

No. 22A184

In the
Supreme Court of the United States

YESHIVA UNIVERSITY, ET AL.,
Applicants,

v.

YU PRIDE ALLIANCE, ET AL.,
Respondents.

**On Emergency Application for Stay Pending Appellate
Review Or, in the Alternative, Petition for Writ of
Certiorari and Stay Pending Resolution to the
Honorable Sonia Sotomayor, Associate Justice of the
United States and Circuit Justice for the Second Circuit**

**MOTION FOR LEAVE TO FILE AND BRIEF
AMICUS CURIAE OF AGUDATH ISRAEL OF
AMERICA IN SUPPORT OF APPLICANTS’
EMERGENCY APPLICATION FOR STAY AND
OTHER RELIEF**

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MOTION FOR LEAVE TO FILE

Agudath Israel of America (“Agudath Israel”) respectfully moves for leave to file a brief *amicus curiae* in support of Applicants’ Emergency Application for Stay and Other Relief without 10 days’ advance notice to the parties of *amicus*’s intent to file as ordinarily required.

The 10 days’ notice requirement was not feasible because of the schedule set by the Court for responding to the Application. Applicant and Respondent have, however, consented to the filing of this brief.

Over the last century Agudath Israel has filed *amicus curiae* briefs in many cases before this Court. As set forth more fully below, it moves to file this brief because the constitutional issues this matter presents are of major importance to the Orthodox Jewish community, as detailed below and in the anticipated submission of another *amicus curiae* brief by a group of Agudath Israel’s Orthodox Jewish organizational colleagues. Agudath Israel files separately here not because it dissents from the views set forth in that submission; to the contrary, it joins in their arguments. Agudath Israel makes this application, however, to permit it a full opportunity to set forth its arguments, given its particular communal perspective and role, as to why the requested relief should be granted.

For the foregoing reasons, proposed *amicus* Agudath Israel respectfully requests that the Court grant leave to file the attached proposed brief *amicus curiae*.

Respectfully submitted,

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**INTEREST OF *AMICUS CURIAE* AGUDATH
ISRAEL OF AMERICA¹**

Agudath Israel of America ("Agudath Israel") is a 100-year-old nonprofit Orthodox Jewish umbrella organization. Agudath Israel's headquarters are located in New York City and it serves over 30 states with its network of regional and state offices, affiliated synagogues, summer camps, special education, youth services, and religious study programs across the country.

Agudath Israel regularly intervenes at all levels of government—federal, state and local; executive, legislative, administrative and judicial (including through the submission of, or participation in, *amicus curiae* briefs in this Court)—to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any governmental action that, inadvertently or otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

One of Agudath Israel's main functions is to represent and advocate on behalf of Jewish schools, commonly referred to as yeshivos. Nowhere is this

¹ No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* has made any monetary contribution intended to fund the preparation or submission of this brief. The parties received notice of the filing of this Brief. The Applicants and Respondents have consented to the filing of this Brief.

truer than in New York City, home to the largest concentration of Jewish schools in the United States. While such schools are independently run, Agudath Israel serves, guides, and advises the broad yeshiva community.

Agudath Israel officials sit on the Committee of NYC Independent and Religious School Officials, which is chaired by Agudath Israel's Executive Vice President, Rabbi David Zwiebel. This body represents religious and nonpublic schools of varied faiths in New York City and is the official representative consulting body for fiscal and services determinations for the overwhelming majority of religious schools to the New York City Department of Education for all federal Title services and other services under the jurisdiction of the Department of Education.

In addition to this representative capacity, Agudath Israel's Yeshiva Services Division counsels and guides New York Orthodox Jewish K-12 schools, as described. Specifically, in the 2021-22 school year, Yeshiva Services disseminated over 200 informational memos; held 15 seminars and webinars; and responded to some 1500 inquiries from New York yeshivas. 148 yeshivas participated in its annual day-long Yeshiva Summit. Agudath Israel officials, including Rabbi Zwiebel, also sit on the New York State Commissioner of Education's Advisory Council for Religious and Independent Schools, which regularly advises the New York Commissioner of Education regarding matters of relevance to the state's approximately 1800 private schools. At the federal level, Agudath Israel represents the interests of Orthodox Jewish schools across Americathrough its

membership in CAPE, the Council of American Private Education.

