**No. 22A184**

# In the Supreme Court of the United States

YESHIVA UNIVERSITY AND PRESIDENT ARI BERMAN,

*Applicants*,

v.

YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL WEINREICH, AMITAI MILLER, AND ANONYMOUS,

*Respondents*.

*ON EMERGENCY APPLICATION FOR STAY PENDING APPELLATE REVIEW OR PETITION FOR WRIT OF CERTIORARI AND STAY*

## BRIEF FOR PROFESSOR DOUGLAS LAYCOCK AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS

CHRISTOPHER E. MILLS
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

*Counsel for* Amicus Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**



**OTHER AUTHORITIES**

## INTEREST OF *AMICUS CURIAE*

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, where he served for 27 years. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for more than four decades at the University of Texas, the University of Virginia, the University of Chicago, and the University of Michigan. He has testified many times before Congress and the Texas legislature and has argued many religious freedom cases in the courts, including the U.S. Supreme Court. He was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012). His many writings on religious liberty have been republished in a five-volume collection under the overall title *Religious Liberty*.

*Amicus* believes that religious institutions must be free from governmental interference in making decisions about internal religious affairs. Protecting this religious autonomy is critical to safeguarding the values protected by the Constitution's Religion Clauses, including protecting the right of religious institutions to exercise their own faith and mission, and preventing state entanglement in religious doctrine.[*]

[*] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

"The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of [religious] government as well as those of faith and doctrine.'" *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). This foundational principle of religious autonomy protects the ability of religious institutions like Yeshiva University to carry out their missions in accord with their faith. And it prevents the state, including the courts, from interfering with and becoming entangled in disputes about religious doctrine and belief.

Even as the court below acknowledged that "Yeshiva has an inherent and integral religious character," App. 64, it refused to consider the religious autonomy implications of its decision to force Yeshiva to recognize a campus group that Yeshiva believes contradicts its faith and mission. Its opinion simultaneously subordinates Yeshiva's religious autonomy rights to any "neutral" law and minimizes the religious import of official group recognition.

But the First Amendment's protection of religious autonomy is not subject to any balancing test. The religious autonomy doctrine categorically prevents civil court intrusion into the internal religious affairs of religious institutions. Any other course, including applying so-called "neutral principles" to these questions, would limit religious institutions' Free Exercise right to their own beliefs, management, and missions. And it would expose courts to intractable entanglement with religious

doctrine and belief. Thus, the trial court's refusal to even consider religious autonomy contradicts this Court's precedents.

A corollary to the religious autonomy doctrine is that courts must give appropriate deference to religious institutions' own explanations of their internal decisions and the relation of their beliefs to those decisions. Here, Yeshiva declined official group recognition based on its understanding of "[t]he message of Torah." App. 78. The trial court seemed to suggest that recognizing the group need "not equate to endorsement" of its beliefs, App. 68, but the court failed to properly defer to the governing religious authority—Yeshiva—and its explanation of how recognizing the group would impair its own religious mission. Though deference does not require abdication, courts may not second-guess Yeshiva's good-faith statements of its own religious beliefs and decisions.

Because the court below disregarded Yeshiva's own religious explanations and its entire religious autonomy defense, the application should be granted.

## ARGUMENT

### I. The trial court erroneously disregarded Yeshiva's religious autonomy.

Almost 150 years ago, this Court held that "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine" is "unquestioned." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1871). Under the First Amendment, the government may not interfere with religious decisions made by such associations. Otherwise, the religious institution would cease to exist in its current form, in contravention of the Free Exercise Clause. The government would entangle itself in religious affairs and shape the future of a religious organization, in contravention of the Establishment Clause.

Thus, the religious autonomy doctrine both prevents "civil courts" from "becom[ing] entangled in essentially religious controversies," *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709 (1976), and protects the freedom of religious institutions with respect to "administration," "operation," and "appointment[s]," *Kedroff*, 344 U.S. at 107. The religious autonomy doctrine "respects the authority of churches to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions' free from governmental interference." *Korte* v. *Sebelius*, 735 F.3d 654, 677 (CA7 2013) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)). The doctrine "mark[s] a boundary between two separate polities, the secular and the religious, … [and] acknowledg[es] the prerogatives of each in its own sphere." *Ibid.* The "doctrine protects religious institutions from governmental monitoring or second-guessing of

their religious beliefs and practices." *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1261 (CA10 2008). In short, religious autonomy "protect[s] a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

The religious autonomy doctrine has deep roots. The work of John Locke was "[an] indispensable part of the intellectual backdrop" for the First Amendment. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1431 (1990); see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. Rev. 346, 354 (2002) ("Locke's version of the idea of liberty of conscience formed the basic theoretical ground for the separation of church and state in America."). In Locke's view, "the whole jurisdiction of the magistrate reaches only to . . . civil concernments," and "all civil power, right, and dominion, is bounded and confined to . . . promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls." John Locke, *A Letter concerning Toleration* (1689), in 5 The Founders' Constitution 52, 52 (Philip M. Kurland & Ralph Lerner eds., 1987). No intrusion by civil authorities into internal religious matters is acceptable.

