed, to prohibit arbitration on the ground that judicial proceedings and arbitrations are similar. *See* Judiciary Law §5. Accordingly, arbitration on Sunday should be permitted.

## 2. Brody's Extension Of Judiciary Law §5 To Arbitration Violates The First Amendment Of The United States Constitution, And The Free Exercise Clause Of The New York Constitution.

Judiciary Law §5, as interpreted by *Brody*, raises Constitutional issues. *Brody's* interpretation of Judiciary Law §5 violates the First Amendment of the United States Constitution. It also violates the Free Exercise clause of the New York State Constitution. Per the Supreme Court's ruling in *Almendarez-Torres v. United States*, this court should make every effort to avoid such an interpretation of the Judiciary Law. *See* 523 U.S. 224, 237 (1998) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score").

### *A. Under Brody's interpretation, Judiciary Law § 5 violates the Establishment Clause of the United States Constitution.*

Under *Brody's* interpretation, Judiciary Law §5 violates the Establishment Clause because it does not have a secular purpose, and it inhibits the practice of religion. The First Amendment states, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." USCS Const. Amend. 1. The primary purpose of the Establishment Clause is to prevent the government's establishment, advancement, or inhibition of religion by prohibiting the involvement of secular institutions with religious institutions. *See*

*Lemon v. Kurtzman*, 403 U.S. 602, 642 (1971). Through the Fourteenth Amendment, the States are bound to abide by the First Amendment. *See McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

A governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose ("purpose prong"); (2) has the primary effect of advancing or inhibiting religion ("effect prong"); or (3) fosters an excessive entanglement with religion ("entanglement prong"). *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). If a law violates any one of these prongs, it is deemed unconstitutional. *See Id*. The three-pronged test set forth by the Supreme Court in *Lemon*, although frequently criticized, "has never been overruled and remains controlling today." *Ritell v. Vill. of Briarcliff Manor*, 466 F. Supp. 2d 514, 522 (S.D.N.Y. 2006) *citing from Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *Grumet v. Pataki*, 93 N.Y.2d 677, 691 (Ct App 1999).

***(i) Judiciary Law §5, as interpreted under Brody, does not have a secular purpose.***

*Brody's* interpretation of Judiciary Law §5 lacks a legitimate secular purpose, thereby failing the first prong of the *Lemon* test. Under *Lemon*, the government's purpose in enacting the statute is the first factor courts consider in determining whether a law violates the Establishment Clause. *See Lemon*, 403 U.S. at 612-613. At a minimum, the Establishment clause requires that the law not discriminate on its face. *Id*. However, even where the law is not discriminatory on its face, it violates the Establishment Clause if other evidence, including the operation of the legislation, indicates it was established for a religious purpose. *See McCreary*, 545 U.S. at 847.

Judiciary Law §5's origins and initial purpose are undoubtedly religious. *See People v. Abrahams*, 40 N.Y. 2d 277, 281 (Ct App 1976). The law derives its historical origin from religious laws instituted in the year 321 C.E., when the Roman Emperor Constantine proclaimed that "all judges and inhabitants of cities" were to rest on Sunday. *Id*. Those religious laws, which

are referred to today as "Blue Laws," were implemented across the Christian world. *See id.* The New York Blue Laws, which were first enacted in 1695, prohibited all manner of labor and entertainment on Sunday. *Id* at 281-83. Over time, exceptions were made to allow for the flow of commerce, leading the court to eventually strike down entire sections of the Blue Laws as being arbitrary and vague with little to no remaining connection to society's mores. *Id.* Judiciary Law §5 is a remaining relic of those religious regulations. Thus, there is no doubt that the purpose and origins of the enactment of Judiciary Law §5 was not secular.

In *McGowan v. State of Maryland*, however, the United States Supreme Court held that Maryland's Blue Laws—although originally enacted for religious reasons—have now obtained a secular purpose of providing citizens with a day of rest, and is therefore constitutionally valid. *See McGowan v. State of Md.*, 366 U.S. 420, 423 (1961). In *McGowan*, employees of a large discount department store located in Maryland, were convicted of making sales on a Sunday in violation of a statute requiring Sunday store closures. The Court rejected their argument that these laws violated the Establishment Clause, upholding the constitutionality of the statute. But the holding in *McGowan* is distinguishable from *Brody*. Unlike the holding in *McGowan*, where the court was faced with deciding whether a statue itself was unconstitutional, the statute in *Brody* is constitutional. At issue here is whether *Brody's extension* of the statute to arbitration proceedings is constitutional.