Applicant Yeshiva University is commonly known as the flagship institution of Modern Orthodox Judaism. The definition of “Modern Orthodoxy” is elusive and widely debated. Indeed, for its own part and that of its constituents, Agudath Israel does not identify as part of that movement. However, that in no way detracts from the fact that Agudath Israel’s mission to service the full range of Orthodox Jewish schools includes those affiliated with the Modern Orthodox community, all of which share a basic commitment to the eternity and inviolability of the Torah and feature rigorous programs of Torah study. A result that would compel Yeshiva University to operate in a manner that contravenes its core religious convictions would deliver a body blow not only to Yeshiva University—unacceptable in its own right—but also to the religious liberties of many others.

As noted, Agudath Israel represents and serves Jewish schools across New York City. A sizable number of such schools, for reasons based in legal, regulatory or other considerations likely lost in the depths of time, are incorporated as educational institutions. Indeed, many Jewish schools specifically incorporate as educational institutions rather than religious ones due to advantages regarding treatment of their assets by the Attorney General when disposing of their corporate assets. Although the New York City Human Rights Law (“NYCHRL”) explicitly exempts religious schools incorporated under the Education Law from its scope, the court below, in concluding that Yeshiva University was not eligible to qualify for that

exemption, based its decision in part on its own determination of whether its organizing documents were sufficiently religious. This scrutiny both crossed a well-recognized line in First Amendment jurisprudence and threatens the status of religious liberties of innumerable schools whose interests are included in Agudath Israel's mission.

The decision by the New York state court extends far beyond the recognition of LGBTQ student clubs. The ruling exposes Yeshiva University and similarly situated religious schools to the full panoply of NYCHRL's requirements, widely considered some of the most sweeping laws of this nature in the country. Enforcement of the NYCHRL's moral, ethical and social judgments to hiring, firing and public accommodation considerations are assured to conflict with the core missions of these primarily religious entities.

Ultimately, Agudath Israel believes that any ruling, such as the one appealed from here, that derogates the wide range of First Amendment protections available to institutions to determine their own internal policies and structure in favor of a local law to the contrary could have dire national consequences.

INTRODUCTION

Yeshiva University's Application raises the important constitutional issues arising under the Religion Clauses of the First Amendment, and the Jewish Organizations *amicus* brief, which has been shared with Agudath Israel, appropriately addresses

the issues First Amendment's protection for speech and association.

SUMMARY OF THE ARGUMENT

The Free Exercise clause of the First Amendment trumps both the federal and local assertion of virtually all policy goals. The effect of the NYCHRL on institutions such as Yeshiva University whose operations include both religious and secular programming, offerings and functions under the facts of this case would strike at the heart of those religious functions. Courts are ill-equipped to make the fine determinations of when an entity with hybrid characteristics, which may be the result of a range of legal and practical factors irrelevant to its core mission or self-identity, should be excluded from the exemption for religious organizations built into laws such as the NYCHRL.

ARGUMENT

As Chief Justice Roberts has observed, “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with [a] new right . . .” *Obergefell v. Hodges*, 576 U.S. 644, 711–12 (2015) (Roberts, C.J., dissenting). The appeal of Yeshiva University here represents a fulfillment of Justice Roberts’s prediction in his *Obergefell* dissent that “There is little doubt that these . . . questions will soon be before this Court.” *Id.*

Agudath Israel submits that in this case, the question is not so hard as the ruling being appealed makes it seem. Under the First Amendment’s

guarantee of the free exercise of religion, New York’s local moral preferences should not be allowed to dictate how Yeshiva University exercises its constitutional, moral and spiritual rights to do what its founders intended: instruct and disseminate traditional Jewish religious scholarship in an atmosphere appropriate to the values of that intellectual and ethical tradition.

“[T]he government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion” *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, __ U.S. __, __, 138 S. Ct. 1719, 1731, 201 L. Ed. 2d 35 (2018), quoting, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). As the Second Circuit observed in *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020), this Court in *Obergefell* was at pains to acknowledge that “religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. Indeed, such advocacy is constitutionally protected . . .” 966 F.3d at 161.