Likewise, James Madison—"the leading architect of the religion clauses of the First Amendment," *Hosanna-Tabor*, 565 U.S. at 184—publicly rejected the idea that "the Civil Magistrate is a competent Judge of Religious Truth" and argued that "Religion" was "exempt from the authority" both of "Society at large" and "that of the

Legislative Body." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in 5 The Founder's Constitution 82, 82–83.

Common law also supports granting religious institutions immunity from suits that threaten interference with their internal governance or religious doctrine. The first Supreme Court case that addressed the religious autonomy doctrine, *Watson*, 80 U.S. 679, involved a dispute between two factions of a Presbyterian church over slavery that had split into "distinct bodies," each claiming to be the real "church," *id.* at 681. The highest governing body of the Presbyterian church determined that the anti-slavery faction was the authorized church. This Court refused to disturb that ruling, explaining that "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" is "a matter over which the civil courts exercise no jurisdiction." *Id.* at 733. By "inquir[ing] into" such matters, the "civil courts" "would deprive [religious] bodies of the right of construing their own church laws." *Ibid.* Thus, based on "a broad and sound view of the relations of church and state under our system of laws," the Court held "that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. In short, the religious autonomy doctrine prevents "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069.

The doctrine does not grant religious institutions "general immunity from secular laws"; instead, it "protect[s] their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* at 2060. Indeed, the First Amendment "outlaws" "any attempt by government to dictate or even to influence such matters." *Ibid.* "[G]overnment involvement in such ecclesiastical decisions" is "prohibit[ed]." *Hosanna-Tabor*, 565 U.S. at 189.

As this Court recently reiterated, an institution's receipt of public funds does not change these principles: a religious institution is still protected by the First Amendment. State intrusion into "whether and how a religious school pursues its educational mission" raises the same "serious concerns about state entanglement with religion and denominational favoritism" within the public benefit context as outside it. *Carson* v. *Makin*, 142 S. Ct. 1987, 2001 (2022). If the law were otherwise, a state that helps fund private schools could "identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2002. But that violates the First Amendment. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

The trial court disregarded all these principles in requiring—without any analysis of religious autonomy—Yeshiva to give its official sanction to a group that contradicts and openly attacks its religious beliefs. That disregard is a fundamental error. According to the trial court itself, "[t]here is no doubt that Yeshiva has an inherent and integral religious character which defines it and sets it apart from other

schools and universities of higher education." App. 64; see also App. 79 ("plaintiffs concede Yeshiva's deeply religious character in their pleadings").

The principle that government has no authority to interfere with a religious institution's internal affairs "has long meant, among other things," that the institution "enjoy[s] meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg, et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). These same principles govern churches, synagogues, mosques, and—as relevant here—religious schools. See *Our Lady*, 140 S. Ct. at 2055; *Hosanna-Tabor*, 565 U.S. at 177. After all, "[r]eligious education is vital to many faiths practiced in the United States." *Our Lady*, 140 S. Ct. at 2064. Specifically to this case, "[t]he contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts." *Id.* at 2065 (cleaned up).

For any religious institution, including a school, part of its internal religious autonomy is its right to manage its own education and programming. Civil courts cannot force a religious institution to host programs contrary to its religious views any more than they could tell churches what materials must be taught in Sunday School. Such compulsion would not only create internal strife and conflict, it "could contradict the [religious institution's] tenets and lead [others] away from the faith." *Our Lady*, 140 S. Ct. at 2060. The "very existence [of a religious group] is dedicated to the *collective* expression and propagation of shared religious ideals." *Hosanna-*

*Tabor*, 565 U.S. at 200 (Alito, J., concurring) (emphasis added). Further, overriding a religious institution's internal religious decisions raises severe establishment concerns.

Once a court determines that an internal decision implicates an institution's religious autonomy, "the First Amendment requires dismissal." *Hosanna-Tabor*, 565 U.S. at 194. Though the trial court failed to discuss Yeshiva's religious autonomy claim at all, its opinion suggests that it may have wrongly thought that religious autonomy gives way to "neutral law[s] of general applicability." App. 68. That is incorrect. The standard from *Employment Division* v. *Smith*, 494 U.S. 872 (1990) does not apply to "government interference with an internal [religious] decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. Nor are courts permitted to apply "neutral principles" to determine whether a religious institution followed its own beliefs or provided valid justifications for its actions. See *id.* at 187, 194–95; see also *Milivojevich*, 426 U.S. at 721. It is not for courts to balance secular and religious interests: "the First Amendment has struck the balance for us." *Hosanna-Tabor*, 565 U.S. at 196.

The cases in which this Court has applied "neutral principles" involved church *property* disputes—not disputes about religious or moral teachings, religious personnel, church governance, or any other issue of internal religious autonomy. See *Jones* v. *Wolf,* 443 U.S. 595 (1979); *Md. & Va. Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969). Cases involving

religious autonomy, typically employment cases, have conspicuously declined to elevate supposed "neutral principles" above the religious institution's right to exercise its faith. See *Milivojevich*, 426 U.S. 696; *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff*, 344 U.S. 94; *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Watson*, 80 U.S. 679.