*Brody's* extension of Judiciary Law §5 bans holding arbitral proceedings on Sunday, creating a statutory regime where non-Jews can hold arbitral proceedings six days a week while Sabbath-observant Jews are limited to five days a week. On its face, this statute is constitutional because courts are open equally to Jews and non-Jews, five days a week. The law thus does not facially place any unreasonable discriminatory burden on Saturday Sabbath observers. A secular

purpose can therefore be engrafted into the statute. Under *Brody's* interpretation and extension, however, Judiciary Law §5 would apply to arbitration as well. By doing so, *Brody* created a statutory regime where non-Jews can hold arbitral proceedings six days a week while Sabbath-observant Jews are limited to five. The statute therefore facially and operatively discriminates against adherents of the Jewish faith. Without any further secular purpose, the statute under *Brody* must be interpreted as a *religious* prohibition. Accordingly, Judiciary Law § 5, as interpreted by *Brody*, violates the Establishment Clause.

***(ii) Under Brody, Judiciary Law §5's effects on religious practices are so substantial that it violates the second prong of the Lemon test.***

Under *Brody's* interpretation, Judiciary Law §5's effects on religious practices are so substantial that it violates the second prong of the *Lemon* test. The second *Lemon* prong requires that a court determine whether the law advances or inhibits religion. *See Lemon*, 403 U.S. at 612-613. While *Lemon* generally requires that the "primary effect" of the challenged legislation inhibit religious practices, *See Hernandez v. C.I.R.*, 490 U.S. 680 (1989), a *per se* Establishment Clause violation exists where a government regulation forces citizens to choose between their religious beliefs and a government benefit. *See Locke v. Davey*, 540 U.S. 712, 720 (2004); *Bronx Household of Faith v. Board of Educ. Of City of New York*, -- F. 3d -- (2d. Cir. 2014).

Under Jewish law, Jews must mediate and arbitrate their disputes in a Rabbinical court. Rabbi Yaacov Feit, *The Prohibition Against Going to Secular Courts*, 1 The Journal of the Beth Din of America 1, 30-31 (2012). Jewish Law prohibits arbitrations on Saturdays, and *Brody's* interpretation of Judiciary Law §5 prohibits arbitrations on Sundays. This leaves the regular work-week, Monday through Friday, as the only practical time to conduct rabbinical arbitration. Taking into account that most Jews, including rabbinic arbitrators, have a regular Monday through Friday workweek, Judiciary Law §5 severely limits the amount of time available for

Jews to arbitrate their claims. By doing so, Judiciary law §5 will force some Jews to violate Jewish law, and bring their claims to a non-Rabbinic court. Accordingly, the court should find that Judiciary Law §5 violates the Establishment Clause because it forces Jews to choose between their religious beliefs, and violation of the law.

***B. Judiciary Law §5, as interpreted under Brody, violates the Free Exercise clause of the New York State Constitution.***

Judiciary Law §5, as interpreted under *Brody*, violates the Free Exercise Clause of the New York State Constitution because it substantially impedes New York's Jewish citizens' ability to seek Rabbinical arbitration. It is, therefore, an unreasonable interference with religious freedom. Article I, § 3 of the New York State Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

*N.Y. Const. art. I, § 3*. The New York Constitution prohibits even those statutes that have an *incidental* effect on the free exercise of religion, if that effect poses an "unreasonable interference with religious freedom." *Catholic Charities of Diocese of Albany v. Serio*, 825 N.Y.S.2d 653, 660 (2006). The Court of Appeals established that, to decide whether an interference is unreasonable, the interest of the legislation must be balanced against the religious interference. *Id*. This standard is much more favorable to religious liberties than the federal free exercise clause. *Id*.

Here, Judiciary Law §5 under *Brody's* interpretation fails the balancing test established in *Serio*. *Id*. On one side of the balance, including Rabbinic arbitration in the statute provides a uniform day of rest without exception. On the other side of the balance, the law imposes a heavy

burden on the free exercise of religion by severely limiting Jewish litigants' access to Rabbinic arbitration. Moreover, as this brief will state below, allowing arbitration on Sunday furthers the public policy favoring arbitration. Extending Judiciary Law §5 to arbitration will greatly curtail this prudent policy by limiting thousands of people's access to arbitration. The balance is thus clearly in favor of allowing Rabbinic arbitration. Accordingly, *Serlo's* balancing test dictates that Judiciary Law §5 interpretation under *Brody* violates the free exercise clause of the New York Constitution.