The departure here is neither “subtle” nor mere advocacy for Yeshiva University. Jewish law

unequivocally prohibits and condemns homosexual practices. C. Rapoport, *Judaism and Homosexuality* 1-5 (2017). Jewish law also prohibits aiding and abetting forbidden practices. Just as it would be anathema for an Orthodox Jewish school to recognize a student organization dedicated to the proposition that it is permissible to eat pork, it is anathema for an Orthodox Jewish school to recognize a student organization dedicated to the proposition that homosexual practices are acceptable. Just as neither a company owned by a religious Christian nor an order of nuns may be required to include abortion or contraception under their health insurance, *see, Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___, 140 S. Ct. 2367 (2020), an Orthodox Jewish school may not be required to recognize a student organization dedicated to celebrating LGBT activities.

We understand that the City of New York considers it to be very important to prevent discrimination based on sexual orientation and gender. We submit, however, that no matter how important the City deems this goal to be, it cannot overrule the Free Exercise Clause. As the Supreme Court has recently reiterated, the “Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, not a society devoid of religious beliefs and symbols.” *American Legion v. Am. Humanist Assoc.*, __ U.S. ___, 139 S. Ct. 2067, 2074,

204 L.Ed.2d 452 (2019). It can hardly be gainsaid that Yeshiva University itself has, for a century, been an important institution of higher learning and a major center of Torah scholarship in New York. Yet the New York state courts have decreed that, notwithstanding the iconic place of Yeshiva University as central to the modern continuation of one of the world's most ancient and influential traditions, a judge's perusal of its organizing documents may render Yeshiva University just another college in the eyes of the law.

This judicial act arrogates to the state a power it not only does not have, but which it is prohibited to assume under the First Amendment. And while Yeshiva University is, in more ways than those adverted to above, unquestionably a symbol, the effect of applying the NYCHRL to the university's operations and administration would be more than symbolic: they would be invidiously destructive.

That is why this Court has recognized, for example, that "the First Amendment can bar the application of employment discrimination laws to claims concerning the employment relationship between a religious institution and its ministers." *Bostock v. Clayton Cnty., Georgia*, __ U.S. __, __ 140 S. Ct. 1731, 1754, 207 L. Ed. 2d 218 (2020). In a religious institution—or even, as the New York ruling would have it, a "somewhat" religious institution—every impingement on religious liberty threatens the religious character of that entity.

Nor is there persuasive force to the argument that since Yeshiva engages in secular studies, it therefore forfeits its fundamental religious nature. “The protections of the Free Exercise Clause do not depend on a ‘judgment-by-judgment analysis’ regarding whether discrimination against religious adherents would somehow serve ill-defined interests.” *Espinoza v. Montana Dep’t of Revenue*, ___ U.S. ___, 140 S. Ct. 2246, 2260, 207 L. Ed. 2d 679 (2020). Few institutions engage in exclusively religious operations. Indeed, contrary to the analysis of the New York courts, even if Yeshiva University is a “hybrid” institution having both religious and secular functions, operations and programs, such an entity is entitled as a constitutional matter to draw the lines between “church and state” as it sees fit. Indeed, as this Court explained in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987):

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict **which of its activities a secular court will consider religious**. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336 (emphasis added). In his separate concurrence, Justice Brennan added as follows:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights . . .

Id. at 342–43. It is hard to posit a greater threat, nor a less constitutionally defensible proposition, to an institution “self-defined” (as Justice Brennan would put it) as dedicated to the practice and promotion of traditional Jewish religion than mandating that it endorse a student club whose values, purpose, message stand in strict contrast to its own.

CONCLUSION

For the foregoing reasons, the application of the NYCHRL to Yeshiva University threatens a serious breach of the First Amendment's protection of the free exercise of religion. Because even a temporary infringement of a constitutional right constitutes irreparable harm, this Court should enter a stay of the New York court order requiring the same as well as the other relief requested by Applicant Yeshiva University.

Respectfully submitted,

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