"The 'neutral principles' doctrine has never been extended to religious controversies in areas of [religious] government, order and discipline, nor should it be." *Hutchison* v. *Thomas*, 789 F.2d 392, 396 (CA6 1986). Neutral principles apply to church-property disputes after a church split, when the two sides both assert rightful ecclesiastical authority; the purpose of the doctrine is to keep the courts out of the business of weighing their competing claims. In religious autonomy cases, by contrast, there is no doubt about what entity exercises ecclesiastical authority. The purpose of the religious autonomy doctrine is to *avoid* applying ostensibly neutral and generally applicable laws that would interfere with internal religious affairs. Thus, the doctrine is a complete bar to judicial inquiry in cases to which it applies.

Because the trial court failed to appreciate the gravity of Yeshiva's religious autonomy claim, the application should be granted.

## II. Courts must give appropriate deference to a religious institution's views about its own internal decisions.

When applying the religious autonomy doctrine, courts must give proper deference to the religious institution's explanation of its own beliefs and the relevance of those beliefs to any internal decisions at issue. As noted, the trial court agreed that "Yeshiva has an inherent and integral religious character," but it doubted that

religion was its "primary purpose." App. 64–65. Whatever the relevance of the trial court's doubts to New York statutory interpretation, it has no relevance to the First Amendment, particularly when schools provide education as an aspect of their religious duty. Cf. *Hosanna-Tabor*, 565 U.S. at 193 (ministerial exception applied even when teacher's "religious duties consumed only 45 minutes of each workday"). Of more concern here is the trial court's second-guessing not only of Yeshiva's religious character, but also of the threat posed by this campus group to Yeshiva's religious mission. According to the trial court, Yeshiva did not present sufficient "evidence" "that formal recognition of an LGBTQ student group" "is inconsistent with the purpose of Yeshiva's mission." App. 69. This reasoning disregards the deference that the First Amendment requires courts to give to religious institutions' own explanations of their decisions. *Hosanna-Tabor*, 565 U.S. at 187.

A religious institution's "definition and explanation" of what it sees "as playing a vital part in carrying out [its] mission" "is important." *Our Lady*, 140 S. Ct. at 2066. In the analogous context of expressive associations, this Court has said that "we give deference to an association's assertions regarding the nature of its expression," and "we must also give deference to an association's view of what would impair its expression." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000).

In the case of internal church matters, deference should be even greater, because the courts cannot "resolve a religious controversy." *Jones*, 443 U.S. at 604. "[T]he judicial process is singularly ill equipped to resolve" issues of religious doctrine, which are "not within the judicial function and judicial competence."

*Thomas* v. *Review Bd.*, 450 U.S. 707, 715, 716 (1981). "[M]atters of faith" may not be strictly "rational or measurable by objective criteria" of the sort that courts and juries are used to applying. *Milivojevich*, 426 U.S. at 714–15. Courts are simply "not well positioned to determine whether [religious] decisions rest on practical and secular considerations or fundamentally different ones that . . . [are] difficult for a person not intimately familiar with the religion to understand." *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 203 (CA2 2017); see also *Milivojevich*, 426 U.S. at 714 n. 8 ("[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes").

Moreover, even a brief inquiry into religious governance or doctrine can chill the free exercise of religion. "If civil courts undertake to resolve such controversies," "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concerns." *Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449. The Court has recognized the "significant burden" that religious organizations face if made to "predict which of [their] activities a secular court will consider religious." *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987). Beyond any actual penalties imposed by the courts, "[f]ear of potential liability" has a profound chilling effect on "the way an organization carrie[s] out . . . its religious mission." *Id.*

Delving deeply into a religious institution's explanation of its own religious decisions, therefore, runs an unacceptable risk of "'imping[ing] on rights guaranteed by the Religion Clauses.'" *Demkovich* v. *Saint Andrew the Apostle Parish*, 3 F.4th 968,

983 (CA7 2021) (quoting *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)). "It is not only the conclusions" reached that may impinge on those rights, "but also the very process of inquiry leading to findings and conclusions." *Catholic Bishop*, 440 U.S. at 502.

Of course, deference is not abdication. But secular courts must not second-guess good-faith religious understandings of religious missions and decisions. Here, the courts need not investigate and resolve the issues of Jewish theology raised by the plaintiffs' apparent attempt to downplay the religious implications of recognizing their group. Neither should courts resolve all those theological issues against Yeshiva by simply ignoring them, as the trial court seemed to do. Rather, courts must defer to the governing religious authority's good-faith explanation of its own religious decisions. Cf. *Milivojevich*, 426 U.S. at 710–11 (quoting *Watson*, 80 U.S. at 728–29). Doing so avoids "excessive government entanglement with religion" and "the danger of chilling religious activity" resulting from "the prospects of litigation." *Amos*, 483 U.S. at 343–44 (Brennan, J., concurring in judgment).

## CONCLUSION

To vindicate principles of religious autonomy protected by the First Amendment, the Court should grant the application.

Respectfully submitted,

CHRISTOPHER E. MILLS
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

AUGUST 30, 2022