### *C. The Canon of Constitutional Avoidance mandates that Judiciary Law §5 allow Sunday Rabbinic arbitration.*

The "Canon of Constitutional Avoidance" mandates that, if a statute is susceptible to more than one reasonable construction, courts should choose an interpretation that avoids raising constitutional issues. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005); *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998); *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 12 N.Y.2d 379, 389 (Ct App 1963); *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44 (Ct App 1948). Here, a proper application of the avoidance canon would mandate an interpretation that allows Rabbinic arbitration on Sunday. The constitutional issues raised above can be avoided by accommodating Jewish citizens' religious beliefs, without sacrificing its interest in maintaining a secular day of rest. In a very real sense, then, there is no inherent conflict between the Jewish citizens' religious beliefs and the State's; only *Brody's* extension of Judiciary Law §5 brings them into conflict. Under these circumstances, there can be no constitutionally adequate reason to forbid Rabbinic arbitration on Sunday.

The court in *Brody* was faced with the following question: does Judiciary Law §5's prohibition of court proceedings include arbitration? This question raises two important constitutional issues: (1) the violation of the Establishment Clause of the United States

Constitution, and (2) the violation of the Free Exercise clause of the New York Constitution. Accordingly, the avoidance canon should have dictated the court to avoid these issues by refraining from extending Judiciary Law §5 to arbitration. Despite this doctrine, the court extended it to arbitration. This court, having already criticized *Brody's* reasoning in subsequent decisions should finally reverse *Brody's* erroneous precedent. Instead, the court should follow the avoidance canon and interpret Judiciary Law §5 according to its plain meaning. Courts, not arbitrators, should be forbidden from holding proceedings on Sunday.

**3. The Public Policy Favoring Arbitration In New York Dictates That Rabbinic Arbitral Proceedings Should Be Allowed On Sunday.**

The public policy favoring arbitration in New York dictates that Rabbinic arbitral proceedings should be allowed on Sunday. New York courts interfere as little as possible with the freedom of consenting parties to arbitrate disputes. *See Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 50 (Ct App 1997); *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 484 (Ct App 2006). This policy is a product of New York State's encouragement of arbitration "as a means of conserving the time and resources of the courts." *See Smith Barney*, 91 N.Y.2d at 50. In fact, an arbitral award is upheld even when a party challenging the award discovered evidence that would otherwise require reversal on public policy grounds. *See Matter of Hirsch Const. Corp. (Cooper)*, 181 A.D.2d 52, 56 (1st Dept 1992) *Leave to appeal denied* 81 N.Y.2d 701 (Ct App 1992). Prohibiting Rabbinic arbitration on Sunday will curtail this prudent policy favoring arbitration. Courts should be very hesitant, therefore, to interfere with integrated, speedier, and less costly alternative dispute resolution modalities. *See Smith Barney*, 91 N.Y.2d at 50.

Moreover, Jewish law forbids holding judicial proceedings on Saturday, leaving only six days a week during which rabbinical arbitrations can be held. If Judiciary Law §5 were

interpreted to prohibit Rabbinic arbitration, Rabbinical arbitrations would be limited to five days a week. This inconvenience is exacerbated when taking into account that those who adhere to Jewish law, including the rabbinical arbitrators themselves, generally have an ordinary Monday through Friday work schedule. Without the capacity to meet on Sunday, therefore, Rabbinical courts will have great difficulty in finding time to meet.

A recent study, conducted by UJA-Federation of New York, counted 1.5 million Jews in New York City, Long Island, and Westchester, up from 1.4 million just 10 years ago. *See* Josh Nathan-Kazis, *Changing Face of New York Jewry*, Forward (Jun. 14, 2012), http://forward.com/articles/157766/changing-face-of-new-york-jewry/. That growth is almost entirely due to a huge surge in New York's Orthodox population, which rose by more than 100,000 people over the past decade. *Id*. In the five boroughs of New York City itself, 40% of Jews currently identify as Orthodox. *Id*. Hence, applying Judiciary Law §5 to Rabbinic arbitral proceedings would limit arbitral relief for a large and growing segment of New York's population. This will undermine New York's strong public policy in favor of arbitrations. By allowing Rabbinic arbitral proceedings on Sunday, however, the court reconciles seemingly conflicting public policy goals–enforcing Judiciary Law §5 on the one hand, and favoring private arbitration on the other.

**4. In The Alternative, This Court Should Not Vacate A Rabbinic Arbitral Award When Both Parties To The Dispute Freely Consent To Sunday proceedings, Thereby Waiving Sunday Process.**

In the alternative, this court should not vacate a Rabbinic arbitral award when both parties to the dispute freely consent to Sunday proceedings. In *Isaacs v. The Beth Hamedrash Society*, the court held that Jews could conduct Rabbinical arbitrations on Sunday, despite a statute prohibiting court proceedings on Sunday. *See* 1 Hilt. 469 (1857). The court reasoned that

the statute does not apply to Jews who keep Saturday as their holy day, because the parties and witnesses attended the Sunday proceedings voluntarily, and "it would be very much regretted if the investigation of the matter on that day should render the subsequent award of the arbitrators of no avail…" *Id.* This logic is equally compelling today as it was in 1857. The lower court, however, rejected reliance on the reasoning in *Isaacs* because it was decided under an old statute. That statute was more general than Judiciary Law §5, and recognized the Saturday Sabbath for Jews. This distinction should not be decisive, however, because Judiciary Law §5 does not address the efficacy of voluntary waivers at all.

Moreover, New York law expressly allows for waivers of procedural defects in an arbitral proceeding. *See* CPLR §7511 (b)(1)(iv). It should apply the same logic here and allow voluntary waivers for Rabbinic arbitral proceedings. Therefore, by allowing for waiver under Judiciary Act §5, the court serves the double function of bringing the Judiciary Act §5 in line with CPLR 7511 (b) (1) (iv), and providing New York's Jewish citizens practical access to rabbinical arbitration.

Furthermore, Judiciary Law §5 should be no different from other New York Sunday laws that allow for voluntary waiver. For example, similar to Judiciary Law §5, General Business Law §11 prohibits service of process on Sundays. *See* N.Y. Gen. Bus. Law § 11 (McKinney). The purposes of the two statutes are the same: to provide a day of rest from judicial process. Under CPLR §3211(e), if defective service is not raised at the outset of the proceeding, it is waived. In *Ross v. Mitkoff*, the court stated, "a defendant's *voluntary* appearance renders the question of the original service of the summons completely moot." *Ross v. Mitkoff*, 18 Misc. 2d 972, 974 (N.Y. Sup. Ct. 1959). Hence, General Business Law §11's prohibition of Sunday process can be voluntarily waived.

Judiciary Law §5 and General Business Law §11 are rooted in the same public policy. It is illogical, then, that one could be waived, while the other cannot. In this case, the parties voluntarily consented to Rabbinic arbitration on Sunday. Therefore, similar to General Business Law §11, it would be unjust to vacate eighty hours of proceedings when both parties voluntarily waived their right. Moreover, because both parties consented to the arbitral proceeding, public policy favors respecting the award so that the Court's resources and legitimacy should not be used for a parties selfish reasons.

Finally, many other jurisdictions allow parties to waive statutes that forbid judicial proceedings on Sunday. *See Burke v. Interstate Savings & Loan Ass'n*, 25 Mont. 315, 64 P. 879 (1901); *White v. Morris*, 107 N.C. 92 (1890); *Morgan v. Chandler*, 906 S.W.2d 584, 589 (Tex. App. Amarillo 1995), *writ denied* (1996). In *Morgan v. Chandler*, for example, the Texas court held that even the filing of a complaint on Sunday is waived if an objection is not raised before filing an answer. *See Morgan*, 906 S.W.2d at 589. The court reasoned that, although there was a statute prohibiting court proceedings on Sunday, the case should be decided on the merits, rather than on a procedural technicality. *Id*. Similarly, Rabbinic arbitration should not be vacated due to a mere procedural technicality. Accordingly, because New York law, and laws in other states, allows for voluntary waivers of Sunday laws and procedural defects, the court should apply the same logic here, and allow voluntary waiver for Rabbinic arbitral proceedings.

## Conclusion

For the reasons stated above, the court should read Judiciary Law §5 under its plain meaning, and limit its applicability to judicial proceedings. If the court reads arbitration into the statute, however, then in the alternative the court should narrowly tailor Judiciary Law § 5 to allow for voluntary waiver.